

14-24-00065-CR

IN THE TEXAS COURT OF APPEALS
FOURTEENTH DISTRICT
HOUSTON, TEXAS

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
10/2/2024 3:10:49 PM
DEBORAH M. YOUNG
Clerk of The Court

DAVID SPATES
Appellant

vs.

THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

Appealed from the 176TH District Court

Harris County, Texas

Trial Court Cause Number:

1848650

CAPITAL MURDER

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Oral argument is not requested

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Presiding Judge at Trial

Honorable Denise Collins (sitting by assignment)
176th Judicial District Court
Harris County Courthouse

STATE OF TEXAS

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ISSUE PRESENTED FOR REVIEW

ISSUE FOR REVIEW NUMBER ONE

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR
INSTRUCTED VERDICT (R-VII-176,177)(CR-I-704-728)**

ISSUE FOR REVIEW NUMBER TWO

**THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO
SUSTAIN THE JURY'S CAPITAL MURDER VERDICT (R-II-VII)**

ISSUE FOR REVIEW NUMBER THREE

IMPROPERLY ADMITTED PHOTOGRAPHS

**THE TRIAL COURT ERRED IN ADMITTING GRUESOME PHOTOGRAPHS
OF THE DECOMPOSED BODY OF THE COMPLAINANT WHERE ANY
PROBATIVE VALUE OF THE PHOTOGRAPHS WAS SUBSTANTIALLY
OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE**

STATE'S EXHIBITS 7, 9, 24 and 247 thru 285

THESE ISSUES ARE GROUPED TOGETHER 38(f) T.R.A.P.

ISSUE FOR REVIEW NUMBER FOUR

CRIME STOPPERS "TIP"

**THE TRIAL COURT ERRED IN ALLOWING THE STATE TO OFFER
EVIDENCE OF A "CRIME STOPPERS TIP" FOR THE PURPOSE OF
PROVING THE TRUTH OF THE MATTER ASSERTED THEREIN (R-III-
141,142)**

ISSUE FOR REVIEW NUMBER FIVE

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR
MISTRIAL AFTER THE STATE'S WITNESS TESTIFIED ABOUT AN
EXTRANEOUS OFFENSE COMMITTED BY APPELLANT (R-V-
122,123,170)(CR-I-57,63,502,547,596,597)**

ISSUE FOR REVIEW NUMBER SIX

**THE JURY CHARGE ERRONEOUSLY PERMITTED THE JURY TO FIND
APPELLANT GUILTY OF RETALIATION CAPITAL MURDER WHERE
THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION
OF THAT THEORY OF PROSECUTION. (CR-I-704) (R-VII-206)**

ISSUE FOR REVIEW NUMBER SEVEN

THE TRIAL COURT ERRED WHEN IT FAILED TO *SUA SPONTE* NAME CLAYTON ROGERS AS AN ACCOMPLICE AS A MATTER-OF-LAW. (CR-I-704)

ISSUE FOR REVIEW NUMBER EIGHT

THE TRIAL COURT ERRED IN ALLOWING STEPHANIE NAPOLITANO TO PROVIDE HEARSAY EVIDENCE FROM MESSAGING WHERE THERE WERE NO EXCEPTIONS TO THE RULE AGAINST HEARSAY (R-V-132,133,187)

ISSUE FOR REVIEW NUMBER NINE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL WHEN INADMISSIBLE HEARSAY TESTIMONY WAS OFFERED BY THE STATE (R-VI-142,143)

ISSUE FOR REVIEW NUMBER TEN

THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY TESTIMONY. (R-VI-154, 172, 173, 186)

ISSUE FOR REVIEW NUMBER ELEVEN

THE TRIAL COURT ERRED IN PERMITTING TESTIMONY WHICH CALLED FOR SPECULATION ON THE PART OF THE SPONSORING WITNESS (R-VI-265-269)

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SUMMARY OF ARGUMENT

ISSUES ONE & TWO

Insufficient as a matter of law to sustain the jury's verdict. finding

ISSUE THREE

Any probative value of photographic evidence was far outweighed by prejudicial effect

ISSUE FOUR

Crime Stoppers Tip denied Appellant the right to confront his accusers

ISSUE FIVE

The denial of a motion for mistrial due to the admission of an extraneous offense was error

ISSUE SIX

The submission of a jury charge on "retaliation" was not supported by the record

ISSUE SEVEN

The evidence established that Clayton Rogers was as an accomplice as a matter of law

ISSUE EIGHT

Inadmissible hearsay testimony was introduced to prove the truth of the matter asserted

ISSUE NINE

A mistrial was warranted because hearsay testimony was introduced over objection

ISSUE TEN

Inadmissible hearsay testimony was introduced to prove the truth of the matter asserted

ISSUE ELEVEN

Testimony calling for speculation from the witness was improperly admitted

RECORD CITATIONS

Clerk's Record is designated – (CR-vol-page)

Court Reporter's Record is designated – (R-vol-page)

STATEMENT REGARDING ORAL ARGUMENT

ORAL ARGUMENT IS NOT REQUESTED IN THIS MATTER

STATEMENT OF THE CASE

Appellant was charged by indictment with the offense of capital murder in the death of Kayla Lary. (CR-I-14) Appellant entered a plea of "not guilty". The jury found

Appellant guilty of capital murder. The trial court judge automatically sentenced Appellant to Life in the Texas Department of Criminal - Institutional Division, without the possibility of parole. (CR-I-729) Appellant gave Notice of Appeal on January 22, 2024. (CR-I-737) The Trial Court's Certification of the Defendant's Right to Appeal was signed on January 22, 2024. (CR-I-735)

PREFACE

On July 4th of 2020, the badly decomposed and not readily identifiable body of Kayla Lary was recovered from the San Jacinto River in Harris County, Texas. (R-VII-135) The medical examiner could not state how Kayla Lary died, stating only that it was “homicidal violence.” (R-IV-30,79)

Appellant was charged with committing the offense of capital murder while in the course of committing and attempting to commit retaliation against Kayla Lary. The indictment alleged various manner and means, including: striking her with a blunt object (R-III-45); by stabbing Kayla Lary with a deadly weapon, namely a knife (R-III-45); by asphyxia by placing bags over Kayla Lary’s head (R-III-46); by drowning Kayla Lary in water (R-III-46); by manual strangulation by holding her neck (R-III-46); by manner and means unknown. (R-III-47) The indictment also alleged that Ms. Lary’s death was caused during her kidnaping. The indictment alleged various manner and means, including that she was struck by a blunt object (R-III-47); by stabbing her with a deadly weapon namely a knife (R-III-47); by asphyxia by placing bags over Kayla Lary’s head (R-III-48); by asphyxia by drowning in water (R-III-48); by manual strangulation by holding her neck with his hand in a manner that would cause the death by asphyxia (R-III-48); by manner and means unknown. (R-III-49) Appellant entered a plea of “not guilty” to all of the manner and means alleged in the indictment. (R-III-49)

STATEMENT OF FACTS IN THE CASE

DEPUTY FRANCISCO PEDRAZA - HCSO

On July 4, 2020, Francisco Pedraza (HCSO) located a decomposing body with tattoos stuck in debris on the San Jacinto River. (R-III-71)

JUAN VIRAMONTES - FORMER HCSO HOMICIDE

INVESTIGATOR

Juan Viramontes also observed the decomposing body. There was no facial recognition – only tattoos. (R-III-85) Viramontes admitted that no witnesses connected Appellant to his investigation. (R-III-93)

FRANKLIN KNIGHTEN - PADOK ROAD RESIDENT

Knighten, who lived near Appellant, provided his video surveillance (SX 143) that depicted a vehicle in a lot down the street. (R-III-99)

KATHRYN HELSTROM - HCSO CRIME SCENE UNIT

Kathryn Helstrom noted the body was in advanced stages of decomposition with “skin sloughing”. (R-III-124) There were signs that animals had taken pieces of the body. (R-III-126) The left arm was missing and the feet had been wrapped with blue painters tape. (R-III-127) The face was described as “skeletal”. (R-III-130) No identification could be made based on the facial appearance. (R-III-130) Helstrom admitted that animal activity, as well as branches and other things in the water, could have torn away clothing. (R-III-132) She noted that any number of animals in the water could have caused the damages to the body, including crabs, fish, or alligators. (R-III-132)

DEPUTY KELLY MURPHY - HCSO

On July 1, 2020, Deputy Kelly Murphy was assigned to a missing person's case. (R-III-138) As a result of a Crime Stoppers tip, Charles Thornton, David Spates and Cynthia McClellan were identified as suspects. (R-III-142) Charles Thornton lived at 11231 East Jacinto Drive in Harris County. (R-III-142) Appellant lived at 11832 Padok Road with Cynthia Lynn McClellan. (R-III-144) On June 30, 2020, a missing person's report was filed about the Complainant. (R-III-146) A car identified as belonging to Kayla Lary was towed on June 30, 2020. Law enforcement used "Vigilant" to read license plates and takes pictures of the vehicle along with the time, date and address where the vehicle was located. (R-III-152) The vehicle was spotted on June 24, 2020 near 14303 Hollypark Drive. (R-III-155)

SGT. KENNETH GARCIA - HCSO

On July 1, 2020, Sgt. Kenneth Garcia went to an address off John Ralston and Garrett to collect evidence. (R-III-172) Among the items found were a purse, shoes and notebooks. (R-III-173)]

DEPUTY JOSEPH CULP - HCSO

Deputy Joseph Culp was dispatched to a mobile home belonging to Charles "Brother" Thornton at 11231 East Jacinto Drive. (R-III-181) Culp was looking for evidence of foul play. (R-III-191) Culp lifted up a carpet, and was able to see dark areas. (R-III-194) Culp performed a presumptive test to determine the presence of blood as well as possible DNA evidence. (R-III-195-199) Culp also searched 11832 Padok Road looking for blue painter's tape, a hammer and a garbage can. (R-III-205) No evidence was found. (R-III-207) Electronic items located inside were turned over for digital analysis.

(R-III-208)

The officer testified he could not tell the age of the stains.(R-III-213) The officers did not take any fingerprints. (R-III-229)

DR. HANNAH BIELAMOWICZ - MEDICAL EXAMINER

Dr. Hannah Bielamowicz performed the autopsy on Kayla Lary. (R-IV-23) She described the cause of death of Kayla Lary as “homicidal violence”. (R-IV-30) The doctor chose the date the body was found as the date of death. (R-IV-30, 31) She explained that facial features could not be assessed because of partial skeletonization. (R-IV-32) Shoelaces had been wrapped around the ankles. (R-IV-35) Tattoos were identified on the body. (R-IV-37) The doctor indicated that a v-shaped defect was very suspicious where a sharp force injury which could have included a blunt object. (R-IV-40) **She quickly noted that it could have come from an instrument, or it was possible that the defect could be something that happened after death, related to animal activity.** (R-IV-41) She opined that a hammer could be a blunt object. (R-IV-41) The body had been scavenged by animals and/or insects. (R-IV-42) A penetrating defect was noted on the body which could possibly have come from a knife **or something else. The doctor said she just didn't know.** (R-IV-44) The cause of a wound located near her left hip **could not be determined.** (R-IV-46) Another injury on the lower back could have been caused by a knife, however **the doctor could not say with any degree of medical certainty that's what caused the injury.** (R-IV-47) Other injuries likewise were of **uncertain origin.** (R-IV-47-49) Injuries to the genital region were caused by scavenging and the right arm was decomposed and consistent with scavenging. (R-IV-49) The loss of the left

arm was consistent with something sharp force, but **she did not know what made it.** (R-IV-51) **Throughout her testimony, Dr. Bielamowicz indicated that she could not determine what caused the injuries with any degree of certainty.** (R-IV-52) When describing the top of the skull, the doctor indicated that tissues in the skin had been scavenged away. **After consulting with an anthropologist, doctors determined that the marks were consistent with post-mortem activity (after death).** (R-IV-53) Dr. Bielamowicz was unable to determine any type of hemorrhaging relating to the defects or injuries. (R-IV-53) Wounds found on the left buttock and hip were described by a sharp force injuries that could have been caused by a knife. (R-IV-56) The medical examiner explained that where she was unable to tell the cause of death, but where circumstances are suspicious, her office classify the death using the term "**homicidal violence**". **Ultimately, Dr. Bielamowicz said "You can't legally determine outside of "homicidal violence" how Kayla Lary died."** (R-IV-61) She also noted that it was possible that Kayla Lary died from other manner and means that were unknown. (R-IV-61)

During cross examination, Dr. Bielamowicz confessed she could not say when Kayla Lary died, even after consulting with an entomologist. (R-IV-65) When pressed, the doctor again had to confess that many factors like branches, trees, pieces of trash or metal objects in the water **could have caused the defects found on her body.** (R-IV-67) **She explained that a particularly sharp pointed tree stump, fallen objects, even parts of a boat could have caused the injuries.** (R-IV-67, 68) The doctor could not state how

the tape came to be around the neck. She found no compression bruising around the neck. (R-IV-68) There was no bruising on the scavenged wrists. (R-IV-68) She could not state whether "wounds" were antimortem (prior to death) or postmortem (after death). (R-IV-69) When asked what happened to Kayla Lary prior to her death", the doctor stated "with medical certainty her feet were bound and the laces of her shoes were tied around her ankles enough to cause bruising." When asked "Is that all?" The doctor "**Yes**". **She acknowledged that all the other defects could have occurred after death.** (R-IV-70) The doctor noted that **none of the defects** she observed had perforated the skin deeper than three inches and none had penetrated an organ. (R-IV-70) **In a series of admissions, Dr. Bielamowicz stated that she could not tell the jury that Kayla Lary died by stabbing of a knife, by asphyxia, by drowning, or by strangulation.** (R-IV-71) **She could not tell the jury with any degree of medical certainty that Kayla did not die of a methamphetamine overdose.** (R-IV-71, 72) **She acknowledged that one of the ways that Kayla Lary could have died was methamphetamine.** (R-IV-72) The doctor conceded that many of the things occurred after death, including scavenging by animals. Some animals that live in the San Jacinto River have sharp teeth and that bites or perforations could go into the body. She also explained a sharp pointed tree limb could perforate the skin. (R-IV-68) **She could not state (with medical certainty) that Kayla Lary died of striking with a blunt force object.** (R-IV-74) **She acknowledged that the head injury found was not consistent with the blunt force of a hammer.** (R-IV-75) The defect found on the head did not even go into the skull. (R-IV-75)

In her final analysis, Dr. Bielamowicz said that she did not know how Kayla

Lary died. (R-IV-79)

DEPUTY GARY CLAYTON - HCSO

Deputy Gary Clayton processed a vehicle located at 310 Fisher Road. (R-IV-83)

He took DNA swabs and processed the vehicle for fingerprints. (R-IV-87)

INVESTIGATOR RUBEN MARTINEZ - HCSO HOMICIDE

Investigator Ruben Martinez summarized his investigation. (R-IV-103) He located Kayla Lary's car where James McBroom had disposed of it. (R-IV-109) Kayla Lary's body was found on July 4, 2020. (R-IV-118) Martinez testified that on June 24, 2020, Kayla Lary's car was seen in the driveway of Appellant's home. (R-IV-130) As of June 25, 2020, Lary's car was in Spates' driveway. (R-IV-132, 133)

Although Clayton Rogers could have been charged with tampering with evidence, Martinez never filed charges against him. (R-IV-154) After interviewing Clayton Rogers, the deputy went back out to search Thornton's trailer. (R-IV-158) Charges of capital murder were filed against David Spates, Detroy Alfred, Veronica Jim and Cynthia McClellan. (R-IV-161, 162) Although uncontested evidence established that James McBroom tampered with evidence (dumping Lary's car in a ditch), Martinez did not file charges against him. (R-IV-174)

During cross examination, Martinez acknowledged that people making Crime Stopper tips can be motivated by money, a grudge, and sometimes make false reports. (R-IV-178) He noted that many times rumors are rampant about what may have happened concerning a criminal case, and that rumors can be exaggerated or not accurate. (R-IV-179, 180) **Deputies were looking for a hammer, a knife and other items, including**

tape when searching Thornton's trailer. None of the items were ever found. (R-IV-182, 183) No blood was found inside the trailer. (R-IV-183) Martinez agreed that McBroom acted intentionally to hide evidence. (R-IV-184) **The deputy noted that in surveillance videos near Appellant's home, there was never a silver or gray vehicle driving in front of the neighbor's house.** He never saw Lary or David Spates in the vehicle. (R-IV-188) **Martinez admitted that he was not asking the jury to assume that Kayla Lary's car was on the video.** (R-IV-195-197) He admitted that when interviewing witnesses (like Clayton Rogers), they often try to minimize their involvement and shift blame to other individuals, including claiming they were under "duress". (R-IV-201, 202) **On July 6, 2020, the deputy went to Appellant's location and looked in the back of his pickup truck.** (R-IV-202) **No evidence was found.** (R-IV-203) In searching Thornton's trailer, Martinez could not state that the spots on the floor were related to this case. (R-IV-205) Martinez did not know if Kayla Lary could have loss blood some other way. (R-IV-205-206) **During the second search of Thornton's trailer they were looking specifically for murder weapons (hammer) (knife) – nothing was found.** (R-IV-206, 207) Martinez acknowledged that James McBroom [who had ditched the car] could have been charged with tampering with evidence, but was not. (R-IV-214, 215) **A search warrant for Appellant's trailer resulted in no evidence of a crime.** (R-IV-217) **Electronic evidence that had been seized was also reviewed, but nothing was found.** (R-IV-234)

TRACY LEWALLEN - HCSO CRIME SCENE INVESTIGATOR

Tracy Lewallen searched a makeshift dump site.(R-IV-240) A suitcase containing

female clothing and belongings was found. (R-IV-248) She took DNA swabs and fingerprints. (R-IV-252) She did not find any evidence connected to Kayla Lary. (R-IV-255)

DEPUTY FERNANDO ESQUEDA - HCSO

On June 23, 2020, Deputy Fernando Esqueda was dispatched to 11231 East Jacinto regarding a stolen boat in the yard. Esqueda met Charles Thornton and after speaking with Thornton, he believed there was probable cause to arrest Thornton for possession of stolen property. (R-IV-263)

MARIA MEDELES - MAGNOLIA GARDENS PROPERTY OWNER

Maria Medeles a landowner in the Magnolia Gardens area, testified that she reported people dumping trash in the area on August 5, 2020. (R-V-15)

DEPUTY BENJAMIN GENGHINI - CHAMBERS COUNTY S.O.

On August 5, 2020, Deputy Benjamin Genghini responded to an illegal dumping call. (R-V-29) He identified David Spates (SX 174) as one of two people who was previously seen by Ms. Medeles. When he arrived, no one was there. He didn't have any contact with David Spates that day. (R-V-30)

Under cross examination, Genghini acknowledged that the dumping call was approximately **one month after Kayla Lary's body was found.** (R-V-34) No DNA or fingerprints tied anything from the dump site to Kayla Lary. (R-V-34) This deputy was unable to determine which items had been **dumped that day, or on previous days.** (R-V-37)

ALEX LONG - KAYLA LARY'S FIANCE

Alex Long the fiancé of Kayla Lary owned a 2006 Ford Focus driven by Kayla Lary. (R-V-52) He testified that Kayla Lary did marijuana and methamphetamine and that she was an “addict”. (R-V-54) In June of 2020, he and Lary went to Thornton’s trailer home in Channelview where they stayed for approximately one week. (R-V-56) Long would drive around with Kayla while she made deliveries of drugs and stolen items so that she could pay Thornton his rent. (R-V-58)

Long stated “I knew she was selling stuff.” (R-V-92) He observed Detroy Alfred (“Troy”) and Veronica Jim smoking methamphetamine with Kayla in Thornton’s trailer. (R-V-93) Long did not know David Spates. (R-V-94) The last time Long heard from Kayla was around 1:00 a.m. on June 24, 2020. (R-V-101)

Long’s mother didn’t want Kayla living with him because of Lary’s addiction to methamphetamine. (R-V-113)

STEPHANIE NAPOLIATANO - PENDING FELONY CHARGE

Stephanie Napolitano’s fiancé was Corey Westbrook. (R-V-121) She stated that Appellant was dating Lynn McClellan. (R-V-122) She saw Appellant at Thornton’s trailer “when, a boat incident happened, when “Brother” got arrested. **They’d all stole a boat together.**” (R-V-122) Napolitano was with her fiancé, Corey Westbrook, Veronica Jim, Detroy Alfred, Kayla Lary, and David Spates when Brother was arrested. (R-V-125, 126) After Brother’s arrest, she and Corey Westbrook met up with Kayla Lary at a Kroger off the Beltway.(R-V-128) Kayla Lary was with Clayton Rogers at the Kroger. (R-V-129) Lary was upset and yelling at Napolitano and Westbrook. (R-V-130) **After their meeting at the Kroger, Napolitano claimed she never saw Kayla Lary again.** (R-V-131)

Napolitano learned that Kayla Lary had gone back to the trailer and that it was not a pleasant time there. (R-V-132) Napolitano saw Lynn McClellan with Lary's car at a gas station on June 24, 2020. (R-V-136) A few days later, the vehicle was parked in Appellant's driveway. (R-V-139)

During cross examination, Naplitano denied being interested in receiving any credit for her testimony. (R-V-141, 144) She knew Charles Thornton ("Brother") for about five years. (R-V-145) The first time she met David Spates was June 23, 2020. (R-V-146) She had never seen David Spates at Brother's trailer. (R-V-146) On the date of Brother's arrest, Napolitano observed Brother (Charles Thornton) in a police car. She indicated that Lary was outside talking to the boat owner. (R-V-152) She did not see David Spates at that time. (R-V-153) Napolitano first observed David Spates standing in the driveway of Brother's house around 9:00. (R-V-153, 154) When cross examined about her August 11th meeting with homicide investigators, Napolitano said she "thought" Kayla was at Brother's trailer when he got arrested. She did not identify David Spates as being there. **All of a sudden, three and a half years later, she claimed that David Spates was there.** (R-V-156) Napolitano claimed she was "scared" at the time. Interestingly, she was not afraid to identify the other co-defendants. (R-V-156). **Napolitano admitted that she lied to the police when she gave her first statement.** (R-V-157) The first person she ever mentioned David Spates to was the prosecutor during a jail visit a few months before trial. (R-V-157) **She acknowledged that it was a major inconsistency between what she first told police versus when interviewed by the prosecutors.** (R-V-159, 160) When defense counsel pressed forward, the witness became

increasingly perturbed, denying that she told other lies and ultimately saying “*Can I go?*” Asked how many other times she had lied to the police in her first meeting in 2020. She responded, “*I don’t know*”. (R-V-173) **Ultimately, Natplitano admitted that she didn’t tell police that Clayton Rogers was there. She confessed that she didn’t tell the jury that earlier in her testimony.** (R-V-176) Napolitano’s unwillingness to answer questions became increasingly evident when **she repeatedly asked whether she could go.** (R-V-177) She agreed there were numerous rumors about Kayla Lary. (R-V-178) As Napolitano became increasingly frustrated, she said “*I don’t want to do this anymore*”. (R-V-178) Napolitano was confronted with the fact that during her trial testimony, she testified that she saw Kayla Lary’s car two or three days later at David and Lynn’s house. When asked to open her eyes during questioning, the witness said “Do I have to?” To which defense counsel responded “That would be preferable when you talk to me – that way I know you’re conscious, okay?” (R-V-180) When pressed further, about her statement to police, she once again said “*Can I please go ma’am?*” (R-V-181) The Court indicated “You have to answer his questions.” (R-V-181) Napolitano confirmed that she had listened to her statement that morning before testifying and **admitted that she never saw David Spates in Kayla Lary’s car, and that she never saw him driving it.** (R-V-182)

Napolitano said that she had heard the phrase “snitches get stitches”. When Napolitano made her statement to police, she was unaware that Kayla was already dead. (R-V-184) Napolitano said in messaging with Veronica Jim and Detroys Alfred, she was asked to come to the location to help with Kayla, because Kayla was acting irate. She said

David Spates was there to take care of the situation. (R-V-187)

The witness further noted that she could not tell whether the message that “it had been taken care of” meant Kayla’s stuff being given back to her. And when asked whether she was trying to speculate on what that meant, she said she did not know. (R-V-189)

COREY WESTBROOK - ON FELONY DEFERRED ADJUDICATION

Corey Westbrook acknowledged that he was on a four year deferred adjudication probation, as well as other felony offenses. He spoke with investigators on August 11, 2020. He went to the Sheriff’s Department to “clear his name”. He acknowledged that Stephanie Napolitano was his girlfriend (fiancé). (R-V-197) He described Charles Thornton (“Brother”) as a close friend of his for over 10 years - “He’s like a brother to me.” (R-V-197) Prior to June of 2020, Westbrook did not know Kayla Lary. When Westbrook got a phone call that Brother was being arrested, he and Napolitano went over to the location. (R-V-201) Westbrook saw Kayla Lary talking with the boat owner. (R-V-202) Westbrook was allowed to speak with Brother, who was sitting in the patrol car. While he did not recall seeing Clayton Rogers at the scene, he may have seen Kayla’s car which he described as silver or gray. (R-V-205) He did not remember seeing Spates that day. (R-V-206) After having a conversation inside the trailer with Detroys and Veronica, Westbrook decided that it was not a good idea for Kayla Lary to stay there. Westbrook told Kayla that she had to leave. This upset Lary. (R-V-207) Westbrook observed Kayla Lary drive away in her car. (R-V-208) He met up later with Kayla later at a Kroger to give her her belongings. Later in the night, Veronica Jim called him. **He acknowledged that**

when he spoke with the police he never told them about this phone call or going back out to the trailer. (R-V-217) Westbrook said that on June 24th he went back to Brother's trailer and observed Stephanie, Detroys, Veronica and Appellant there. He claimed that David told them "We don't have to worry about that anymore" referring to Kayla Lary. (R-V-219) Westbrook said David Spates showed him a picture of Kayla Lary sitting on the floor with blood coming out of her ear, but she was fully conscious. (R-V-220) He couldn't recall whether he told the police about this, even though he was trying to "clear his name". (R-V-229) Westbrook didn't want to be associated with Kayla Lary's death. (R-V-230) Westbrook told police that he had nothing to do with stealing a boat, nor did Brother. (R-V-231) When pressed about implicating Brother, he told police they had no idea where the boat came from – it just appeared. (R-V-234) **He confessed that this was a lie – admitting that he had seen the boat there before.** (R-V-234) After speaking with Brother, Westbrook said Kayla was only going to stay long enough to get her stuff. (R-V-247) Things changed after he talked with Veronica and Troy. Westbrook said that he personally didn't trust Kayla. He noted there were words between Kayla and Veronica. (R-V-248) Westbrook said that Kayla Lary was driving her own vehicle at the Kroger and that Rogers with her. (R-V-254) The next day, Westbrook went to Brother's trailer – Troy, Veronica and Spates were there. **When asked whether he was under the influence of anything that day, Westbrook took the Fifth Amendment.** (R-V-257, 258) Westbrook said that he was shown a photo of Kayla on **someone's phone.** (R-V-258) Westbrook's version of who showed him a picture of Lary kept changing. (R-V-264) **Ultimately, when asked whether he ever told an investigator that the person who**

showed him the photo of Kayla was in fact Detroy Alfred, his responded “yeah, I remember telling him that.” (R-V-265)

DR. JULIE FLEISHMAN - FORENSIC ANTHROPOLOGIST

Dr. Julie Fleishman a forensic anthropologist did not find any indication of trauma on Kayla Lary. Lary’s teeth were not broken – they were missing probably due to decomposition. (R-V-284) She observed shallow scratches on the cranial vault consistent with **postmortem** damage – likely animal activity, but **not skeletal trauma.** (R-V-285) She noted fractures of the cartilage in the neck. **She was unable to rule out that these were caused postmortem.** (R-V-285) **Even the head injury would not be consistent with prior to death because there were no indications of healing.** (R-V-289) She found no trauma to the left shoulder, no trauma or skeletal injuries in the left hip, none in the right forearm, none in the right chest, or on any other area she was asked to review. (R-V-290)

JAMES McBROOM - OPEN CASES IN HARRIS COUNTY

James McBroom claimed the Fifth Amendment about open cases that he had in Harris County, Texas. (R-VI-8, 9) He admitted convictions dating from 20017 through 2022. (R-VI-9) He identified David Spates, saying he borrowed a vehicle from him. McBroom claimed that Spates told him to take the car to a Kroger’s parking lot, put the keys in the gas tank and that he (Spates) would pick it up later. (R-VI-16, 17) McBroom saw a friend (Tressa) traveling in the opposite direction when she advised McBroom to follow her. (R-VI-21) McBroom took the car to John Ralston Road and put it in a ditch. (R-VI-22)

McBroom acknowledged that he was driving a stolen car and he could go to prison for tampering. (R-VI-31, 35) Like Westbrook, McBroom claimed he was trying to "clear his name". Michael Wayne who was with Tressa assisted McBroom in ditching the car. Neither Wayne or Tressa were prosecuted. (R-VI-50) McBroom acknowledged that he did not call the police to report this incident. (R-VI-52) **Even though McBroom had a backpack with him for approximately six days after the incident, he claimed that he never realized that Kayla Lary's phone was in the backpack.** (R-VI-56)

KELLY ANDERS - HARRIS COUNTY GENETICS LABORATORY

Kelly Anders examined DNA from inside Lary's vehicle and Brother's trailer. (R-VI-77, 81) A pair of blue shorts, pants, panties, and a bra were also tested. (R-VI-89) **David Spates was excluded as a contributor of DNA on the car. He was also excluded from the living room floor swabs.** (R-VI-94)

Anders was asked about the cuttings from the trailer floorboard. Anders could not say with any degree of certainty that it was blood. (R-VI-113) Nothing was shown to come back to David Spates. (R-VI-115) Summarizing, Anders agreed that Appellant, David Spates, was excluded from the evidence collected. (R-VI-116)

CLAYTON ROGERS

Clayton Rogers, with a long criminal history dating back to 2012, knew Kayla Lary. (R-VI-121) **When Detectives Martinez and Hays interviewed Rogers, he was not truthful with them.** (R-VI-123) Rogers tried to minimize his involvement. (R-VI-123) Lary asked Rogers to accompany her and they drove to a plasma center where they picked up Detroys Alfred and Veronica Jim. (R-VI-128) Kayla then drove to a trailer park

trying to trade for some “ice” [methamphetamine]. (R-VI-129, 130) When they drove to Brother’s house, the police were there repossessing stolen property. (R-VI-133) Rogers observed Kayla talking to “somebody”. (R-VI-135) Rogers observed Corey Westbrook come running up and yelling. (R-VI-138) **Rogers said David Spates was not present when Brother was arrested.** (R-VI-139) When they left Brother’s trailer, Kayla seemed to be distraught. (R-VI-141) Kayla wanted her stuff back because she was told not to go back to the trailer. (R-VI-142) They drove to a Krogers near the Beltway 8 where they met Corey Westbrook and a woman. (R-VI-144) Westbrook and Kayla argued. Kayla grabbed her belongings from Westbrook. (R-VI-145) Kayla and Lynn McLellan went to a gas station. Rogers did not see an individual by the name of David Spates at the gas station. (R-VI-149, 150) Lynn seemed a little mad. (R-VI-150) They went back to Brother’s location and Kayla was told not to come back. (R-VI-152) Kayla eventually went back into the trailer. (R-VI-156) As Rogers was waiting outside, he could hear arguing inside the trailer. Eventually, Rogers went back. Rogers observed Kayla Lary sitting on the floor. (R-VI-159) An argument began between Lynn and Kayla and Veronica joined in – it became physical. (R-VI-161) Rogers observed **Veronica slap and hit Kayla at least three times in the face and head.** (R-VI-162) **Rogers did not step in as Kayla was being attacked.** (R-VI-163) **Rogers acknowledged lying to the police.** He told them that when he came out of the bathroom Kayla was gone. (R-VI-166) He said Veronica grab Teflon bags, rope and blue painter’s tape. (R-VI-168) Veronica then started tying Kayla’s hands and feet with the tape. (R-VI-170) Veronica then began to put Kayla into the bags. Kayla was crying and pleading for Veronica to stop. (R-VI-171)

Veronica then raised Kayla up and put the top bag on her. (R-VI-177) Rogers did try to help Kayla. (R-VI-178) Veronica hit Kayla while she was inside the bag. Rogers said that when David Spates came to the trailer, Kayla had been in the bag 1 - 3 hours. (R-VI-181) Rogers said Spates kicked and stomped on Kayla and said "*it's time to kill that bitch*". (R-VI-183) Rogers said he saw Spates get a hammer and hit Kayla twice in the head. (R-VI-186) As she was being hit with the hammer, Kayla said "*Please stop, please, please, please stop. Let me go*". (R-VI-187) Spates then went and got a trash can. (R-VI-187) Rogers then claimed that Spates asked him to get cinder blocks from outside. (R-VI-188)

The Court explained to the jury that there was scheduling conflict which required this witness to stop and resume later.

VERONICA JIM - CO-DEFENDANT

COOPERATING WITNESS WITH PLEA DEAL FOR MURDER CAPPED AT 20

Veronica Jim was testifying as part of an agreement with the State where she was allowed to plead guilty to a lesser charge of murder in exchange for a punishment between 5–20 years. (R-VI-198) She identified Detroyn Alfred as her ex-boyfriend. (R-VI-199) Jim recounted her long criminal history, including methamphetamine and cocaine. (R-VI-201) In May, 2020, Jim was living with Charles "Brother" Thornton. (R-VI-204) Illegal drugs, including methamphetamine were being used by "Brother" and Detroyn Alfred. (R-VI-208) Jim liked Kayla when she first met her — the two would do drugs together. (R-VI-211) She identified Kayla Lary's car in State Exhibit No. 66. (R-VI-212) Kayla Lary moved into Brother's trailer in the latter part of May, 2020 and Kayla's

husband, came to stay with her. This made “Brother” angry. (R-VI-215) Kayla would take Detroy Alfred, Amanda Perez, Clayton Rogers and Veronica Jim to a plasma center to get drug money. Brother got arrested for a boat theft. The boat was in Brother’s backyard. (R-VI-222) Jim went to speak with “Brother” who was in a police car, then she went into the trailer. Jim said Kayla left and drove off in her car. (R-VI-224) Kayla Lary arrived at the trailer unannounced one evening. (R-VI-227) An argument took place among all of the individuals. (R-VI-230) Cynthia “Lynn” McLellan was upset with Kayla for stealing, so she hit Lary with a 2X4. (R-VI-230, 231) **When Jim was questioned by the police in August, 2020, she never mentioned Lynn hitting Kayla with a 2X4.** (R-VI-232) Kayla tried to gather her belongings, but Jim had been told not to let Kayla leave. **Out of nowhere, Jim said she got mad for always being picked on and bullied for taking things that she didn’t take, so she decided to tie Kayla’s shoelaces together and tape her feet and hands so she wouldn’t take “nothing”.** (R-VI-237) She then placed a white bag over Kayla’s legs so she couldn’t move. Jim stated that Spates came into the trailer angry and kicked Kayla Lary on the side of her head. (R-VI-243) Jim claimed Appellant then hit Kayla in the back of the head with a hammer. (R-VI-244) Jim said Spates looked in Kayla’s phone and became angry. (R-VI-245) Jim said that Kayla was very faint and her body movement was just slow, but **she was still alive.** (R-VI-246) Spates told Clayton Rogers to get two cinder blocks from underneath the trailer and when he returned, he was told to go get rope from the back of the truck. (R-VI-249) Rogers then put the rope through the cinder blocks and put them inside the bag with Lary. (R-VI-249) Detroy Alfred also assisted. (R-VI-250) A second bag was then placed over Kayla’s

head. (R-VI-250) While Kayla was still inside the bag, David Spates allegedly stabbed her. (R-VI-251) When Jim asked Clayton Rogers why Kayla was bleeding, he responded that she stabbed herself. (R-VI-253) Appellant, Detroys and Clayton then put Kayla upside down in the trash can. (R-VI-253) Jim claimed that Lary then told David “Let her go” and his response was “No, she’s going to tell.” Jim claimed she mentioned that Kayla needed to go to the hospital. (R-VI-256) Spates kicked the trash can and told Lary “If you don’t shut the fuck up, I will kill you right now.” (R-VI-257) Detroys and David Spates then left the trailer. (R-VI-259) Kayla never returned to the trailer. (R-VI-262) The next morning, David Spates and Detroys Alfred returned to the trailer. David said he had taken Lary to the hospital. (R-VI-262) Lynn then drove off in Kayla’s car. (R-VI-264) On August 20, 2020, Veronica Jim spoke to the police and told them she believed Kayla was responsible for getting Brother arrested. (R-VI-265) She said those same concerns were expressed by Detroys Alfred, Veronica Jim, Corey Westbrook, Stephanie Napolitano, Brother himself, David Spates, Thomas Gray and Tempy Jackson. (R-VI-268) **Jim was questioned about the proffer meeting she had with the prosecutor on November 1, 2022 as well as her trial preparation meeting on December 13, 2023.** (R-VI-274, 275) **Jim acknowledged lying to the prosecutor during the meeting in December, 2023.** She admitted lying to the prosecutor about tying Kayla up claiming she had been forced to do so by David Spates. She admitted that was a lie. (R-VI-275) Interestingly, it was brought out that when she lied to the prosecutor she had already pled guilty and secured her plea deal that capped her punishment in this case at 20 years. (R-VI-276) Jim claimed that when she met with the prosecutor in the Harris County Jail on November 1, 2022, she did

so to “tell the truth”. Still, she continued to lie to the prosecutors on December 23, 2023.

(R-VI-277) Despite wanting “to tell the truth”, Jim lied to the prosecutor telling her that David Spates was present when she tied Kayla up. (R-VI-279) Jim tried to excuse her conduct in this matter by claiming her anger issues, **were a product of how she was treated in her youth.** (R-VI-279)

During cross examination, Jim admitted that when speaking to investigators and prosecutors, she told them all different stories. **Jim claimed that she didn’t think it was wrong to strike and hit Kayla that night, because she was mad and had been “triggered”.** (R-VI-284) **She confessed that getting the tape and the bag was her choice and her idea to do so.** (R-VI-286) **When questioned about her recent conversations with the prosecutor in December, 2023 (less than a month before trial), she confessed that she lied to the prosecutor.** (R-VI-287) She insisted that she was not going to go to prison for something that wasn’t done by her own hands. (R-VI-287) **She admitted that since the month before trial, she changed her story.** (R-VI-287) **In speaking with the prosecutor, and wanting to “share the truth”, she said that a hammer wasn’t used to hit the Complainant.** (R-VI-287) **Yet, in Court she claimed a hammer was used.** (R-VI-288) In June, 2020, Jim was high on methamphetamine all day – smoking it throughout the day. When pressed about her drug use, Jim became arrogant, retorting **“Am I trial for dope or are we on trial for murder?”** (R-VI-289) Jim explained that she, along with “Brother”, Detroyn and Kayla, would stay high continuously smoking methamphetamine. (R-VI-293) **Jim admitted that she was the one that**

confronted Kayla and was upset with her for allegedly “stealing”. (R-VI-295) Jim said she had “flashbacks” and for some reason, she couldn’t remember what she did that day.

When Jim spoke with police on August 20, 2020, she was trying to convince the police that she and Kayla were close. (R-VII-5, 6) Jim wanted the police to believe that the last time she saw Kayla was when Kayla dropped her off and she saw Brother being arrested. (R-VII-7) **She further acknowledged that her first versions [that she did not know what happened Kayla] and [the last time she saw Kayla was when she drove away] and [she went into the trailer] were not true. (R-VII-7) She also admitted that her claim that she and Troy went into the trailer after Brother’s arrest, and Kayla left with Clayton was not true. (R-VII-7) She acknowledged that David Spates was not present at that time and prior to the arrest date, she had not known Appellant. (R-VII-8)** Jim admitted that she never did methamphetamine with David Spates. (R-VII-9) **Jim lied to the police saying she stayed with her daughter on the night that Brother was arrested. R-VII-9, 10) She confessed that she wanted the police to believe that she had nothing to do with Kayla’s missing or death. (R-VII-11) Jim further admitted lying to the police in August 2020, when she said “*If somebody hurt her (Kayla) and I was there, I would say it.*” She further acknowledged that she wanted the police to believe that she (Jim) did not hurt anybody. (R-VII-12) Upon further questioning Jim acknowledged that she caused pain to Kayla. (R-VII-13) When asked who was responsible, Jim said Brother and Alex. (R-VII-14, 15) When the police reminded Jim that Brother was in police custody at the time, she then implicated Alex (Kayla’s**

husband). (R-VII-15) She indicated that Brother and Kayla had disagreements – she told the police that Kayla was scared of Brother because he raped her. (R-VII-16) Jim was concerned that her DNA might be on Kayla because she had kissed her, held her or cried with her. (R-VII-17) During a proffer session she had with prosecutors, Jim said she didn't want Kayla to steal anything more from Brother, so she hit Kayla and tied her up. (R-VII-20) No one tried to leave that night and Kayla was unable to, because she was tied up. (R-VII-22) Lynn's role in the event was physical – fighting, then hitting Kayla with a 2X4. She also cleaned up the blood. (R-VII-23) Clayton helped gather Kayla's belongings with Jim, then Corey Westbrook and Stephanie Napolitano picked everything up that belonged to Kayla. (R-VII-26) Westbrook assisted getting Kayla into the trash can, then David Spates took her. (R-VII-28) Jim acknowledged that Clayton Roger never told anybody to stop what was happening. (R-VII-27) **David Spates took Kayla's phone from her and he became very upset.** (R-VII-29) Interestingly, again, this was the first time that Veronica Jim ever mentioned this fact. (R-VII-29) On further cross examination, Jim admitted that she had changed her story about the use of a hammer. (R-VII-30) **She had to in December, 2023 when meeting with prosecutors, she did not mention the use of a hammer at all.** (R-VII-30) Jim admitted putting the 2X4 Lynn used to hit Kayla in the yard. (R-VII-33) Corey Westbrook was in charge of the trailer, and that if there was a problem or an issue with Kayla, he would be the one to come over. (R-VII-35) Jim claimed that Detroys took a picture of Kayla while she was hurt with bags on her legs. (R-VII-35) Detroys showed the photo to Corey Westbrook. (R-VII-36) **Another new revelation during Jim's testimony, was that she wanted Kayla to go**

to the hospital, yet she made no effort to call a hospital. (R-VII-37) She told Alex Long that she didn't know what happened to Kayla. (R-VII-37) Despite Jim's claim that she was very upset at David Spates, she didn't call the police. When Veronica Jim was arrested, she was coming from David Spates' home where she had lived for the previous two weeks. (R-VII-42)

DETECTIVE TIMOTHY HAYES - HCSO HOMICIDE

Detective Timothy Hayes, a homicide investigator testified that he believed Clayton Rogers was a witness, not a criminal. He opined that Rogers was operating under "duress" during the situation. (R-VII-54)

CLAYTON ROGERS - RESUMED

Clayton Rogers direct examination resumed after Veronica Jim's testimony was concluded. (R-VII-70) He said Veronica Jim was tying up Kayla and yelling "*What you did was wrong and we're going to wait for David to get here.*" (R-VII-70) Rogers believed that the others were calling Kayla a thief and a snitch. (R-VII-71) When David Spates arrived, he came in yelling and saying "*It's time to kill this bitch.*" (R-VII-72) Spates then kicked Kayla, stomped on her and hit her with a hammer. Rogers went outside and got cinder blocks to place around Kayla. **When he was questioned by the police on August 12, 2020, Clayton Rogers did not tell them that he put the cinder blocks in the bag.** (R-VII-75) Rogers said Detroyn and David carried Kayla out and put her in the bed of a truck and drove off. (R-VII-76, 81) Rogers said this was the last time he saw Kayla alive. (R-VII-81) Rogers did not see Kayla's car again. (R-VII-87) Rogers did not call the police. Rogers quickly realized that Kayla was a methamphetamine addict.

(R-VII-91) Rogers admitted that when everyone was dealing with the police about the stolen boat, he did not see David Spates at the location. (R-VII-98) During the first 20 minutes of his police statement all Rogers said was “these girls, they were getting in a cat fight and I watched it, and then I went in the bathroom and came out and Kayla was gone.” (R-VII-104) When police confronted Rogers about his lies, he then shifted and said that he was going to tell them everything that really happened, because he was “raised to tell the truth.” (R-VII-107) He described how Veronica Jim taped Kayla’s hands. (R-VII-108) It was brought out immediately that this was the first time that he had ever told anybody about that. (R-VII-109) Rogers said that his memory comes and goes and he’s still trying to piece everything together that he saw that day. (R-VII-110) Rogers was pressed about his statement that Kayla was flailing around like a fish out of water. He admitted that his testimony at trial was the first time he had ever told anybody that. (R-VII-112) He was also confronted about his claim that the name “David” came up a lot, admitting that he had never said the before. Rogers was pressed about changing his statement from “it’s time to kill this bitch” to “alright, I’ve had enough of this bitch.” He agreed there was a substantial difference between the two and that constituted a major inconsistency by him. (R-VII-114, 115) When Rogers was describing Spates use of a hammer, he told the police that Spates hit her with a hammer really hard, saying “Bam.” (R-VII-119) Miraculously, despite Rogers’ claim that Spates hit Kayla hard two times, she was still conscious. (R-VII-125)

INVESTIGATOR TIMOTHY HAYES - HSCSO

Investigator Hayes who was assigned to this case, recounted the chronology of his investigation beginning with interviewing individuals which caused him to proceed to 11231 East Jacinto where Charles Thornton (“Brother”) lived. **When law enforcement went into the trailer to look for evidence of an attack, nothing was found.** (R-VII-134) **Hayes found no signs of foul play.** (R-VII-135)

Hayes also investigated an illegal dumping allegation regarding David Spates which did not produce any relevant information. Corey Wesbrook was not cooperative during Hayes’ investigation. (R-VII-148) Hayes interviewed Clayton Roger. Despite the lies told by Rogers, Hayes didn’t charge him with a criminal offense because he believed Rogers was under “duress” at the time. (R-VII-149) A second search at Brother’s trailer found no evidence. (R-VII-151) A search warrant for David Spates’ residence was executed and electronics were recovered. (R-VII-157) **The police were specifically trying to locate a picture on the device that showed a photograph of Kayla Lary.** (R-VII-160) **No such photo was ever found.** (R-VII-160) Even though the phone that was taken from Spates was in law enforcement custody, they made no effort to collect call logs or text messages to show who was, or wasn’t, called at a particular time. (R-VII-162) Hayes said Detroy Alfred was also charged because he assisted in moving the body. Lynn McClellan also assisted by assaulting the victim, Kayla Lary. (R-VII-165) Clayton Rogers moved Kayla Lary in a trash can after putting cinder blocks in the bag with Lary. Rogers withheld information from the police, but Hayes wanted to utilize Clayton Rogers more as a witness as opposed to a co-conspirator. (R-VII-166)

Hayes claimed that after speaking with the District Attorney’s Office, “a mutual

decision” was reached – not to charge Rogers with a crime. (R-VII-168) Hayes said James McBroom (who ditched Kayla’s car) was also not charged with any crime. (R-VII-170) Not surprisingly, Veronica Jim lied when she was trying to convince law enforcement that she knew nothing about the case. She even tried to point the finger at “Brother”, until she learned that he was actually in jail at the time. (R-VII-171) She then tried to point the finger at Alex Long (Kayla’s fiancé) in this case. Ultimately, Jim got a deal in her case by putting the blame on David Spates. (R-VII-172) Hayes acknowledged that Veronica Jim was attempting to minimize her behavior, and in fact had told conflicting stories to the District Attorney’s Office. (R-VII-172) Hayes detailed the absence of evidence connecting David Spates to the crime: Spates’ fingerprints were **not** found in Kayla’s car, there was **no** evidence that Spates ever drove Kayla’s car, Spates’ DNA was **not** found on Kayla or her possessions, David Spates’ fingerprints were **not** found inside Brother’s trailer, there was **no** phone or photo of Kayla Lary, there were **no** text messages linking Kayla Lary to David Spates, there was **nothing** about the trash that was dumped by David Spates that linked him to Kayla Lary. (R-VII-172-174) Although law enforcement had a photo of Kayla Lary’s car through the use of Vigilant, the witness acknowledged that you could not tell who was driving that vehicle. (R-VII-174) The State rested its case. (R-VII-176)

KEITH KUCIFER - PRIVATE INVESTIGATOR

Appellant called Keith Kucifer a private investigator to determine if Corey Westbrook had been shown a photograph of Kayla Lary. (R-VII-182) On January 8, 2024, Kucifer verified that he had been shown a photograph by Detroyn Alfred, Detroyn showed

the photograph to Westbrook and said: "*She will not be a problem.*" (R-VII-188) **Westbrook said that David Spates did not show him a photograph of Kayla Lary injured on the floor.** (R-VII-189)

Appellant was found guilty of capital murder.

Appellant's punishment was automatically set at life in prison.

ISSUE FOR REVIEW NUMBER ONE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR INSTRUCTED VERDICT (R-VII-176,177)(CR-I-704-728)

ISSUE FOR REVIEW NUMBER TWO

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE JURY'S CAPITAL MURDER VERDICT (R-II-VII)

STATEMENT OF FACTS

The Statement of Facts appearing at the beginning of this brief, along with those appearing below, will be used in conjunction with these Issues for Review.

The trial court instructed the jury that the burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant (Appellant). (CR-I-725) The trial court also instructed the jury that the prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offenses charged beyond a reasonable doubt and if it failed to do so, they must acquit the defendant. (CR-I-725)

Appellant made a Motion for Instructed Verdict of Not Guilty asserting that:

(1) the State had not produced sufficient evidence to establish the elements of the offense alleged, and specifically there was no evidence establishing the cause of death;

- (2) there was no evidence connecting Appellant to a “retaliation” as alleged in the indictment;
- (3) there was no evidence supporting the various manner and means of causing death alleged in the indictment.

The trial court denied the motion in whole. (R-VIII-177)

Appellant renewed his objection when stating that the jury charge should not include the various “manner and means” alleged in the indictment because the medical examiner and forensic pathologist could not establish a specific cause of death. (R-IV-71-79) The indictment did not allege “homicidal violence. (R-VII-207,208)

As summarized below, the record is devoid of legally sufficient evidence required to sustain the jury’s verdict on appeal.

ARGUMENT AND AUTHORITIES

A Motion for Instructed Verdict is treated as a challenge to the legal sufficiency of the evidence. **Williams v. State, 937 SW2d 479 (Tex. Crim. App. 1996)**

Section 19.03 of the Texas Penal Code provides that a person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and: the person intentionally commits the murder in the course of committing or attempting to commit kidnapping.... or retaliation .

The burden of proof is on the State to establish beyond a reasonable doubt that Appellant committed the offense alleged. **Hightower v. State, 389 SW2d 674 (Tex. Crim. App. 1965); McCullen v. State, 372 SW2d 693 (Tex. Crim. App. 1964).** This burden of proof is on the State to prove each and every element of the offense beyond a reasonable

doubt. **Mullaney v. Wilbur**, 421 US 684 (1975) In re Winship, 397 US 358 (1970).

In Texas criminal jurisprudence, the concept of “legal sufficiency” of the evidence is based upon the law of due process. See: **Gollihar v. State**, 46 SW3d 243 (Tex. Crim. App. 2001) citing *In re Winship*, 397 U.S. 358, where the court expressed it as follows: We expressly hold that the **Due Process Clause** protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Sufficiency of the evidence is measured by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 US 307 (1979): whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Moreno v. State**, 755 SW2d 866 (Tex. Crim. App. 1988) The Supreme Court held in **Jackson v. Virginia** that its previous “no evidence” test was “simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt” because “[a] mere modicum of evidence may satisfy a ‘no evidence’ standard.” **Jackson v. Virginia**, 443 U.S. at 320 (quoting **Jacobellis v. Ohio**, 378 U.S. 184, 202 (1964))

In **Brooks v. State**, 323 SW3d 893 (Tex .Crim. App. 2010), this Court held there is no meaningful distinction between a **Clewis v. State**, 922 SW2d 126 (Tex. Crim. App. 1996) factual sufficiency standard and a **Jackson v. Virginia**, 443 U.S. 307 (1979) legal sufficiency standard. This Court announced that the **Jackson v. Virginia** legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. The court noted that it bears

emphasizing that a rigorous and proper application of the **Jackson v. Virginia** legal-sufficiency standard is as exacting a standard as any factual-sufficiency standard (especially one that is “barely distinguishable” or indistinguishable from a **Jackson v. Virginia** legal-sufficiency standard). Reversal and acquittal are required under this standard of review, if, after considering all the evidence the jury's finding of guilt is not a rational finding.

In her concurring opinion in **Brooks**, Judge Cochran noted that the **Jackson** Court stated the correct standard must incorporate the prosecution's burden of proof - beyond a reasonable doubt- in a due-process review. The court noted that a reasonable doubt has often been described as one based on reason which arises from the evidence or lack thereof. A reasonable doubt might arise because the verdict is manifestly against the great weight and preponderance of the credible evidence or because there is nothing more than a mere scintilla of evidence to support some element of the offense. Judge Cochran, cited **Black's Law Dictionary**, which states that legal sufficiency of the evidence is a test of adequacy, not mere quantity. Sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Judge Cochran went on to state that in criminal cases, only that evidence which is sufficient in character, weight, and amount to justify a fact finder in concluding that *every element* of the offense has been proven beyond a reasonable doubt is adequate to support a conviction. After giving proper deference to the role of the trier of fact, an appellate court must uphold the verdict unless a rational fact finder must have had a reasonable doubt as to any essential element. **Laster v. State**, 275 SW3d at 518, citing **Narvaiz v. State**, 840 SW2d 415 (Tex. Crim. App. 1992).

An Appellant is entitled to reversal and judgment of acquittal because Due Process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the alleged offense. **In re Winship**, 397 U.S. 358 (1970). The question is whether the evidence in this case is genuinely legally sufficient, not whether there is some proof from which a conclusion of guilty can be drawn. **Jackson**.

Insufficient Evidence

At the outset, Appellant acknowledges that line of cases holding that the jury determines the weight of the evidence, the credibility of witnesses and that the reviewing court does not re-weigh the evidence or substitute its judgment for the fact finders. **Metcalf v. State**, 597 SW3d 847 (Tex. Crim. App. 2008); **Williams v. State**, 235 SW3d 742 (Tex. Crim. App. 2007)

BUT WHAT SHOULD THE COURT DO WHEN IT IS OBVIOUS THAT THE JURY GOT IT WRONG ??

Appellant urges this Court to reconsider its strict adherence to the legal construct whereby total deference is paid to the jury's decision. Appellant submits that after applying a rigorous and proper application of **Jackson v. Virginia**, the Court must conclude that the evidence was insufficient as a matter-of-law, and due process requires a judgment of acquittal be ordered.

The complete record in this case fails to establish beyond a reasonable doubt that Appellant had the specific intent [conscious objective or desire] to cause the death of Kayla Lary. The indictment returned in this matter is a **smorgasbord** of inconsistent and contradictory allegations. (CR-I-14,15) **Roberts v. State**, 273 SW3d 322 (Tex. Crim. App. 2008)

In failing to establish Appellant's conduct, as specifically alleged in the indictment,

the State of Texas did not produce the requisite proof beyond a reasonable doubt required to sustain the capital murder verdict returned by the jury.

In addressing these Issues, an especially narrow focus must be maintained when reviewing the facts of the case as they relate to the proof requirement of a capital murder charge. The State of Texas must prove (if it can) that the Appellant intentionally caused the death of Kayla Lary. No one saw how or under what circumstances Lary died.

The following evidence contradicts the jury's verdict as a matter of law:

The jury verdict cannot withstand appellate scrutiny due to the legally insufficient evidence as follows:

NO EVIDENCE OF RETALIATION

While there were rumors being cast about concerning Kayla Lary being a "snitch," there was no evidence that she was. Additionally, there was no evidence establishing that Appellant had knowledge of these assertions. Without such proof, the State failed to establish that retaliation was the predicate felony offense. **Section 36.06 T.P.C.**
Callaway v. State, 546 SW3d 899 (Tex. App. - Amarillo 2018, pet. ref'd)

SCIENTIFIC INSUFFICIENCY

First, and foremost, the medical examiner (Dr. Bielamowicz), could not state how Kayla Lary died. She admitted that **she could not rule out that Kayla Lary came to her death as a result of a Methamphetamine overdose.** (R-IV-72) She could not state when the complainant died. (R-IV-65) She was unable to identify the origin of many injuries on the body. (R-IV-47-49) Throughout her testimony, the doctor indicated that she could not determine what caused the injuries with any degree of certainty. (R-IV-52) She acknowledged that a sharp pointed tree stump, or even parts of a boat, could have caused

the injuries. (R-IV-67,68) While noting defects on the body, the doctor quickly acknowledged that what she observed could be something that happened after death - related to animal activity. (R-IV-41,70) She noted that death **could have** occurred from an unknown manner. (R-IV-61) Specifically, Dr. Bielamowicz **did not find**, based on medical certainty, that death resulted from striking with a blunt force object - **the head injury was not consistent with the blunt force of a hammer.** (R-IV-75) In The doctor could not state that Kayla Lary came to her death as a result of any of the specific manner and means alleged in the indictment. (R-IV-61) The catch phrase "homicidal violence" was used to describe the cause of death of Kayla Lary. (R-IV-30)

Dr. Julie Fleishman,a forensic anthropologist found **no trauma** on Kayla Lary. (R-V-284) She observed scratches on the cranial vault consistent with postmortem damage likely caused by animal activity, but **not skeletal trauma.** (R-V-285) She noted that even the head injury would not be consistent with prior to death, because there was no indication of healing. (R-V-289) She found no skeletal injuries on the limbs, chest, or other areas she reviewed. (R-V-290)

Appellant was "excluded"as a contributor of DNA collected during the investigation into the death of Kayla Lary. (R-VI-94,98,99,115) No fingerprint evidence connected Appellant to the death of Kayla Lary. (R-IV-248-255)

NO PHYSICAL EVIDENCE CONNECTING APPELLANT TO THE DEATH OF KAYLA LARY

The Harris County Sheriff's Office conducted an exhaustive investigation into the death of Kayla Lary. Deputies searched tirelessly for any physical evidence that would connect Appellant to Lary's death - **none was found.** In the search of Brother's trailer - no hammer, knife or other instrumentalities of crime were located. (R-IV-182,183) **No**

blood was found inside the trailer. (R-IV-183) A second search of the trailer also **failed to produce any evidence.** (R-IV-206,207) **No evidence** [hammer, knife, garbage can, blue tape, rope, cinder blocks or industrial type bags] was located in the bed of Appellant's pick-up truck. (R-IV-202) A search warrant executed at Appellant's residence resulted in **no evidence of a crime.** (R-IV-234)

**INSUFFICIENCY BASED ON WITNESS FABRICATION,
INCONSISTENCIES, CONTRADICTIONS AND MOTIVES
TO PROVIDE FALSE AND MISLEADING TESTIMONY**

Beginning with a "Crime Stopper's Tip", the investigation into the death of Kayla Lary relied upon a Rogues' Gallery of individuals - many of whom escaped prosecution.

Veronica Jim

An accomplice as a matter of law, Veronica Jim **continuously lied to investigators** and the District Attorney's Office, yet was **rewarded with a plea bargain deal** to the reduced charge of murder with a "cap" of twenty (20) years. Even after securing her plea deal, **Jim continued lying.** (R-VI-276) Jim acknowledged **lying to prosecutors in December, 2023**, when she told them Appellant had forced her to tie Lary up. (R-VI-275) She claimed that as a result of being bullied as a youth, she bound Lary's feet and hands. (R-VI-237,279) **Jim never told investigators** in 2020, that Cynthia "Lynn" McLellan, hit Kayla Lary with a 2X4. (R-VI-232) That was **first revealed at trial.** Despite her claim that she "wanted to tell the truth", **she lied to prosecutors** when she told them Appellant was present in the trailer when she bound Lary's feet and hands. (R-VI-279) In December 2023, Jim **told prosecutors a hammer was not used**, but at trial she claimed a hammer was used. (R-VI-288;R-VII-30) Jim **confessed that it was her choice** to confront Lary and her idea to tape Lary's hands and feet and place her in a

bag. (R-VI-286,295) She further admitted that her claim that she didn't know what happened to Lary was **false**. **She confessed that she lied** when she said Clayton Rogers and Lary left Brother's trailer together. (R-VII-7) Jim admitted trying to convince the police that she had nothing to do with Lary's disappearance or death. (R-VII-11) She even tried to "frame" Brother and Alex Long. (R-VII-14,15) For the first time at trial, Veronica Jim said she told Appellant to take Lary to a hospital. (R-VII-36)

Clayton Rogers

When interviewed by investigators, **Clayton lied to them**. Rogers tried to **minimize his involvement** in the death of Kayla Lary. (R-VI-123) Rogers testified that Appellant was not present when "Brother" was arrested. (R-VI-139; R-VII-98) Rogers did nothing to stop Veronica Jim when she assaulted Lary and tied her up and placed her in a bag. (R-VI-163-170). Rogers lied to investigators when he said the girls were having a "cat fight" and when he came out of the bathroom, Lary was already gone. (R-VI-104,166) On August 12, 2020, **Rogers never told police that he attached cinder blocks to Lary** and put her in a bag. (R-VII-75) When Rogers was confronted about **his lies by investigators**, he claimed he would tell them everything - because he was "**raised to tell the truth.**" (R-VII-107) Rogers changed his story about what he claimed Appellant said to "Alright, I've had enough of this bitch", not that it was "time to kill this bitch."- **a major inconsistency.** (R-VII- 114) At no time did Rogers make any effort to assist Lary - instead he cried duress. **Rogers was rewarded for his lies by not being charged with any crime.**

Stephanie Napolitano

During an August 11th (2020) meeting with investigators, Napolitano did not

identify Appellant as being present when Charles “Brother” Thornton was arrested. All of a sudden, at trial, she said Appellant was present. (R-VII-156) Napolitano acknowledged that **she lied when she spoke with officers.** (R-VI-157) She said the first person she ever told this to was the prosecutor when she visited Napolitano in jail. (R-V-159) She admitted **this was a major inconsistency.** (R-VI-160) Napolitano admitted that **she never saw Appellant in Lary’s car.** (R-V-182) When pressed about how many times she had lied, Napolitano said “*I don’t know*”. (R-V-173)

Corey Westbrook

Anxious to “**clear his name**”, Westbrook (who was on probation) went to the Sheriff’s Department on August 11, 2020. (R-V-195) He acknowledged that **he failed to tell investigators** about a phone call he had with Veronica Jim and that he went back to Brother’s trailer. (R-V-217) **He didn’t want to be associated with Kayla Lary’s death.** (R-V-230) He even lied telling investigators that the boat “just appeared” - **he confessed this was a lie.** (R-V-234) Westbrook “**took the Fifth**” when asked if he was under the influence that day. (R-V-257) Westbrook confirmed that it was Detroi Alfred, **not Appellant**, who had shown him a photo of Kayla Lary tied up. (R-V-265)

The State offered no relevant evidence to establish that David Spates planned to kill Kayla Lary - **there was insufficient evidence that Appellant had the specific intent to cause the death of Kayla Lary.** As a result, the State failed to prove all of the elements of the offense of capital murder beyond a reasonable doubt. Accordingly, Appellant’s conviction should be reversed, and an order of acquittal entered in the case.

In ruling on the sufficiency of the evidence to uphold the jury’s verdict, it is paramount that this reviewing court evaluate the inconsistent and contradictory testimony

of civilian witnesses with great skepticism. Appellant submits that the jury's verdict could not be rationally based on the evidence provided by the State's witnesses.

Sufficiency of Non–Accomplice Evidence

INSUFFICIENT EVIDENCE TO CORROBORATE THE ACCOMPLICE WITNESS AS A MATTER OF LAW (R-III-R-VII)

Veronica Jim was named in the jury charge as an accomplice as a matter of law (CR-I-704) Her testimony [outlined above and incorporated herein by reference] revealed that she continuously lied to investigators and prosecutors. Other witnesses were called in an effort to corroborate her testimony [outlined above and incorporated herein by reference]. While Appellant asserts that Clayton Rogers was an accomplice as a matter of law, the jury was charged only that they could decide if he was an accomplice as a matter of fact. (CR-I-704)(R-IV-154) Rogers was not prosecuted at all, despite having lied to investigators and then admitting his participation in the alleged crime. (R-VII-75-125) The decision not to charge Rogers came as a result of a “mutual decision” reached by detectives and the District Attorney’s Office. (R-VII-168) The testimony adduced at trial, was inconsistent and contradictory. There was no physical evidence connecting Appellant to the death of Kayla Lary. (R-VII-172-174) The testimony of the medical examiner and forensic pathologist failed to produce a cause of death that was supported in any way by the testimony of the State’s other witnesses. The evidence failed to establish that Appellant specifically intended to cause the death of Kayla Lary. The State failed to corroborate Jim’s testimony, because while she and Rogers claim that Appellant struck Lary in the head with a hammer, Lary was still alive and conscious. (R-VI-246) Additionally, there was no anatomic findings supporting that testimony. (R-V-284,290) The witnesses testified about a knife, a trash can, cinder blocks and plastic bags, yet none

of these items were ever recovered - again, no corroboration. (R-IV-182,183)(R-V-285) There was no evidence corroborating witness testimony establishing Appellant's identification as the person responsible for Kayla's death - no DNA, no fingerprints and nothing recovered from his home or truck to corroborate the testimony if witnesses. (R-IV-202,203,206,207,217,234)(R-V-182,183)(R-V-248-255)(R-VI-116) The State also attempted to establish corroboration by suggesting that Appellant showed Corey Westbrook a photo of Kayla Lary when she was hurt - it was later revealed that Westbrook was shown the photo by Detroys Alfred, not Appellant. (R-V-265) No such photograph was ever found. (R-VII-160) The issue of the complainant's car as corroboration also failed - James McBroom, who escaped prosecution for evidence tampering when ditching Lary's car, said he got the car from Appellant. (R-VI-16) There was no independent corroboration of this testimony - no one observed Appellant driving the vehicle. (R-V-182) In fact, Veronica Jim stated that Lynn McLellan drove Lary's car. The State conveniently chose to prosecute some, but not all of the individuals who were involved in this matter. This gave the State a strategic advantage when it came to the jury evaluating the evidence. Co-defendants, Detroys Alfred and Cynthia "Lynn:" McLellan, were not called by the State to testify. (R-IV-162) The medical examiner best summed up the absence of the evidence, when she confessed that she did not know how Kayla Lary died. (R-IV-79) Although she used the catch phrase - "homicidal violence", Dr. Bielamowicz could not rule out that Kayla Lary came to her death as a result of a Methamphetamine overdose. (R-IV-72)

ARGUMENT AND AUTHORITIES

Art. 38.14 C.C.P. provides that the 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.

At the outset, Appellant urges this court to review the testimony of Clayton Rogers as an accomplice as a matter of law [Issue for Review 7] and not consider it as corroboration of the testimony of Veronica Jim. (CR-I-704)(R-VI-195-VII-42) Even if the Court rejects this invitation, Appellant submits that the testimony fails to corroborate Jim's testimony as outlined above and in Issues for Review 1&2.

An accomplice is a person who participates in the offense before, during, or after its commission with the requisite mental state. **Paredes v. State, 129 SW3d 530 (Tex. Crim. App. 2004)** The evidence in each case will dictate whether a State's witness is an accomplice as a matter of law, or matter of fact. **Blake v. State, 971 SW2d 451 (Tex. Crim. App.1998)** A witness who is indicted for the same offense is an accomplice as a matter of law. The witness continues to be an accomplice if the witness agrees to testify against the accused in exchange for the dismissal of the charge. **Garza v. State, 296 SW2d 267 (Tex. Crim. App.1956)** Appellant submits that Clayton Rogers should be considered as an accomplice as a matter of law, because he was able to obtain the functional equivalent of a dismissal, albeit on the front end of the case, when the State chose to give him a pass on prosecution. Appellant submits that Rogers' testimony cannot corroborate Veronica Jim's testimony. **Art. 38.14 C.C.P.**

The legislature has determined that the fact finder should exercise caution when considering the testimony of an accomplice because they often have incentives to lie, such as to avoid punishment or shift blame to another person [as Jim did in trying to frame

Charles Thornton and Alex Long]. **Blake.**

The sufficiency of the non-accomplice evidence is judged according to the particular facts and circumstances of each case. **Reed v. State, 744 SW2d 112 (Tex. Crim. App. 1988)** The facts and circumstances of this case do not justify a finding in favor of the State.

Whether the Court views Rogers as an accomplice or not, the entire record fails to establish corroboration of Veronica Jim's testimony beyond a reasonable doubt. Appellant further submits that the record fails to prove Appellant's guilt beyond a reasonable doubt - this entitles Appellant to a judgment of acquittal on appeal.

An appellate court must always address challenges to the sufficiency of the evidence. **Garza v. State, 715 S.W.2d 642 (Tex. Crim. App.).** Such a review must be conducted when a legal sufficiency challenge is raised, even if the conviction must be reversed on other grounds, because a finding that the evidence is legally insufficient to support the conviction prevents a retrial under the double jeopardy clause of the **Fifth Amendment to the Constitution of the United States.** See: **Hudson v. U.S., 522 U.S. 93 (1977).** If this Court finds that the verdict is contrary to the evidence presented at trial, this Court can reverse the conviction and enter a judgment of acquittal. **Texas Rules of Appellate procedure 43.2.** This Court may also reform the judgment in accordance with the evidence produced at trial. **Texas Rules of Appellate Procedure 43.2(b)(c).**

Whether viewed individually, or collectively, the issues addressed in these Issues for Review require reversal based on legally insufficient evidence. Appellant submits that this result will be reached after the Court conducts a rigorous and proper application of **Jackson and Brooks.** The jury's verdict was not based on a rational review of the

evidence. **Winn v. State, 871 S.W.2d 756 (Tex. App. - Corpus Christi 1993).**

Appellant submits that even though a jury is charged with the responsibility of determining the credibility of witnesses and the weight to be given their testimony, in this case, as a matter of **Due-Process**, this appellate court should find that the verdict is not right or just, and therefore it cannot stand. Appellant submits that when this Court conducts its **Due-Process** review of the sufficiency of the evidence to support the conviction, even when viewing the evidence in the light most favorable to the verdict, it must find that **no rational trier of fact could have found the essential elements beyond a reasonable doubt.** **Stobaugh v. State, 02-11-00157-CR (Tex. App. - Fort Worth, January 23, 2014)** citing: **Jackson v. Virginia.**

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt? In this case, the resounding answer is NO! The facts in combination with all the surrounding circumstances would negate the degree of proof necessary to sustain the jury's capital murder verdict in this matter.

A judgment of acquittal is appropriate in those situations in which there is an actual failure in the State's proof of the crime. **Malik v. State, 953 SW2d 234m (Tex. Crim. App. 1997)**

Appellant submits that in failing to establish all the elements necessary to support a capital murder verdict, this Court may conclude that Appellant is entitled to have the judgment reformed in accordance with **Rule 43.2(b,c) T.R.A.P.** to the lesser offense of murder.

Where the evidence is insufficient to sustain a conviction on appeal, double jeopardy bars a retrial. **Burks v. United States**, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); **Greene v. Massey**, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

ISSUE FOR REVIEW NUMBER THREE

IMPROPERLY ADMITTED PHOTOGRAPHS

THE TRIAL COURT ERRED IN ADMITTING GRUESOME PHOTOGRAPHS OF THE DECOMPOSED BODY OF THE COMPLAINANT WHERE ANY PROBATIVE VALUE OF THE PHOTOGRAPHS WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE

**STATE'S EXHIBITS 7, 9, 24 and 247 thru 285
THESE ISSUES ARE GROUPED TOGETHER 38(f) T.R.A.P.**

The State sought to introduce State's Exhibits 7, 9, and 24 which depicted the badly decomposed body of the complainant, Kayla Lary. The State sought to admit numerous other photographs of Lary's body during the medical examiner's testimony. (State's Exhibits 247 thru 285) (R-IV-1016) Appellant lodged objections based on the very prejudicial nature of the unedited photographs and they were repetitious (cumulative). (R-IV-10-16) (R-III-86) Appellant's counsel noted that the photographs did not depict a likely cause of death because. (R-IV-10) Appellant's counsel noted that the face of the individual had been sloughed off and that identification of the body was made by tattoos. The State's argument for the admission of the photographs came with a stunning admission that the medical examiner and prosecutors didn't really know how Ms. Lary came to her death, other than to label it as "homicidal violence". (R-IV-11) The prosecution acknowledged

that “these are **possible** ways that she (Lary) **could have died**”. (R-IV-11) Appellant’s objections (with the exception of States # 255) were overruled. (R-IV-12,13,15,16) Even those photographs (Exhibits 257,258,259) depicting tattoos on the body were without probative value – as identification was not a contested issue in the case. Additionally, those three photographs (257,258,259) were unedited, and as Appellant’s counsel suggested, – they could have been cropped to only show the tattoos, without depicting the very graphic decomposed body of Kayla Lary. (R-III-73)

ARGUMENT AND AUTHORITIES

Once a defendant objects to photographic evidence on the basis of unfair prejudice (**Rule 403**), the trial court must balance the probative value of the photographs against their potential for unfair prejudice. Probative value means more than simply relevance. Probative force is how strongly it serves to make more or less probable the existence of a fact of consequence. **Valdez v. State, 663 SW3d 133 (Tex. Crim. App. 2022)** Unfair prejudice means a tendency to suggest a decision on an improper basis. The photographs in the instant appeal were of questionable probative value, but had great negative influence on the jury deciding the guilt of Appellant. The trial court must consider the factors affecting probativeness, including the relative weight of evidence, the degree to which its proponent might be disadvantaged without it, and balance those factors against the tendency, if any, that the photographs have to encourage resolution of material issues on an inappropriate emotional basis. **Narvaiz v. State, 840 S.W.2d 415 (Tex.Crim.App. 1992)** Once a defendant objects to photographic evidence, on the basis of cumulativeness, the trial court must balance the probativeness of the evidence against the tendency, if any, that the evidence has to prolong the trial to the defendant’s detriment. **Alvarado v. State, 912 S.W.2d 199 (Tex.Crim.App. 1995)**. Also see: **Montgomery v. State, 810 S.W.2d 372**

(Tex.Crim.App. 1990).

The trial court erred in allowing the State to introduce photographs meant to appeal to emotion, rather than the fact finding process. This was excessive, especially in light of the other evidence used. Taken together, the prejudicial effect of the State's photographs far outweighed any possible probative value. **Wyatt v. State, 23 S.W.3d 18 (Tex. Crim. App. 2000).**

The unfairly prejudicial effect of the above listed photographs influenced the jury in a manner that denied Appellant a fair trial. There was no controverted issue as to identity, and as such, the admission of the gruesome photographs did nothing but inflame the jury. The error raised in this issue affected the substantial rights of Appellant. **Rule 44.2(b)**
T.R.E.

ISSUE FOR REVIEW NUMBER FOUR

CRIME STOPPERS “TIP”

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO OFFER EVIDENCE OF A “CRIME STOPPERS TIP” FOR THE PURPOSE OF PROVING THE TRUTH OF THE MATTER ASSERTED THEREIN (R-III-141,142)

Deputy K. Murphy was allowed to testify over Appellant's objection, that he had received a “Crime Stoppers” tip. (R-III-141,142) Murphy was allowed to expound on the nature of the tip by stating that *“people can anonymously contact Crime Stoppers if they have information on a crime, AND if that information is used AND they get a good case AND it can go to trial that person can be given money”*. He also noted that people can call in and state: *“I saw this crime AND this is the suspect involved.”* (R-III-141) Appellant objected to this testimony because the source of the information came from hearsay. The trial court overruled the objection. (R-III-142). Murphy told the jury that based on that “tip”, Appellant (David Spates), Charles Thornton and Cynthia McClellan were identified as the

suspects in this case.

The Crime Stoppers issue re-appeared later in the trial during the testimony of deputy Martinez, when he was asked: "The information you received from witnesses in this case, was it consistent with the information from the Crime Stoppers ? (R-IV-223) Appellant objected that because of the anonymous nature of the Crime Stoppers tip, he would be denied the right to confrontation of the witness. (R-IV-224) Appellant never was provided with the Crime Stoppers tip. (R-IV-225) Appellant also objected to hearsay. The trial court issued a "compromise" ruling - commenting that Appellant wouldn't like it. (R-IV-227) In overruling Appellant's objections, the judge gave the prosecutor the question to ask the witness: "I will allow you to ask this, ask this.....did you ever find any corroboration to the anonymous tip? (R-IV-227) Appellant again objected to hearsay, denial of confrontation of the **Sixth Amendment** right to confront whoever made the anonymous tip, noting that there was no way of knowing the details of that tip and whether that could be corroborated. The Court interjected: "Let's say for argument purposes, it's not offered for the truth but why he did what he did...(R-IV-228) The Court continued to give direction to the prosecutor, saying: "I guess what I'm saying, you know, as a result of the Crime Stoppers tip, you know, did you keep interviewing – I mean, you can ask it that way". (R-IV-228) The Court went further: "I don't want you to ask it in – I don't see as you're offering for it's truth. If you can ask it in a way that's not offered for the truth of what he did, just why he did what he did, I'll let you do it, but if you can't I'll sustain your objection. (R-IV-230) Sensing the constitutional dilemma that was developing, the prosecutor opted to abandon the line of questioning. (R-IV-230) The colloquy that took place underscores how serious an issue it was - allowing the reference to the Crime Stoppers tip (and related information) prejudiced Appellant by denying him his constitutional right to cross examine

his accusers. **Sixth Amendment to the U.S. Constitution.**

Murphy was also allowed to testify (over Appellant's hearsay objections) that Appellant's address was 11832 Padok Road, Houston, Harris County, Texas. (R-III-143) He noted that this address applied to Cynthia McClellan as well. (R-III- 144) State's Exhibits 31 & 32 were objected to on the basis of "improper foundation". The objections were overruled. (R-III-145) Murphy identified Alex Long and Kayla Lary's boyfriend. Murphy was asked what type of vehicle Kayla Lary had. Appellant objected that the response would come from hearsay and should be excluded. (R-III-148) State's Exhibit 33 was objected to because the proponent had no personal knowledge. (R-III-156) State's Exhibit 36 (Vigilant Report) was objected to because it was hearsay. (R-III-156)

All of the complained of issues found their source in hearsay provided by third parties and should have been excluded.

ARGUMENT AND AUTHORITIES

Rule 801 of the Texas Rules of Evidence prohibits the admission of a declarant's out-of-court statement to prove the truth of the matter asserted therein.

The **Sixth Amendment to the U.S. Constitution** guarantees an accused the right to confront and cross examine his accusers.

In discussing his "Crime Stoppers tip, Murphy conveyed to the jurors that they were entitled to rely on the information because, as the following highlighted portions indicate – **they have information on a crime / that information is used / they get a good case / it can go to trial / that the person saw the crime / this is the suspect involved.** Clearly, this was provided to the jury to indicate that the information contained in the "tip" met all the criteria for reliability and to prove the truth of the matter asserted in the Crime Stoppers tip. Appellant argued this information should have been excluded.

While the Court of Criminal Appeals held in **Jones v. State**, 843 SW2d 487 (Tex. Crim. App. 1992) that testimony of an officer explaining how he came to suspect an individual was not objectionable as hearsay, Appellant asserts that the instant case is distinguishable from **Jones** because here the officer went beyond merely stating he received a “tip”. Murphy provided his structural analysis of the Crime Stoppers tip - asserting it met all the criteria outlined above. Appellant submits that if the purpose of the testimony is to use an out-of-court statement to evidence the truth of the matter asserted therein, then the hearsay objection cannot be obviated by eliciting the purport of the statement in an indirect form. **Schaffer v. State**, 777 SW2d 111 (Tex. Crim. App. 1989) citing: **McCormick on Evidence (1984)**. Evidence as to the purport of information received by the witness, or testimony of the results of investigations made by other persons, offered as proof of the facts asserted out of court, are properly classified as hearsay. As the Court noted in **Schaffer**, where there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly.

Even relevant testimony is excludable if the danger of unfair prejudice to the defendant substantially outweighs its probative value. **Rule 403 T.R.E.** Unfair prejudice refers to the tendency to suggest a decision on an improper basis, commonly though not necessarily, an emotional one. **Davis v. State**, 329 SW3d 798 (Tex. Crim. App. 2010).

Under the **Confrontation Clause (6th Amendment)** testimonial hearsay cannot be admitted where the accused has not had a prior opportunity to cross examine. **Crawford v. Washington**, 541 U.S. 36 (2004) Moreover, if the person obtaining the statement is a governmental employee or police officer carrying out an investigation or prosecutorial functions, the statement is “testimonial”. **Crawford**.

The jury was allowed to hear that the police had been received a “tip” which was relied upon by the prosecution. The witness who provided the “tip” was not subject to confrontation or cross examination.

Appellant was harmed by the admission of the Crime Stoppers “tip” and the use of same by the jury.

ISSUE FOR REVIEW NUMBER FIVE

THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR MISTRIAL AFTER THE STATE’S WITNESS TESTIFIED ABOUT AN EXTRANEOUS OFFENSE COMMITTED BY APPELLANT (R-V-122,123,170)(CR-I-57,63,502,547,596,597)

EXTRANEOUS OFFENSE

Prior to trial, Appellant filed several pleadings : Request for Discovery -Article 39.14 C.C.P.; Rule 404(b) Notice of Extraneous Offenses; Art. 37.37(g) Notice of bad acts and a Motion in Limine seeking to preclude the State from presenting any evidence of...unadjudicated extraneous offenses or bad acts without first having a hearing outside the presence of the jury to determine the admissibility of such extraneous offenses or bad acts pursuant to **Rules 403 and 404 of the Texas Rules of Evidence and Article 37.07 Texas C.C.P.** (CR-I-57,63,502,547,596, 597) The Motion in Limine also requested that witnesses not provide hearsay testimony regarding what they allegedly heard from other individuals about what may have occurred in this matter.(CR-I-502)

When Stephanie Napolitano was asked whether she ever saw Appellant over at Brother’s trailer, she responded: “*Hmm, just when, hmm, a boat incident happened, when Brother got arrested. “They’d all stole a boat together.”* (TR-V-122) Appellant initially objected that her answer was non-responsive.(R-V-123) The Court sustained the initial objection and instructed the jury to disregard the comment. (R-V-125) Appellant followed up with a request for a mistrial which was denied. (R-V-170) Appellant also lodged a

complaint that it was a violation of the Motion in Limine. The Court sustained the objection, but denied Appellant's request for a mistrial on that issue as well. (R-V-171) The State made no effort to justify the admission of this evidence.

ARGUMENT AND AUTHORITIES

Rule 33.1 T.R.A.P. provides that as a prerequisite to presenting a complaint for appellate review, the record must show a complaint was made to the trial court by a timely request, objection, or motion stating the grounds for the ruling – unless the specific grounds were apparent from the context.

Rule 404(b) T.R.E. provides that evidence of a crime, wrong, or other act is not admissible unless an exception is established that authorizes its admission. Otherwise, a defendant on trial could be charged for being a criminal generally. **Rubio v. State, 607 SW2d 498 (Tex. Crim. App. 1980)**

An extraneous offense is an act of misconduct committed by the accused, whether or not it resulted in prosecution, that is not shown in the charging instrument. See: **Hernandez v. State, 817 SW2d 744 (Tex. App. – Houston [1st Dist.] 1991, no pet.)** Extraneous misconduct evidence must be proven beyond a reasonable doubt and by competent evidence. **Valadez v. State, 663 SW3d 133 (Tex. Crim. App. 2022); Fischer v. State, 268 SW3d 552 (Tex. Crim. App. 2008)** The propensity to commit crimes is not a material fact in a criminal case. **Segundo v. State, 270 SW3d 79 (Tex. Crim. App. 2008)**

In the instant appeal, the State's witness provided a non-responsive answer which injected evidence of Appellant's commission of an extraneous felony offense [boat theft]. The answer did more than to just reference a felony crime, it specifically linked Appellant to its commission along with "Brother" and several co-defendants. Napolitano's answer would allow the jury to speculate that Appellant had a reason to kidnap or retaliate against

the Complainant, because he was identified by this witness as being criminally responsible for the boat theft which gave rise to this prosecution.

In voicing his objection to the response made by Napolitano, it was clear from the context of Appellant's objection that a complaint was being made about the evidence of an "extraneous offense" being presented to the jury. Appellant referenced the Motion in Limine which specifically addressed the issue of "extraneous offenses" (CR-I-596,597)

The trial court issued an instruction to the jury to disregard Napolitano's extraneous offense comment. A trial court's instruction to disregard can render harmless testimony referring to extraneous offenses unless it appears the evidence was so clearly calculated to inflame the minds of the jury or is of such a damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind. **Kemp v. State, 846 SW2d 289 (Tex. Crim. App. 1992)** The introduction of an extraneous offense is inherently prejudicial. **Williams v. State, 662 SW2d 344 (Tex. Crim. App. 1984)** citing: **Elkins v. State, 647 SW2d 663 (Tex. Crim. App. 1983)**

The Court's decision to deny a mistrial is reviewed under an abuse of discretion standard. **Wood v. State, 18 SW3d 642 (Tex. Crim. App. 2000)**

Appellant submits that once Napolitano identified Appellant as a principal in the theft of the boat found in Thornton's yard, no instruction by the trial court would "un-ring" that bell. The trial court abused its discretion in denying Appellant's Motion for Mistrial. Appellant suffered egregious harm by the evidence of an extraneous offense.

ISSUE FOR REVIEW NUMBER SIX

THE JURY CHARGE ERRONEOUSLY PERMITTED THE JURY TO FIND APPELLANT GUILTY OF RETALIATION CAPITAL MURDER WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF THAT THEORY OF PROSECUTION. (CR-I-704) (R-VII-206)

Appellant objected to the trial court's proposed jury charge based on a retaliation

capital murder. (R-VII-206, stating: “ the retaliation paragraph, **we are asking for that not to be given to the jury** in that there was insufficient evidence to support the jury going forward on a retaliation capital murder. (R-VII-206)

The trial court overruled Appellant’s objection. (R-VII-206)

ARGUMENT AND AUTHORITIES

Article 36.14 Tex. C.C.P. requires the trial court to submit a properly worded set of instructions to the jury deciding the case. The jury charge is the instrument by which the jury convicts, and thus it must contain an accurate statement of the law and must set out all the essential elements of the offense. **Vasquez v. State, 389 SW3d 361 (Tex. Crim. App. 2012)**

In the instant appeal, the record reveals that there was **no evidence to establish the requisite knowledge on the part of Appellant that Kayla Lary was a witness or a prospective witness; or a person who had reported or who the actor knew intended to report the occurrence of a crime.** (CR-I-704) As noted during final argument, a boat owner told law enforcement where his boat was located. (R-VIII-16) There was no evidence that Kayla Lary ever reported anything about a boat - she was not listed as a “witness”. Lary was not identified as the anonymous “tipster”. **Rumors about Lary being a “snitch” did not elevate the evidence to the point that any action toward her constituted “retaliation”.**

Appellant adopts the argument and authorities set forth in Issues for Review One and Two in support of this Issue for Review.

ARGUMENT AND AUTHORITIES

ISSUE FOR REVIEW NUMBER SEVEN

THE TRIAL COURT ERRED WHEN IT FAILED TO SUA SPONTE NAME CLAYTON ROGERS AS AN ACCOMPLICE AS A MATTER-OF-LAW. (CR-I-

704)

Clayton Rogers appeared as one of the main witnesses against Appellant. Rogers, admitted lying to the police for the first 15-20 minutes of his interview when he told them he came out of the bathroom at “Brother’s” and Kayla Lary was gone - falsely suggesting he didn’t know what happened to her. (R-VII-73, 104)(R-VI-166) He claimed that Kayla Lary stabbed herself. (R-VI-253) He also lied, but then confessed, about retrieving cinder blocks from under Brother’s trailer, then tying them around Kayla Lary as she sat in a beaten condition on the floor of “Brother’s” trailer home. Rogers made no effort to intervene when he observed Veronica Jim slap and hit Kayla at least three times in the face and head, then tie her hands and feet with tape and put Kayla into 50 pound rice bags, while Lary was flailing around like a fish. (R-VI-166,167) (R-VI-162) Rogers was present when Appellant allegedly struck Kayla Lary in the head two times with a hammer. Veronica Jim saw Rogers put a plastic bag over Lary, then help Appellant and Detrov Alfred put her upside down in a trash can. (R-VI-253,255) (R-VI-183) Armed with this damning evidence of Rogers’ active participation, officials agreed that Rogers could have been charged in this matter, but instead, Rogers escaped prosecution and was given a “pass”, becoming a witness for the State (despite having lied to the police in this matter). (R-IV-154,155,168) Just because Rogers secured his relief [no prosecution] on the “front-end”, rather than having been charged and dismissed, does not change his status as an accomplice as a matter of law.

The jury charge did not name Clayton Rogers as an accomplice as a matter-of-law. CR-I-704) In doing so, the trial judge (who heard all the evidence) endorsed the State’s strategic decision not to charge Rogers with a crime - lessening the State’s burden of proof.

ARGUMENT AND AUTHORITIES

Article 38.14 Tex. C.C.P. provides that 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.

The court's instructions must apply the law to the facts adduced at trial. **Gray v. State, 152 SW3d 125 (Tex. Crim. App. 2004)**

A witness is an “accomplice as a matter of law” if he has been charged with the same offense as the defendant or a lesser-included offense, or if he was charged, but the charges were dismissed in exchange for testifying against the defendant, or where there is “no doubt or the evidence clearly shows” that the witness is an accomplice. **Ash v. State, 533 SW3d 878 (Tex. Crim. App. 2017)** **Paredes v. State, 129 SW3d 530 (Tex. Crim. App. 2004)** As the Court noted in **Silba v. State, 275 SW2d 108 (Tex. Crim. App. 1954)**, if all the evidence shows that the witness is answerable to the law as a principal or an accomplice to the crime or an accessory to the accused .— then he is an accomplice as a matter of law. When there exists no doubt as to the character of a witness as an accomplice as a matter of law the court is under a duty to so instruct the jury. **Ash, citing: Burns v. State, 703 SW2d 649 (Tex. Crim. App. 1985)** In **Blake v. State, 971 SW2d 451 (Tex. Crim. App. 1998)** the Court explained that the phrase “could be prosecuted” means that a person is an accomplice if there is sufficient evidence connecting them to the criminal offense as a blameworthy participant.

The law provides that the testimony of one accomplice cannot be used to corroborate another accomplice's testimony. **Badillo v. State, 963 SW3d 854 (Tex. App. - San Antonio 1998, pet. ref'd)**

In the instant appeal, there can be no question that the acts committed by Clayton

Rogers made him susceptible to prosecution. By choosing not to prosecute Rogers, the State gained a strategic evidentiary advantage at trial. This advantage was compounded when the trial court failed to identify him as an accomplice as a matter of law in the jury charge. This allowed the jury to evaluate his testimony under a less restrictive format. The charge given also permitted the jury to find that Rogers was not an accomplice at all, thus allowing his testimony to be used as “corroboration” of the testimony given by others. This was error harmful to Appellant.

Appellant submits that the charge given was erroneous and calculated to injure, and did injure, his substantial rights, resulting in the denial of a fair trial. **Rule 21.3(b) & 44.2 T.R.A.P.**

ISSUES FOR REVIEW 8,9 & 10 ARE GROUPED TOGETHER PURSUANT TO RULE 38(F) T.R.A.P BECAUSE EACH ISSUE INVOLVES THE ADMISSION OF HEARSAY TESTIMONY

ISSUE FOR REVIEW NUMBER EIGHT

THE TRIAL COURT ERRED IN ALLOWING STEPHANIE NAPOLITANO TO PROVIDE HEARSAY EVIDENCE FROM MESSAGING WHERE THERE WERE NO EXCEPTIONS TO THE RULE AGAINST HEARSAY (R-V-132,133,187)

Outside the presence of the jury

Stephanie Napolitano was questioned about messages between her, Veronica Jim and Detroy Alfred - *“that Clayton and Kayla had showed up and they were causing a scene, essentially, and that ultimately it’s not a problem anymore, David showed up”* (R-V-161) Appellant objected to the hearsay nature of the communications - noting that this was not a situation where one coconspirator is talking to another coconspirator (R-V-166) The trial court stated: *“I think you have a valid objection.... But I’m going to overrule your objection”*. (R-V-167) Appellant’s counsel argued that it was not in furtherance of the conspiracy and it wasn’t a statement by David Spates. He noted it would be a different

exception to the hearsay rule, but this was made by an alleged co-defendant when they weren't even charged. (R-V-168) The objections were overruled. (R-V-170)

Before the jury

Napolitano was asked if she had **learned** that Kayla had gone back to the trailer? When she answered in the affirmative, the prosecutor asked: "*Okay, and was it your understanding that it was a pleasant time at the trailer ?*" Appellant objected to hearsay, but the witness answered: "no". (R-V-132) Then, when the State asked if the messages contained information about anyone else showing up, Appellant's hearsay objection was sustained. (R-V-132)

Stephanie Napolitano discussed messaging that took place between her, Veronica Jim and Detroys Alfred. (R-V-185) Appellant lodged a hearsay objection and adopted his **previous objections made during Alex Long's testimony noted below.** (R-V-69-90), The trial Court said: "*Sustained, I mean overruled*". (R-V-186) Napolitano was allowed to describe information contained in the messages. (R-V-186) **First it was for us to come out there (trailer), to help with the situation with her (Kayla).** She also related that messages were sent that **she (Kayla) was acting irate.** (R-V-186) She stated that another message indicated that **the situation had been taken care of by the Appellant, David Spates.** (R-V-186,187) During cross examination, Napolitano acknowledged that the phone was not even hers – it belonged to her fiancé, Corey Westbrook. (R-V-187) She also admitted that she didn't know what the phrase "taken care of" meant. (R-V-189)

APPELLANT'S ADOPTED OBJECTION

During the testimony of Alex Long, an off-the-record discussion took place - he was questioned by the prosecutor about screen shots he had taken of Facebook messages between himself and Kayla Lary. (R-V- 68,69-90) In the purported message from Lary to Long, Lary states that **people are accusing her of being a "snitch", that Brother is in jail,**

people end up with stitches—with stitches and in a ditch. (R-V-71)

Appellant lodged objections based on untimely filing of the records without a proper predicate. (R-V-68,78) Since the records were not timely filed, Appellant reasonably believed they would not be admitted at trial. (R-V-74) The prosecutor responded that the records from Facebook were not received in time to file a business records affidavit. (R-V-72) Appellant also objected that there was no predicate established and the screen shots constituted hearsay and would deny him the right to confrontation of witnesses under the **Sixth Amendment**, because the deceased was obviously not there to be cross examined. (R-V-76,77) Outside the presence of the jury, Long said Appellant was not mentioned in the messaging. (R-V-83) During cross examination, Long agreed that he was not present when the person was writing the response message. (R-V-84) As a result, he could not tell who was typing the other messages. (R-V-85) He couldn't say whether someone else got Lary's phone and wrote the messages. (R-V-85) Long did not identify Appellant. (R-V-88) The trial court did not allow the State to put the records into evidence. (R-V-79)

ISSUE FOR REVIEW NUMBER NINE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL WHEN INADMISSIBLE HEARSAY TESTIMONY WAS OFFERED BY THE STATE (R-VI-142,143)

When Clayton Rogers was asked where he and Kayla Lary were going to go as they drove around Channelview, he responded: "*Hmm, while we were driving around she's still talking about getting her stuff back because she got told not to go back to the trailer.*" (R-VI-142) Appellant's hearsay objection was sustained; the jury was instructed to disregard the answer, but Appellant's motion for Mistrial was denied. (R-VI-142,143)

When Rogers was asked if he had concerns about going back to Brother's trailer that night, he responded "yes". Then, when asked why – Appellant objected that the question called for hearsay. (R-VI-152) The court instructed the witness and State that it couldn't be something told to the witness. (R-VI-152) The witness replied: "*Kayla being told don't come back.*" (R-VI-152) Appellant's hearsay objection was sustained, the jury was instructed to disregard the answer, but again, Appellant's Motion for Mistrial was denied. (R-VI-152)

ISSUE FOR REVIEW NUMBER TEN

THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY TESTIMONY. (R-VI-154, 172, 173, 186)

Before continuing with Rogers testimony, Appellant requested that Rogers be admonished for violating the “rule”. (R-VI-153) The judge instructed Rogers not to state what other people had told him. When the court asked: “*are you with me*”, Rogers said, “*yes, ma’am.*” (R-VI-154)

The prosecutor then asked: “*Okay, Does Kayla say anything while she’s on the ground tied up?*” Rogers quickly responded: “*Please stop, let me go*”. Appellant objected on hearsay grounds and requested an instruction to disregard. The court admonished the witness that the answer would have been “yes” or “no”. (R-VI-171,172) The judge commented “*I’m probably going to overrule that objection if she would ask it correctly*” - then the judge did overrule the hearsay objection. (R-VI-172) Rogers responded: “*She was pleading and crying, please stop, let me go, I’ll leave and never come back.*” (R-VI-173)

Rogers was asked if Kayla said anything after being hit in the head by Appellant. Appellant’s **hearsay objection was overruled.** (R-VI-186) Rogers replied: “*Please stop, please, please stop, let me go*” (R-VI-187)

Rogers was asked whether Veronica Jim and Lynn McLellan were yelling at Kayla when they were tying her up. Appellant objected to any hearsay response. The trial court overruled the objection. Rogers said: “**they**” were telling — yelling at Kayla that “*You know what you did was wrong and we’re going to wait for David to get here.*” (R-VI-70) Cynthia “Lynn” McLellan did not testify.

ARGUMENT AND AUTHORITIES

Appellant objected to the admission of hearsay testimony as set forth above. In Issue

Number Nine, Appellant also requested a mistrial, which was denied. The State was permitted to introduce the hearsay statements attributed to the complainant, Kayla Lary.

Rule 801 T.R.E. provides that hearsay is a statement other than the one made by the declarant while testifying at trial offered in evidence to prove the matter asserted. **Zuliani v. State, 97 SW3d 589 (tex. Crim. App. 2003)**

In each exchange noted above, the State was offering hearsay testimony for the express purpose of proving the matters stated therein were true. This evidence was an essential piece of the puzzle presented by the State in an effort to shore up its inconsistent and contradictory prosecution of Appellant.

Where the Court finds reversible error in failing to exclude hearsay evidence, the proper disposition is to reverse and remand for a new trial. **Cofield v. State, 857 SW2d 798 (Tex. App. - Corpus Christi, 1993) aff'd 891 SW2d 953 (Tex. Crim. App. 1994)**

Appellant submits that the admission of this evidence was significant and very damaging - requiring reversal for a new trial.

ISSUE FOR REVIEW NUMBER ELEVEN

THE TRIAL COURT ERRED IN PERMITTING TESTIMONY WHICH CALLED FOR SPECULATION ON THE PART OF THE SPONSORING WITNESS (R-VI-265-269)

Veronica Jim was asked whether she “believed” that Kayla Lary was responsible for getting “Brother” arrested” on the boat charge. Appellant objected that this question called for speculation. (R-VI-265) The objection was overruled. Ms. Jim answered: “Yes”. (R-VI-266) Follow-up questions inquired about who else had the same belief. Appellant’s objections based on speculation were overruled. (R-VI-266) Jim was asked if Detroyn Alfred had “concerns” that Kayla was responsible for Brother’s arrest. Again, Appellant’s speculation objection was overruled. (R-VI-268) She answered: “Yes”. When

asked if Kayla was being blamed for being a “snitch” on Brother, the witness was allowed to answer “yes”, **adding that Corey Westbrook, Brother, David Spates, Thomas Gray, Tempy Jackson and herself all felt the same way.** (R-VI-268,269).

When asked whether Kayla Lary was blamed for snitching on “Brother” about the boat, over a speculation objection, Jim said “yes”. (R-VI-269)

Clayton Rogers was asked whether based on his interactions with Jim and McLellan, did he believe he knew what they were talking about? Appellant objected to **speculation** and was overruled. He responded: *“I believe they were calling her a thief.”* (R-VII-70,71)

Appellant objected to **speculation** when Rogers was asked to express his belief about what Kayla had done wrong. He was allowed to state that Kayla was suspected of being a thief and a snitch. (R-VII-70)

ARGUMENT AND AUTHORITIES

Rule 401 T.R.E provides that evidence is relevant only if it has a tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.

Rule 602 T.R.E. provides that a witness may testify to a matter **only if** evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. **Hooper v. State, 214 SW3d 9 (Tex. Crim. App. 2007)** If a witness does not know a **fact** to be true or not, but testifies about it anyway, this testimony would be objectionable as “speculation”. A speculation objection occurs when a witness is asked to guess or make assumptions about facts they do

not have personal knowledge of. As the court noted in **Ivie v. State, 407 SW3d 305 (Tex. App. - Eastland 2013, pet. ref'd)** Testimony based on speculation or conjecture makes no fact more or less probable.

Testimony based solely on speculation and conjecture would like probative value; thus, it would not be relevant. **Rule 401 T.R.E.** Accordingly, it would be inadmissible under **Rule 402**.

When Veronica Jim and Clayton Rogers were posed with questions concerning "beliefs" (whether attributed to themselves or others) it called upon them to speculate what their responses would be. There was no showing that either Jim or Rogers had personal knowledge concerning those "facts" they were providing. **Rule 602 T.R.E.**

Admission of this testimony misled the jury and also unfairly prejudiced Appellant. The potential for harm far outweighed any speculative probative value. The evidence should have been excluded - allowing the testimony was error harmful to Appellant.

PRAYER FOR RELIEF

Appellant prays this Court will review the Issues for Review raised herein and grant relief as follows: Appellant prays the Court set aside the jury's verdict on the charge of capital murder and enter a judgment of acquittal. In the alternative, without waiving the foregoing prayer, Appellant prays the Court grant a new trial. Further in the alternative, Appellant prays that the Court reform the judgment in this case to murder and order a new punishment hearing.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

The total word count shown in the computer program used to prepare this document is 17,694. A Motion to file an expanded brief will be filed on this date.

Wayne T. Hill

CERTIFICATE OF SERVICE

On today's date, a true and correct copy of this Brief will be electronically mailed to the Harris County District Attorney's Office - Appellate Division via the Fourteenth Court of Appeals e-file service.

Wayne T. Hill