NO. 14-24-00712-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

ISRAEL MIRANDA
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1780000
From the 185th Judicial District Court of Harris County, Texas
Hon. Andrea Beall, Judge Presiding

BRIEF FOR APPELLANT

Oral Argument Requested

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STATEMENT OF THE CASE

Mr. Miranda was charged with the murder of Lucio Buruca, stemming from events on July 24, 2022. (CR 56).[1] Jury selection began on September 17, 2024, with trial following. (1RR 3).[2] On September 20, 2024, the jury returned a guilty verdict against Mr. Miranda and assessed punishment at 20 years confinement in the Texas Department of Criminal Justice – Institutional Division. (7RR 92, 144; CR 428, 436). Mr. Miranda filed timely notice of appeal for the conviction. (CR 447). A motion for new trial was not filed in this case.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this case specifically to discuss Issue III which is the jury charge issue. Counsel for Appellant could not find a single case in Texas in which the court opined on a 9.04 instruction that was at the behest of the State to apply to a complainant. The case law surrounding a 9.04 jury instruction has focused on an accused's conduct – not a complainant. Counsel for Appellant believes this is an issue of first impression. It is delved into in Issue III of this brief.

[1] The Clerk's Record on appeal is designated by "CR" followed by the page number.
[2] The Reporter's Record on appeal is designated by volume number, followed by "RR" followed by page number.

ISSUES PRESENTED

ISSUE I: The trial court violated Texas Code of Criminal Procedure Article 38.05 by telling the venire panel that if someone is shot in the head or thigh, the shooter clearly intended to cause death or serious bodily injury and committed an act clearly dangerous to human life. This communicated the trial court's opinion of the merits of a murder case with a like set of facts and lowered the State's burden to prove murder and infringed on Appellant's presumption of innocence. The comments were improper and material, and harmed Appellant.

ISSUE II: The trial court erred when it prohibited witnesses from testifying before the jury about the complainant's extraneous acts of violence. Specific violent acts of misconduct by the decedent may be admitted in a homicide prosecution to show (1) the reasonableness of the accused's fear of danger, or (2) that the complainant was the first aggressor. This testimony was both relevant and admissible and the trial court's exclusion of this testimony prevented Appellant from presenting a meaningful defense. Appellant was harmed by the exclusion of this evidence.

ISSUE III: The trial court included a 9.04 instruction in the jury charge at request from the State and over objection from Appellant. The trial court erred in doing so because the instruction, as worded, applied to Appellant. A 9.04 instruction is a defensive instruction which is a strategic decision for the defense to request at trial. It is inappropriate and counter to the law for the State to request a defensive instruction be it for the accused or, as it was in this matter, for the complainant. In including the 9.04 instruction, the trial court infringed on Appellant's right to present a defense and commented on the weight of the evidence. This harmed Appellant.

ISSUE IV: The State made numerous improper comments during its rebuttal closing argument. The State repeatedly misstated the law and commented on Appellant's Fifth Amendment right from self-incrimination violating his due process. The improper comments confused and impacted the jury.

ISSUE V: The written judgment should be reformed to correctly reflect the Appellant has the right of appeal.

STATEMENT OF FACTS

Presentation of Evidence at Guilt/Innocence

Hanging out and working at La Divina Auto Sales

Lucio Buruca Sr., the complainant, lived on a property that encompassed both his home and business, *La Divina Auto Sales*. (3RR 31; 6RR 14, 43). Oscar Navarijo worked at Lucio Sr.'s business and lived in the home with him. (4RR 141-142; 6RR 20). On the morning of July 24, 2022, Oscar was working there with Lucio Sr. and his son Lucio Buruca Jr. (4RR 143). At about 11:00 a.m., Fausto Miranda, Lucio Sr.'s ex brother-in-law, arrived with his sons and worked on Fausto's vehicle. (6RR 55-56; 4RR 144-145). Fausto, Lucio Sr., and Oscar began drinking about one to two hours after Fausto arrived. (6RR 56-58).

Israel Miranda arrived

Israel Miranda, Fausto's brother, arrived at about 8:00 p.m. (6RR 59). By this time, Lucio Sr. and Oscar had been drinking for seven to eight hours. (6RR 59). Lucio Sr., Oscar, Fausto, and Mr. Miranda were drinking outside and getting along. (4RR 147; 6RR 21, 62-63). After Fausto, his sons, and Lucio Jr. left, the remaining three men continued drinking and started hanging out in the living room of the home. (4RR 150-152; 6RR 21-22, 58).

Oscar Navarijo's testimony as to the events inside the home

Oscar testified that Mr. Miranda slapped him in the face after being unable to connect his phone to a Bluetooth speaker. (4RR 154). Oscar decided to go to bed

after that. (4RR 155). After some time, Lucio Sr. called Oscar because Mr. Miranda stated that Oscar hid his boot. (4RR 158). Oscar went to the living room where Lucio Sr. and Mr. Miranda were and saw that Mr. Miranda was wearing one boot. (4RR 158-159). Before looking for the boot, Oscar testified that Mr. Miranda grabbed him by the arm and drew a gun at Oscar's temple. (4RR 160-162). Mr. Miranda and Oscar went to the bedroom Mr. Miranda was staying in and located the boot in front of the bed. (4RR 162-163). Mr. Miranda then hit Oscar in the head with the gun's handle. (4RR 164-165).

Lucio Sr. tried to take the gun from Mr. Miranda and a struggle ensued between them with Mr. Miranda shooting the gun but not hitting anyone. (4RR 166-167). Mr. Miranda then exited the home and Oscar proceeded to hide while Lucio Sr. went to his bedroom. (4RR 167-170). Oscar then heard a shot, looked for Lucio Sr., and found him lying outside. (4RR 170-172).

The surveillance videos outside the home

Lucio Sr. kept surveillance cameras on his property, and the videos[3] introduced at trial depicted the scene outside the home moments before the shooting, during, and after. (8RR 11-12; St. Ex. 303; Def. Ex. 28).

The videos showed Mr. Miranda walking outside with a gun in his hand followed shortly after by Lucio Sr. who also had a gun in his hand. (4RR 188 St. Ex.

[3] The videos did not include any audio. (5RR 87-89, 103).

303[4] 01:46:19 – 01:46:33; 5RR 81, 83). Lucio Sr. appeared to be loading his weapon as he followed Mr. Miranda. (St. Ex. 303[5] 01:46:34; 4RR 190). Mr. Miranda turned around and raised his hand[6] at the direction of Lucio Sr. and then Lucio Sr. knocked Mr. Miranda's hand down. (St. Ex. 303[7] 01:46:43 – 01:46:52; 4RR 193; 5RR 86). Lucio Sr. circles around Mr. Miranda and gets in between him and the vehicle. (St. Ex. 303[8] 01:46:52 – 01:46:54; 5RR 115). Mr. Miranda then put his hand on Lucio Sr.'s left arm to keep his weapon down. (St. Ex. 303[9] 01:46:56 – 01:47:00; 4RR 195; 5RR 120-122). Mr. Miranda then looked down, reached into his pants, and shot Lucio Sr. (St. Ex. 303[10] 01:47:04 - 01:47:08; 4RR 195; 5RR 121-123).

Trial counsel's argument at trial

Trial counsel argued that Lucio Sr. did not follow Mr. Miranda, who was already leaving, under the guise of being a peacemaker. (3RR 10; 7RR 76). Lucio Sr. was in control of the scene – the property was barbed wire gated and only he had access to open the gate – which effectively left Mr. Miranda trapped. (3RR 11-12; 7RR 65-70). When Lucio Sr. chased after him, it was Mr. Miranda who raised his hand and

[4] A USB was provided to the court reporter with the contents of this exhibit. This citation refers to video "CH03 2022-07-24_0146718 2022-07-24_014643_ID02889."
[5] Video "CH03 2022-07-24_0146718 2022-07-24_014643_ID02889."
[6] There was contention as to whether Mr. Miranda was pointing a gun at Lucio Sr. or only raising his hand. Investigator David Crain conceded on cross examination that although he believed Mr. Miranda to be holding a gun, it was not clear from the video whether he was. (5RR 113, 121-122).
[7] Video "CH 01 2022-07-24_014600_2022-07-24_020000_ID02879_E."
[8] Video "CH 01 2022-07-24_014600_2022-07-24_020000_ID02879_E."
[9] Video "CH 01 2022-07-24_014600_2022-07-24_020000_ID02879_E."
[10] Video "CH 01 2022-07-24_014600_2022-07-24_020000_ID02879_E."

told him to go back inside. (7RR 68-69). However, Lucio Sr. slapped his hand away and circled him, and Mr. Miranda put his hand on Lucio Sr.'s shoulder to prevent him from pulling a gun at him. (3RR 13; 7RR 70). Mr. Miranda was in a position where Lucio Sr. would have killed him unless he acted first. (7RR 71).

The State's argument at trial

The State argued that Mr. Miranda provoked everything, beginning with the alleged altercation with Oscar, and had no right to claim self-defense against Lucio Sr. (7RR 81-83). The State argued that Lucio Sr. had every right to go outside to shoot Mr. Miranda and that he only followed him outside to diffuse the situation. (7RR 84-86).

The Verdict

On September 20, 2024, the jury found Mr. Miranda guilty of murder as charged in the indictment. (7RR 92; CR 428).

The Punishment Phase of Trial

Israel Miranda's Testimony[11]

Hanging out at La Divina Auto Sales

Mr. Miranda arrived at *La Divina Auto Sales* between 7:30 p.m. and 8:00 p.m. on July 24, 2022, bringing a 6 pack of beer that he left in his truck. (7RR 108-109, 128). He hadn't seen Lucio Sr. in years but he called him that day and learned that his

[11] Mr. Miranda did not testify during the guilt/innocence portion of trial; he testified during the punishment phase. His version, as he testified to, is included in this subheading.

brother Fausto was there, so Mr. Miranda joined. (7RR 122). He hung out with Fausto, Lucio Sr., and Oscar; Mr. Miranda had not met Oscar prior to that night. (7RR 109-110). When Fausto left, Mr. Miranda was going to join him, but Lucio Sr. and Oscar asked him to stay – so he did. (7RR 109, 129). The three men continued drinking. (7RR 109-110).

Inside the home

Eventually, the three men decided to go to sleep. (7RR 110). Mr. Miranda slept in the living room; he did not sleep in the back bedroom nor go into that bedroom. (7RR 110). He denied shooting a gun in that bedroom and having no knowledge as to the bullet hole in the wall. (7RR 110-111, 128-129). Mr. Miranda denied hitting Oscar and didn't know how Oscar got cut on his head. (7RR 119, 128-129).

The boot

Mr. Miranda readied to sleep and took off his boots in front of him. (7RR 111). When he awoke later, only one boot was there. (7RR 111). He saw Lucio Sr. walking towards the kitchen and asked him if he knew the whereabouts of the other boot, but Lucio Sr. did not. (7RR 112). Mr. Miranda began looking for the boot and told Lucio Sr., "Let's don't be playing. Bring me back my boot." (7RR 112). Lucio Sr. told Oscar to bring the boot and he did. (7RR 113).

What happened outside the home

Mr. Miranda decided to leave so he put on his boots and grabbed his pistol, which was nearby, and headed outside. (7RR 113). He headed down the stairs outside

and put the pistol away in his waist. (7RR 114). Mr. Miranda then realized that Lucio was behind him. (7RR 114-115). Mr. Miranda raised his hand and said, "Lucio, go inside. Let me go." (7RR 115). Lucio Sr. pushed Mr. Miranda's hand and began telling him that the Miranda family was no good. (7RR 115).

Mr. Miranda testified that he had known Lucio Sr. almost all his life and there were times when he would be nice, but his temperament was very different when he was drinking. (7RR 122-123, 127, 129).

Lucio Sr.'s temperament was aggressive as he insulted Mr. Miranda's family. (7RR 116). Mr. Miranda put his hand on Lucio Sr. to prevent him from grabbing his weapon; Mr. Miranda could see Lucio Sr.'s weapon and was filled with fear. (7RR 116). Mr. Miranda pleaded for Lucio Sr. to let him go but Lucio Sr. told him, "You're going to end up on the ground here." (7RR 117). Mr. Miranda then bent his head down, fearful for his life, and pulled out his weapon and shot Lucio Sr. (7RR 117).

After the shooting

Mr. Miranda didn't know what to do but ultimately got in his vehicle, drove through the gate of the property, and tossed his gun out onto the road. (7RR 118). He spoke with his sister, Leticia, over the phone and told her what happened. (7RR 119). They met at a gas station before proceeding to their mother's house where Mr. Miranda asked her for forgiveness. (7RR 120). He went back to Lucio Sr.'s business and turned himself in. (7RR 121).

The Sentence

After hearing testimony from Mr. Miranda and his daughter Rosa Miranda, the jury assessed punishment at 20 years confinement in the Texas Department of Criminal Justice – Institutional Division. (7RR 101, 106, 144; CR 436). The court pronounced sentence and issued its judgment against Mr. Miranda the same day. (7RR 145; CR 439-441).

SUMMARY OF THE ARGUMENT

Judge Andrea Beall, who presided over Appellant's trial, made improper comments during voir dire in violation of Article 38.05 of the Texas Code of Criminal Procedure. In attempting to explain the mens rea and "clearly dangerous to human life" elements of the two theories of murder charged, she told the jury venire that if someone is shot in the head then it is intentional. Judge Beall also stated that if someone is shot in an important part of the body, like the thigh, that the shooter intended to cause serious bodily injury and only an act clearly dangerous to human life would be associated with that type of gunshot injury. These comments lowered the Sate's burden to prove the crime charged by committing the jury to a particular finding depending on the location of a gunshot wound. This was also a comment on the weight of the evidence. Judge Beall made these statements despite being aware that this was a shooting case. This harmed Appellant because the complainant was shot in the head, making the facts of the case materially similar to the fact pattern Judge Beall provided.

The trial court also erred when it prohibited witnesses from testifying before the jury about the complainant's extraneous acts of violence. Judge Beall prohibited the testimony ruling that it did not explain the complainant's aggressive conduct in this case. However, Texas law provides that specific violent acts of misconduct by the complainant may be admitted in a murder prosecution to show (1) the reasonableness of the accused's fear of danger, or (2) that the complainant was the first aggressor. Early Texas cases that opined on this framework were more lenient in the admissibility of extraneous offense evidence of the complainant whereas recent Texas case law has been stricter. Appellant argues that Texas Rules of Evidence is more expansive than the recent Texas case law has interpreted. The extraneous acts of the complainant were relevant to explain Appellant's state of mind and that the complainant was the first aggressor. By prohibiting the testimony, Appellant was denied a meaningful opportunity to present a defense.

The trial court further erred in providing an incorrect, or at a minimum incomplete, charge to the jury. The instruction at issue is TEX. PEN. CODE § 9.04 which is a defensive instruction providing that threatening another with a weapon does not constitute deadly force "as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary." The trial court included this instruction at request from the State and over objection from Appellant. The trial court was aware that the State requested the instruction for the benefit of the complainant who was holding a firearm prior to Appellant shooting him. The

instruction given to the jury did not include an application paragraph and therefore, as written, it did not explain how to apply the instruction. The 9.04 instruction should not have been included at all because the actual lawfulness of the complainant's conduct is irrelevant in Texas and no evidence was raised to justify its inclusion either. At a minimum, its inclusion was incomplete for failure to include an application paragraph. Appellant was harmed in multiple ways by this instruction: (1) the trial court commented on the weight of the evidence by implying approval of the State's argument that the complainant had a weapon merely for apprehension, (2) the forced jury instruction infringed upon Appellant's right to present a defense because 9.04 is a defensive instruction and the State requested it for the complainant, and (3) the State's closing argument capitalized on the charge error.

In his next issue, Appellant asserts that the State misstated and misapplied the law of self-defense in its rebuttal closing argument. Specifically, the State argued that an accused's state of mind – feeling one's life threatened – was not a valid reason for self-defense. The State repeatedly argued self-defense in the context of the complainant's standpoint when Texas law only contemplates that be viewed through the standpoint of the accused. The State's closing argument additionally commented on Appellant's silence which is violative of his Fifth Amendment rights. The trial court erred in denying Appellant's motion for mistrial and, at a minimum, in not providing any curative instructions. The State's misstatements of law and comments on Appellant's silence harmed Appellant.

Lastly, Appellant requests for the judgment to be reformed because it indicates that he does not have a right to appeal. The trial court's certification includes the right of appeal and nothing in the record indicates that Appellant waived his right to appeal.

ARGUMENT

ISSUE I: The trial court violated Texas Code of Criminal Procedure Article 38.05 by telling the venire panel that if someone is shot in the head or thigh, the shooter clearly intended to cause death or serious bodily injury and committed an act clearly dangerous to human life. This communicated the trial court's opinion of the merits of a murder case with a like set of facts and lowered the State's burden to prove murder and infringed on Appellant's presumption of innocence. The comments were improper and material, and harmed Appellant.

A. The Indictment and the Trial Court's Comments

The indictment charged Appellant with murder, alleging alternate theories. It alleged that Appellant:

> on or about July 24, 2022, did then and there unlawfully, intentionally and knowingly cause the death of [the complainant] by shooting Complainant with a deadly weapon, to wit: a Firearm.
>
> It is further presented that …[Appellant]…did then and there unlawfully intend to cause serious bodily injury to…[Complainant], and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely by shooting Complainant with a deadly weapon, to wit: a Firearm.

(CR 56); *see* TEX. PEN. CODE § 19.02(b)(1) & (2).

During the trial court's voir dire, Judge Beall made the following comments in an attempt to explain some components of the theories of murder charged in the indictment:

> So the first paragraph is unlawfully, intentionally and knowingly cause the death by shooting with a deadly weapon, a firearm. So let's say Juror No.4 - - and I know you would never do this, Juror 4…but let's say Juror No. 4 leaves here today and he sees me in the parking garage and he goes, you know what, I just don't like that that judge talked for so long, okay, and I don't like that she wouldn't let Juror No. 18 do her triathlon, okay, **so I'm angry, I have my firearm, I'm going to kill her. So he walks up to me and points the firearm right at my head and pulls the trigger and I die**. Everybody can agree, right, that that would be an intentional and knowingly causing the death of somebody by shooting them with a firearm? No one's confused, right? Okay. So that's the first paragraph.
>
> The second paragraph is somebody intends to cause serious bodily injury and commits an act clearly dangerous to human life and that act results in someone dying. So that would be like Juror No. 4 saying, you know what, I don't know if I want the judge to die but I definitely want to cause her some serious bodily injury, so I'm going to shoot her in the thigh in the parking garage, okay? And you know, if she gets medical attention, she'll probably live but if she doesn't, sorry, your bad luck today, right, because we've got arteries running through that thigh. **Everybody can agree, right, that would be an act clearly dangerous to human life; that would be serious bodily injury to be shot in the thigh, right? Okay. So then if I end up laying there and bleeding out and dying, he would still be guilty of murder even though he didn't necessarily intend to cause me death**. Everybody follow?

(2RR 16-18) (emphasis added).

The evidence in this case showed the complainant was shot in the head. (5RR 42; 8RR St. Ex. 201).

B. Applicable Law and Standard of Review

"[T]he trial court shall maintain an attitude of impartiality throughout the trial." *Ex parte Scott*, 541 S.W.3d 104, 125 (Tex. Crim. App. 2017), quoting *Lagrone v. State*, 209 S.W. 411, 415 (Tex. Crim. App. 1919). "[I]t has been often held his views or

impressions of the weight of the evidence or upon the issues in the case may be conveyed to the jury as effectively by other means as by charge of the court." *Anderson v. State*, 202 S.W. 944, 946 (Tex. Crim. App. 1918). As the Court of Criminal Appeals explained in *Lagrone*:

> To the jury the language and conduct of the trial court have a special and peculiar weight. The law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved. The delicacy of the situation in which he is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret.

Lagrone, 209 S.W. at 415 (internal citations omitted).

"Article 38.05 of the Texas Code of Criminal Procedure prohibits the trial judge from commenting on the weight of the evidence in criminal proceedings or otherwise divulging to the jury [their] opinion of the case[.]" TEX. CODE CRIM. PROC. art. 38.05; *Proenza v. State*, 541 S.W.3d 786, 791 (Tex. Crim. App. 2017). Article 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Even if a trial judge's intention is not to advocate for the State or to undermine an accused's rights, their comments can still be improper under 38.05. *Simon v. State*, 203

S.W.3d 581, 592 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("Without judging the trial court's intention in making these comments, we conclude they were improper.").

"In evaluating a claimed violation of article 38.05, we first determine whether the trial court's comments were, in fact, improper under the article." *Moore v. State*, 624 S.W.3d 676, 681 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd), citing *Simon*, 203 S.W.3d at 590. "If so, we must determine whether the comments were material." *Id.* "A comment is material if the jury was considering the same issue." *Id.* at 682, citing *Simon*, 203 S.W.3d at 592. If a court finds they were improper and material, it reviews for non-constitutional harm under TEX. R. APP. P. 44.2(b). *Id.*, citing *Proenza*, 541 S.W.3d at 801.

C. Analysis

a. **This issue is not forfeitable and was not waived.**

Trial counsel did not object to the trial court's comments. However, in *Proenza*, the Court of Criminal Appeals determined that "claims of improper judicial comments raised under Article 38.05 are not within *Marin's* third class for forfeitable rights. Rather, . . . the right to be tried in a proceeding devoid of improper judiciary commentary is at least a category-two, waiver-only right." *Proenza*, 541 S.W.3d at 801, referencing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (en banc) (explaining category-two rights as those "which must be implemented by the system

unless expressly waived"). The record does not show this right was waived. As a result, this issue is properly before this Court.

b. **The trial court's comments were improper and material.**

Again, Judge Beall informed the jury venire that if someone is shot in the head, that this objectively indicates the shooter intended to do so and intended for that person to die. (2RR 16-18). She also commented that if someone is shot in a location like the thigh that it is clear the shooter intended to cause serious bodily injury. *Id.* Though this was in the context of attempting to explain a legal concept, the statement commented on the weight of the evidence and communicated the judge's opinion of the merits of a murder case with a like set of facts. This lowered the State's burden to prove murder.

"[T]he U.S. Supreme Court has explained, and [the Court of Criminal Appeals] has reiterated that '[the] principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Rogers v. State*, 664 S.W.3d 843, 489 (Tex. Crim. App. 2022), quoting *Kimble v. State*, 537 S.W.2d 254, 254-255 (Tex. Crim. App. 1976). "The presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

"Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right to the 'presumption of innocence,' *i.e.* the right to be free

from criminal conviction unless the State can prove his guilt beyond a reasonable doubt by probative evidence adduced at trial." *Miles v. State*, 204 S.W.3d 822, 825 (Tex. Crim. App. 2006), citing *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

The presumption of innocence is also guaranteed by Texas state law, as "the statute itself arises from a constitutional guarantee, that of a right of a fair and impartial trial." *Miles v. State*, 154 S.W.3d 679, 681 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 204 S.W.3d 822 (Tex. Crim. App. 2006), citing U.S. CONST. amend. XIV; TEX. CODE CRIM. PROC. art. 38.03; *Estelle*, 425 U.S. at 503; and *Oliver v. State*, 999 S.W.2d 596, 599 n. 3 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). "The presumption of innocence is a fundamental right, and 'its enforcement lies at the foundation of the administration of our criminal law.'" *Walker v. State*, 469 S.W.3d 204, 208 (Tex. App.—Tyler 2015, pet. ref'd), citing *Taylor*, 436 U.S. at 483 and *Ex parte Clark*, 545 S.W.2d 175, 177 (Tex. Crim. App. 1977).

While Judge Beall's comments were not directly concerned with the admission of evidence, her comments conveyed to the jury her opinion of the case: that Appellant's guilt depended on the location of a gunshot—specifically, that if somebody was shot by a gun in either a kill spot or any important part of the body—that the shooter certainly intended to cause death or serious bodily injury. (2RR 16-18). This violated Appellant's presumption of innocence. TEX. CODE CRIM. PROC. art. 38.05 (trial judge should not "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the

case."). It is possible for someone to recklessly or negligently (rather than intentionally or knowingly) shoot a gun and hit someone in the head or other important body part,[12] but Judge Beall's comments precluded a finding of not guilty on this basis. At best, her statements were an improper comment on the weight of the evidence because they included facts materially identical to the facts of this case and communicated her opinion of a certain type of case (which happened to be similar to this one). At worst, it was a misstatement of the law. If the location of a penetrating injury which resulted in death necessarily showed intent or knowingness, then no shooting case where death resulted would ever qualify as manslaughter or negligent homicide.

Judge Beall's comments acted as a command to the jury venire that under a materially similar set of facts – "he…points the fiream right at my head and pulls the trigger and I die" – it should convict Appellant. And though a comment can be improper even if unintentional, Judge Beall was aware that this case involved a shooting death because the State alleged the complainant was killed with a firearm in the indictment. (CR 56). A hypothetical involving, for example, poison, could have just as effectively assisted the jury in understanding the meanings of "intentionally or knowingly", "serious bodily injury", and "clearly dangerous to human life" without

[12] TEX. PEN. CODE §§ 6.03(c, d), 19.04(a), 19.05(a). The State may argue, then, that this comment was harmless because it was not a defense theory that this was a recklessness-oriented shooting, but this does not matter because the State still has the burden to prove all essential elements of murder regardless of the defensive theory.

the risk of improperly commenting her opinion on cases involving penetrating injuries—more specifically, gunshot wounds.

It is improper for a trial judge to act as an advocate rather than referee. *See Tejeda v. State*, 905 S.W.2d 313, 317 (Tex. App.—San Antonio 1995, pet. ref'd). An entire body of caselaw is dedicated to issues in which the State presented a jury panel with overly specific hypotheticals to inculcate them on a particular set of facts. *E.g.*, *Atkins v. State*, 951 S.W.2d 787, 789-90 (Tex. Crim. App. 1997) (holding prosecutor improperly committed the jurors when it stated, "If the evidence, in a hypothetical case, showed that a person was arrested and they had a crack pipe in their pocket, and they had a residue amount in it, and it could be measured, and it could be seen, is there anyone who could not convict a person, based on that—[?]"). It is improper to use hypothetical scenarios with facts similar to the actual case in order to commit the jury. *Id.*

"[T]he rationale for the rule which prohibits counsel from asking a question based on a hypothetical case or from bringing out the juror's views on the particular case to be tried is to avoid allowing counsel to commit the juror to a particular finding in advance of hearing the testimony or because the answer would not tend to show the juror's bias or prejudice." *Shipley v. State*, 790 S.W.2d 604, 608 (Tex. Crim. App. 1990) (en banc), citing 23 TEX. JUR.3d "Criminal Law" Sec. 2668 (1982) & TEX. JUR.3d Sec. 74 (1986). This logic should inform an analysis on an improper judicial comment where a trial judge gives a directive on a certain set of facts at voir dire.

Judge Beall's comments here were styled as commitment comments: "So he walks up to me and points the firearm right at my head and pulls the trigger and I die. Everybody can agree, right, that that would be an intentional and knowingly causing the death of somebody by shooting them with a firearm? No one's confused, right?" (2RR 17). In her second hypothetical, involving a shooting to the thigh, Judge Beall continued with the commitment comments: "Everybody can agree, right, that would be an act clearly dangerous to human life; that would be serious bodily injury to be shot in the thigh, right? Okay. So then if I end up laying there and bleeding out and dying, he would still be guilty of murder even though he didn't necessarily intend to cause me death. Everybody follow?" (2RR 18). *See Moore*, 624 S.W.3d at 681 (finding judicial comments improper, "particularly the comments in which the trial judge argues hypothetical scenarios on the complainant's behalf").

Judge Beall's statements were material because they pertained to the essential elements of the crime charged. They directly undermined the presumption of innocence, which is foundational to any criminal trial. *Simon*, 203 S.W.3d at 592 ("A matter is material if the jury had the same issue before it."). Her statements were exactly the type of improper comment within the purview of 38.05. *Moore*, 624 S.W.3d at 682 (holding trial court's comments improper because they showed the court "abdicat[ed] its assigned role as an impartial arbiter"), citing *Proenza*, 541 S.W.3d at 802.

c. **Harm**

"To constitute harm under article 38.05, the trial court's improper comments must be reasonably calculated to benefit the State or prejudice the defendant's rights." *Moore*, 624 S.W.3d at 682. This error is reviewed under TEX. R. APP. P. 44.2(b). *Proenza*, 541 S.W.3d at 801. "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (citation omitted). "The focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict." *Hankston v. State*, 656 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd), citing *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011).

"A conviction must be reversed if this court has 'grave doubt' that the result of the trial was free from the substantial effect of the error." *Id.* "'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced he feels himself in virtual equipoise as to the harmlessness of the error." *Id.*, quoting *Barshaw*, 342 S.W.3d at 94. When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001).

Judge Beall's erroneous comments were made toward the beginning of voir dire. (2RR 16-18). Though the comments were purported to explain a legal concept,

Judge Beall did not make these comments with the "manifest intent to benefit the defendant and to protect [Appellant's] rights[.]" *Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013). Her opinion prejudged the Appellant as guilty under a certain set of facts immediately prior to the State presenting evidence that showed a story materially like Judge Beall's hypothetical. These comments "impart[ed] information to the venire panel that…tainted appellant's presumption of innocence[.]" *Soto v. State*, No. 05-01-00589-CR, 2003 Tex. App. LEXIS 2476 at *12 (Tex. App.—Dallas March 25, 2003, no pet.) (mem. op., not designated for publication). They did not helpfully explain a legal concept; rather, they qualified it.

The State might argue that the context of the comments renders them harmless because Judge Beall explained in voir dire that the accused are presumed innocent and the default verdict is "not guilty." *E.g.*, (2RR 19-20). However, no matter how frequently or vehemently it was communicated that Appellant was entitled this presumption, the presumption was improperly qualified. Judge Beall's statements communicated Appellant was presumed not guilty *unless* the complainant was shot in the head or another important part of the body, despite that there are many conceivable scenarios in which this may happen, and the accused is still not guilty of murder. Judge Beall precluded the jury from finding this.

Although it was undisputed at trial that Appellant shot the complainant in the head, Judge Beall's comments left the jury with the impression that this set of facts equates to an unjustified shooting with the shooter being guilty of murder. However,

it is entirely possible that someone can shoot a gun recklessly or negligently and/or in self-defense and not be guilty of murder. The jury was all but instructed that it should convict Appellant if the facts regarding the weapon used and where the bullet landed were similar enough to the hypothetical Judge Beall gave, which in this case, they were.

The trial court's comments during voir dire caused a substantial and injurious effect on the verdict in the guilt phase of trial. This case should therefore be reversed and remanded for a new trial.

ISSUE II: The trial court erred when it prohibited witnesses from testifying before the jury about the complainant's extraneous acts of violence. Specific violent acts of misconduct by the decedent may be admitted in a homicide prosecution to show (1) the reasonableness of the accused's fear of danger, or (2) that the complainant was the first aggressor. This testimony was both relevant and admissible and the trial court's exclusion of this testimony prevented Appellant from presenting a meaningful defense. Appellant was harmed by the exclusion of this evidence.

A. Trial Counsel's Offers of Proof

a. Complainant's prior conviction

Trial counsel presented an offer of proof regarding the complainant's prior conviction:

> I have given these translations, they're certified copies of – yesterday the witness[13] was asked a question, if [complainant] regularly carries a handgun…And he said no. [Complainant] was convicted in his home country of unlawful possession of carrying a firearm. He was actually sentenced to prison and then it was turned into probation. I have certified copies of the translations which I've provided to the State.

[13] The witness trial counsel was referring to was Oscar Navarijo.

(5RR 6).

The State objected on relevance grounds, and the trial court ruled against the admissibility of the prior conviction.

b. **The specific violent acts of complainant**

Trial counsel proffered the testimony of Carlos Flores, Julio Amaya, and Argentina Buruca regarding the complainant's extraneous act of violence against them. (6RR 30-36). The trial court ruled to exclude the evidence after hearing the proffer and again after listening to testimony from two of the witnesses. (6RR 35, 37; 7RR 15, 27).

i. Carlos Flores

Trial counsel proffered to the trial court:

> He'll testify that while he was an employee of the victim, of [complainant], and he's at his - - he's working on the property. They're doing like some construction work on this, I think it's the garage they built in the back; and while he's doing the work, they get basically in kind of a little but of an argument over a measurement and he's not armed. When he tells [complainant], basically, you know, don't talk to me that way, [complainant] pulls out his gun and fires three shots at his feet. And he said, you know, he just escalated, blew up out of nowhere.

(6RR 31).

Outside the presence of the jury, Mr. Flores testified that 12 years earlier he was fabricating a building for the complainant, but the complainant became upset due to a piece of material not being the correct size. (7RR 8-9). Complainant went inside his home, came outside with a weapon, and shot at Mr. Flores three times. (7RR 9-10).

ii. Julio Amaya

Trial counsel proffered to the trial court:

> They were actually in El Salvador and [complainant] calls his - - Julio's wife - - calls the wife and wants them to meet to bring something back to the United States. They tell [complainant] they want to meet him at a chicken shack 'cause it's on the way to the airport. There are 15 people in this car, including children. [Complainant] basically shows up and they say he's drunk and he goes - - like what they're describing is kind of what they're seeing in the video, he just goes from zero to a hundred in a second. And he has a long gun and he points the gun at the driver, and the only thing he's made about is they didn't meet him where he wanted to meet him. He pulls a gun on the driver in front of like 15 people, including Julio, his daughter, his wife, and all that. Julio has to confront him to basically calm him down so he's drop the gun.

(6RR 31-32).

Outside the presence of the jury, Mr. Amaya testified that six years earlier he and the complainant agreed to meet while both in El Salvador because Mr. Amaya was returning to the United States and the complainant wanted to send things for his children. (7RR 17-19). 14 people of Mr. Amaya's family were in a bus headed to the airport. (7RR 19). When they came to meet the complainant, the complainant was cursing and pointing a shotgun at them. (7RR 20-21). Mr. Amaya then got out of the bus and went towards the complainant. (7RR 22). The complainant had gotten into his truck and continued pointing the weapon at Mr. Amaya and the bus. (7RR 23). Mr. Amaya testified that the complainant was drunk but lowered the weapon when he was closer to him. (7RR 23-24).

iii. Argentina Buruca

There was an off the record discussion and then the trial court stated:

> Defense has asked to call a witness by the name of Argentina to the stand based off Argentina's knowledge of a 2006 domestic violence case that the [complainant] pled guilty to and then was reversed based off of a lack of immigration status or how it would affect his immigration status and was later dismissed. The dismissal is not important to the Court. However, based off of what's been proffered - - and Defense please go ahead and make that proffer about Argentina and her testimony.

Trial counsel then proffered to the trial court:

> Argentina's testimony will be that she was assaulted by [complainant] and that after that he violated a protective order and that, basically, that's one part of the testimony.

(6RR 36).

B. Standard of Review

This Court reviews a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Page v. State*, 213 S.W.3d. 337 (Tex. Crim. App. 2006). A trial court does not abuse its discretion unless the ruling falls outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). A trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably. *Id.* at 380.

C. Applicable Law

a. **The United States Constitution ensures "a meaningful opportunity to present a complete defense."**

Whether it be through the Fourteenth or the Sixth Amendment, the United States Constitution ensures criminal defendants will have "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Peace v. State*, No. 14-04-00233-CR, 2005 WL2276883, 7 (Tex. App. - Houston [14th Dist.] Sept. 20, 2005 pet. ref'd) (mem. op. not designated for publication) (citing *Miller v. State*, 36 S.W.3d 503, 506 (Tex. Crim. App. 2001). An accused has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule. *Miller*, 36 S.W.3d at 507. This right includes the right to present a vigorous defense and the jury should be allowed to hear all admissible evidence offered by the accused that bears on any defensive theories. *Peace v. State*, No. 14-04-00233-CR, 2005 WL 2276883, 7 (Tex. App. - Houston [14th Dist.] Sept. 20, 2005, pet. ref'd) (mem. op. not designated for publication).

b. **A complainant's extraneous acts of violence may be introduced by an accused raising the issue of self-defense.**

In a homicide prosecution, an accused who raises the issue of self-defense may introduce evidence of the complainant's violent character. *Smith v. State*, 355 S.W.3d 138, 150 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). "Specific acts of violence may be introduced to demonstrate the reasonableness of the defendant's fear of danger or to demonstrate that the deceased was the first aggressor." *Torres v. State*, 117

S.W.3d 891, 894 (Tex. Crim. App. 2003), citing *Torres v. State*, 71 S.W.3d 758, (Tex. Crim. App. 2002). The Court of Criminal Appeals "has held that specific, violent acts are relevant apart from showing character conformity in the context of proving that the deceased was the first aggressor by demonstrating the deceased's intent, motive, or state of mind." *Torres*, 117 S.W.3d at 894-895. In *Miller*, the Court of Criminal Appeals stated that "[a]n entirely separate rationale supports the admission of evidence of the victim's prior specific acts of violence when offered for a non-character purpose – such as his specific intent, motive for an attack on the defendant, or hostility – in the particular case. *Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009). "This extraneous offense evidence may be admissible under Rule 404(b)." *Id.*, citing *Torres*, 117 S.W.3d at 896-897 ("defendant was entitled to offer evidence that, several days before the murder, the victim had climbed through his ex-girlfriend's aunt's window and threatened her and her children; this evidence was relevant to show that the deceased had a specific motive or intent to be the first aggressor when he climbed through his ex-girlfriend's bedroom window early one morning and the defendant shot him"), *Hayes v. State*, 161 S.W.3d 507, 509 (Tex. Crim. App. 2005), and *Tate v. State*, 981 S.W.2d 189, 193 (Tex. Crim. App. 1998 ("evidence of victim's prior specific acts may shed light on his intent or motive in the confrontation").

An accused may also offer evidence of specific prior acts of violence by the complainant to show the "reasonableness of defendant's claim of apprehension of danger" from the complainant. *Miller*, 330 S.W.3d at 618. This evidence is admissible

when the accused is aware of the complainant's violent tendencies and perceives a danger posed by the complainant. *Id.* This evidence is for the purpose of proving the accused's own "self-defensive state of mind and the reasonableness of that state of mind." *Id.*

c. **Two conditions must be met for the complainant's extraneous acts to be admissible.**

Two conditions must exist before a complainant's extraneous acts will be admissible to support a self-defense claim: "1) some ambiguous or uncertain evidence of a violent or aggressive act by the victim must exist that tends to show the victim was the first aggressor; and 2) the proffered evidence must tend to dispel the ambiguity or explain the victim's conduct." *Reyna v. State*, 99 S.W.3d 344, 347 (Tex. App.—Fort Worth 2003, pet. ref'd) citing *Torres*, 71 S.W.3d at 762.

If the complainant's conduct is plainly aggressive and no explanation is necessary to show that the accused reasonably feared for their life, then a trial court is within its discretion to exclude the complainant's prior violent acts. *Smith*, 355 S.W.3d at 150 comparing *Thompson v. State*, 659 S.W.2d 649, 653-54 (Tex. Crim. App. 1983) ("finding that defendant was entitled to establish victim's violent character to explain his ambiguously aggressive conduct of walking toward defendant with arms outstretched") with *Reyna,* 99 S.W.3d at 347 ("trial court did not err in excluding proffered testimony about victim's prior violent acts because defendant's account of victim's conduct during altercation with defendant consisted of unambiguous acts of

aggression and violence that needed no explanation—victim allegedly flashed gun at defendant and allegedly shot him first") and *London v. State,* 325 S.W.3d 197, 206 (Tex.App.-Dallas 2008, pet. ref'd) ("trial court did not err in excluding victim's violent past—gang affiliation and terrorization of neighborhood—because victim allegedly shot at defendant's car, and his doing so was unambiguous act of aggression and violence that needed no explanation").

D. Analysis

a. **The evidence was properly preserved via offers of proof.**

To preserve error when a trial court rules to exclude evidence, the substance of that excluded evidence must be shown by an offer of proof. *Bundy v. State*, 280 S.W.3d 425, 428 (Tex. App.—Fort Worth 2009, pet. ref'd). An offer of proof is sufficient when it includes a concise statement of trial counsel's belief of what the testimony would show. *Moosavi v. State*, 711 S.W.2d 53, 55 (Tex. Crim. App. 1986). An offer of proof may also be in question-and-answer form. *Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998)

i. Complainant's prior conviction

Trial counsel presented the trial court with an offer of proof regarding the complainant's prior conviction from events occurring outside of the United States. (5RR 6-7). Trial counsel presented this offer for purposes of cross examination and impeachment of Oscar Navarijo. (4RR 156; 5RR 6-7). The trial attorney provided the court with a concise statement about the prior conviction of the complainant, which

was objected to and denied by the trial court. (5RR 6-7). The statement regarding complainant's prior conviction is sufficient offer of proof for preservation on appeal.

ii. The specific violent acts of complainant

Trial counsel presented concise statements of the expected testimony for both Carlos Flores and Julio Amaya; trial counsel also offered the testimony of these two witnesses outside the presence of the jury in question-and-answer form. (6RR 31; 7RR 7-11, 16-24). This was sufficient for preservation for appeal.

Trial counsel also preserved error when he provided the trial court with a concise statement as to the expected testimony of Argentina Buruca regarding the complainant's assault and protective order violations against her. (6RR 36).

b. **The testimony sought was relevant and admissible.**

Evidence is relevant if it has "any tendency to make the evidence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. "Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case." *Beasley v. State*, No. 01-04-00989-CR, 2005 WL 3005593, 4 (Tex. App. - Houston [1st Dist.] Nov. 10, 2005. pet. ref'd) (mem. op., not designated for publication) citing *Montgomery*, 810 S.W.2d at 375. Accordingly, courts must examine the purpose for which the evidence is offered and whether there is a direct or logical connection between the evidence

and the proposition sought to be proven. *Garza v. State*, 18 S.W.3d 813, 822 (Tex. App. - Fort Worth 2000, pet. ref'd).

i. Complainant's extraneous acts were violent.

Appellant established in the trial court that the complainant's extraneous acts were in fact *violent* acts: (1) the complainant had a criminal conviction for unlawful possession of a firearm, (2) the complainant used a firearm to shoot at Carlos Flores, (3) the complainant pointed a gun at Julio Amaya and his family, and (4) the complainant assaulted his then wife Argentina Buruca. (6RR 30-36). *See Jones v. State*, No. 14-19-00952-CR, 2021 WL 1745927, at *2 (Tex. App.—Houston [14th Dist.] May 4, 2021, no pet.) (mem. op. not designated for publication) ("as the proponent of the evidence, appellant had the burden of showing that the felonies were violent and relevant").

ii. The testimony sought was admissible to support Appellant's self-defense claim because there was ambiguous evidence of a violent act by the complainant to show he was the first aggressor.

"A trial court is within its discretion to exclude prior violent acts if the victim's conduct was plainly aggressive and no explanation is necessary to show that the defendant reasonably feared for his life." *Allen v. State*, 473 S.W.3d 426, 448 (Tex. App.—Houston [14th Dist.] 2015, pet. dismissed as improv. gtd) *Smith*, 355 S.W.3d at 150–51 citing *Torres v. State*, 71 S.W.3d 758, 762 (Tex. Crim App. 2002).

In this case, the State's theory was that only Appellant was the aggressor – that Appellant provoked the alleged altercation with Oscar Navarijo inside the complainant's home and then intentionally shot and killed the complainant outside. (3RR 5-10; 7RR 81-92). The State argued:

> …this is not an ambiguous act. We have it on video. Everybody has seen it. The Complainant has a gun in his hand. There is no ambiguity to that, and while Defense said in opening that the Defendant, I'm going to take you down[14] or the Complainant said that. There is nothing ambiguous about that and, therefore, it should not be relevant to this case.
>
> In the first aggressor contact the victim's prior violent conduct would be admissible only if there is some ambiguous, uncertain evidence of a violent or aggressor act by the victim.

(6RR 33-35).

Appellant's trial counsel argued, "They kind of want to have it both ways." *Id.* As the excerpts above show in addition to the State's theory of the case throughout the entire trial, the State did want to have it both ways – to paint Appellant as the sole aggressor but argue that complainant's conduct was also unambiguously aggressive. This Court should not allow this.

Here, the complainant's conduct is like the conduct of the complainant in *Thompson*. *See Thompson* 659 S.W.2d at 653-654. There, the court found that the

[14] "A defendant who sets forth a defensive theory in opening statement is not bound by that theory. His defensive theory may change in response to testimony in the state's case-in-chief, and then evidence in support of the original theory will not be offered. Juries are prohibited from considering information not admitted into evidence." *Powell v. State*, 63 S.W.3d 435, 441 (Tex. Crim. App. 2001). Appellant did not offer the evidence the State mentions here during the guilt/innocence portion of trial. The State arguing this here is irrelevant to the discussion on ambiguity.

complainant's conduct of walking toward the accused with arms outstretched was ambiguously aggressive. *Id.* The complainant here was also walking towards the Appellant after Appellant was leaving the complainant's home; this conduct is ambiguous because persons do have the right to bear arms and protect themselves and property but, on the same token, Appellant here was already leaving prior to the complainant following him outside with a firearm. This rises to ambiguous evidence of a violent or aggressive act by the complainant to show that complainant was the first aggressor in this case – could complainant's actions have been for protection or for seeking an altercation with the Appellant after the alleged altercations from inside were over? Thus, Appellant was entitled to explain the complainant's ambiguously aggressive conduct to establish the complainant's violent character through the testimony sought. Appellant's right to present a defense was denied when the trial court denied the admission of this evidence.

iii. Complainant's extraneous acts of violence were relevant to explain that the complainant was the first aggressor.

The complainant's weapon conviction and violent acts against Carlos Flores, Julio Amaya, and Argentina Buruca is the type of evidence that is admissible and relevant for purposes other than to prove character conformity. The crux of this case

was whether Appellant feared for his life to such a degree that he had to shoot the complainant. As an "inclusionary rule," the evidence should have been admitted.[15]

In an older case, the First Court of Appeals considered whether a homicide complainant's prior aggressive acts were admissible:

> Texas Rule of Criminal Evidence 401 defines relevant evidence as evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. If the jury had heard that Ida Delaney assaulted Officers Kerckhoff and James and her former husband as stated in the bill of exceptions, it might well have found it more likely that she fired at appellant on the Gulf Freeway. Thus, the evidence was relevant, as many federal and state courts have held.
>
> The evidence is not made irrelevant by the fact that Ida Delaney fired first when she confronted appellant face to face. The issue is who was the first aggressor, not who fired first during the fatal moments.

Gonzales v. State, 838 S.W.2d 848, 858-859 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

Although Texas cases that the *Gonzales* opinion relied on have been disapproved to the extent that they hold specific, violent acts of the complainant are admissible to show character conformity[16], the *Gonzales* case is still influential insofar as it comports with the rules of evidence. In *Gonzales*, it is clear the court believed

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[15] Legal scholars have referred to Rule 404(b)Rule 404(b) as an inclusionary rule in which evidence of other wrongs, crimes, or acts is allowed so long as it is not offered to prove character or propensity to act or behave in a certain fashion. Goode, et al., Guide to the Texas Rules of Evidence: Civil and Criminal § 405.2 (2nd ed.1993). *Tate*, 981 S.W.2d at 192–93.

[16] The *Gonzales* case relied on *Dempsey v. State*, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954) which was disapproved of by *Torres v. State*, 71 S.W.3d 758 (Tex. Crim. App. 2002) to the extent that specific, violent acts of the deceased are admissible to show character conformity.

extraneous evidence to be relevant for the dispositive issue of who was the first aggressor, as it is for Appellant in this case.

Texas Rule of Evidence 404(b)(2) provides that extraneous offense evidence may be admissible for the purpose of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). The case law on the first aggressor issue and the admissibility of extraneous acts have focused on "demonstrating the deceased's intent, motive, or state of mind." *Torres*, 117 S.W.3d at 894-895. However, 404(b)(2) is more expansive than *intent*, *motive*, or *state of mind*; 404(b) is a non-exhaustive list. *See Thomas v. State*, 651 S.W.3d 102, 109 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). It follows that Texas courts have shirked 404(b) by having placed limitations on extraneous offense evidence when it accounts for an accused who raises the issue of self-defense and introduces extraneous violent acts of the complainant. The repercussion of that limitation is seen in this case as the trial court excluded the evidence as it "does not explain the Complainant's aggressive conduct for a specific intent whether for hostility in this particular case." (6RR 35). This does not comport with the rules of evidence and infringes upon an accused's right to present a meaningful defense.

Looking at the totality of 404(b), the excluded evidence in this case was admissible to explain that the complainant's conduct was not in defense of self, property, or others but instead explained that his conduct on this occasion was neither a mistake nor an accident.

In *Gillette*, the court agreed that two extraneous acts of the accused were admissible because evidence of the accused's "prior threats undermined his defensive theory that he was momentarily carried away but not intending to threaten anyone." *Gillette v. State*, 444 S.W.3d 713, 734 (Tex. App.—Corpus Christi–Edinburg 2014, no pet.). There, the fact that the accused had previously used similar threatening language showed that he was aware of the impact of using that language; that he again resorted to it "supports a finding that he intended to cause the natural response such alarming invective predictably evokes, indicating an absence of mistake and accident." *Id.*

In *Johnston*, the Court of Criminal Appeals stated that evidence of uncharged misconduct to show the absence of mistake or accident is a proper theory of admissibility under Rule 404(b). *Johnston v. State*, 145 S.W.3d 215, 222 (Tex. Crim. App. 2004). "Sometimes a defendant admits the conduct, but raises a defense of "it was an accident," or "it was inadvertent." *Id.* The State may then rebut that defense "with evidence of other conduct by the defendant which tends to show that his actions on those occasions, and hence on this occasion as well, were not mistaken, inadvertent, or accidental. *Id.*

Although *Gillette* and *Johnston* involved extraneous acts of the accused, the same proposition should stand for the extraneous offense evidence of the complainant. Here, the State framed the complainant as peaceable and acting in defense of himself, his property, and others; the complainant's extraneous acts should have been admitted to rebut the State's contentions. The extraneous offense evidence involving firearms –

the weapon conviction and the specific violent acts against Julio Amaya and Carlos Flores – were admissible to undermine the State's theory of the case. As in *Gillette*, the extraneous acts here show that the complainant was aware of the impact of him using a firearm – having a conviction and having had multiple negative altercations involving firearms – and the fact that the complainant again resorted to this conduct indicates an absence of mistake and accident. *See Gillette*, 444 S.W.3d at 734.

iv. Complainant's extraneous acts of violence against Argentina Buruca were additionally relevant to the reasonableness of Appellant's fear of danger because he knew about complainant's violence against her.

After trial counsel proffered Argentina Buruca's testimony about the complainant's assault and violations of protective orders against her, trial counsel stated:

> And also I think it would go to my client's state of mind because he knew about the actions of Lucio towards his sister.

(6RR 36).

The testimony sought from Argentina Buruca was admissible because Appellant knew about the violence complainant inflicted upon her and explains the "reasonableness of defendant's claim of apprehension of danger" from the complainant. *See Miller*, 330 S.W.3d at 618. The testimony sought from Argentina Buruca would have gone towards proving Appellant's own "self-defensive state of mind and the reasonableness of that state of mind." *Id.*

In *Allen*, the accused testified about his apprehension of danger from the complainant and stated that he feared for his life when the complainant was choking him. *Allen*, 473 S.W.3d at 448. The accused in *Allen* proffered evidence as to the complainant's gang membership and his physical abuse of his girlfriend. *Id.* This Court concluded that the accused did not explain how the proffered evidence of the complainant clarified the accused's conduct as deadly conduct justifying his use of deadly force in self-defense. *Id.* at 449.

Appellant's case is different from that presented in *Allen*. Here, Appellant did not testify at the guilt/innocence phase of trial about his state of mind prior to shooting the complainant. Appellant was completely deprived of presenting this defense to the jury through the testimony sought from Argentina Buruca.

c. **Appellant was harmed by the exclusion of the evidence.**

While the exclusion of an accused's evidence rarely rises to the level of constitutional error, such rulings can be constitutional error if they "significantly undermine fundamental elements of the accused's defense." *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002). "Exclusion of evidence might rise to the level of a constitutional violation if: (1) a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense; or (2) a trial court's clearly erroneous ruling results in the exclusion of admissible evidence that forms the vital core of a defendant's theory of defense and

effectively prevents him from presenting that defense." *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007).

The right to present a defense includes "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). An essential component of procedural fairness is an opportunity to be heard. *Crane v. Kentucky*, 476 U.S. at 690.

Appellant was harmed by the exclusion of this evidence and was denied the right to present a meaningful defense as to the issue of who was the first aggressor. Reversible error is presented, and Appellant should receive a new trial.

ISSUE III: The trial court included a 9.04 instruction in the jury charge at request from the State and over objection from Appellant. The trial court erred in doing so because the instruction, as worded, applied to Appellant. A 9.04 instruction is a defensive instruction which is a strategic decision for the defense to request at trial. It is inappropriate and counter to the law for the State to request a defensive instruction be it for the accused or, as it was in this matter, for the complainant. In including the 9.04 instruction, the trial court infringed on Appellant's right to present a defense and commented on the weight of the evidence. This harmed Appellant.

A. The jury charge conference

At the jury charge conference, the State requested a 9.04 instruction. (7RR 30). That instruction stated:

> You are instructed that the threat of force is justified when the use of force is justified above. A threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force.

(CR 423); *See* TEX. PEN. CODE §9.04.

Appellant objected to the inclusion of this instruction on multiple grounds: (1) the instruction would confuse the jury, (2) it is a comment on the weight of the evidence from the trial court and, (3) no evidence was raised for the inclusion of the instruction. (7RR 31-32).

The trial court ruled that there was sufficient evidence to include the 9.04 instruction but did not include the application paragraph "based on the fact that the State is requesting the 9.04 charge and Defense is objecting to it." (7RR 32).

B. Standard of Review

Appellate review of errors in a jury charge is a two-step process. *Kirsch v. State,* 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, this Court determines whether the jury charge is erroneous. *Id.* Second, if there is error, then this Court determines whether the error caused sufficient harm to reverse the conviction. *Id.*

C. Applicable Law

An accused is "entitled to be convicted upon a correct statement of the law." *Hill v. State*, 265 S.W.3d 539, 541 (Tex. App.—Houston [1st Dist.] 2008). To this end, trial courts must deliver to the jury "a written charge distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. art. 36.14. The court's charge should not only inform the jury of the applicable law but also "guide them in its application to the case." *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007). "It is not the function of the charge merely to avoid misleading or confusing the jury; it is the

function of the charge to lead and to prevent confusion." *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

a. The 9.04 instruction should not have been included in the jury charge because, in Texas, the actual lawfulness of the complainant's conduct is irrelevant.

In Texas, Penal Code 9.31 and 9.32 allow force or deadly force "against another when and to the degree the actor **reasonably believes** the [deadly] force is immediately necessary to protect the actor against the other's use or attempted use of **unlawful** [deadly] force." TEX. PEN. CODE §§9.31(a), 9.32(a)(2)(A) (emphasis added).

The Court of Criminal Appeals has repeatedly held that, under these statutes' reasonable-belief elements, "it is not necessary that a jury find that the deceased was using or attempting to use unlawful deadly force against a defendant in order for the defendant's right of self-defense to exist." *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996) (citing *Jones v.* State, 544 S.W.2d 139 (Tex. Crim. App. 1976)). "A person has the right to defend himself from apparent danger to the same extent as he would if the danger were real." *Id.* (citing *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984)). "The term "reasonably believes" in §9.32 encompasses the traditional holding that a suspect is justified in defending against danger as he reasonably apprehends it." *Id.* (citing *Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App 1981)).

A 9.04 instruction for the *complainant* requires the jury to determine whether the *complainant* was actually using or attempting to use lawful, as opposed to unlawful,

threats of force. This is like in *Jones*, where the trial court had required the jury to find that the complainant was actually using or attempting to use unlawful deadly force before it could acquit the accused. 544 S.W.2d at 143. The Court of Criminal Appeals held that instruction to be error because: "…it was not necessary that the jury find that the deceased was using or attempting to use unlawful deadly force against appellant in order for appellant's right of self-defense to exist. It would be sufficient if the jury found that the appellant reasonably believed, as viewed from his standpoint at the time, that deadly force, when and to the degree used, if it was, was immediately necessary to protect himself against the use or attempted use of unlawful deadly force by deceased." *Id.* at 142.

This means that in Texas, the *actual* lawfulness of the complainant's conduct is irrelevant. The *only* inquiry is into (1) the *accused's* belief that the complainant's conduct was unlawful, and (2) the reasonableness of that belief.

b. The 9.04 instruction, as worded, applied to Appellant.

The 9.04 instruction in the jury charge referred to an *actor*. (CR 423). This instruction was not, in fact, made applicable to the complainant, but rather directed the jury to the Appellant's conduct. Even if this Court believes that a 9.04 instruction in this case was justified for the complainant, it was still an incomplete instruction. *See Vasquez v. State*, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012) ("Because [the application] paragraph specifies the factual circumstances under which the jury should convict or acquit, it is the "heart and soul" of the jury charge"")).

Although the *actual* lawfulness of the complainant's conduct is irrelevant, the Court of Criminal Appeals has not always been consistent on this. *See Bennett v. State*, 726 S.W.2d 32 (Tex. Crim. App. 1986). In *Bennett*, the court considered a jury instruction that allowed the jury to consider whether the complainant's use of force was lawful as defense of a third person. *Id.* at 34-35. The court reasoned that when an accused claims self-defense, he's saying the complainant used unlawful force, and so the complainant becomes *an actor* – that is, "a person whose criminal responsibility is in issue" in the case."" *Id.* at 36. Thus, if the complainant's conduct was justified, then it was "not unlawful." *Id.* The court concluded that the trial court had "the ability to instruct the jury on the [complainant's] right to defend a third person, should a full assessment of appellant's claim of self-defense, as developed by the evidence, warrant it. *Id.* at 36-37. The court explained: "the facts of the instant case suggest that appellant was in a position to recognize, at the time he acted, that the force being exerted against him, though perhaps deadly, was justifiable, and hence, lawful. *Id.* at 38. In *Bennett*, the lawfulness of the complainant's conduct was a relevant factor in determining whether the accused's subjective belief was objectively reasonable.

But, in *Bennett*, the jury was given a complete instruction that allowed them to make that assessment:

> The jury was instructed that **before it could discount appellant's selfdefense claim it must first find beyond a reasonable doubt two things**. First the jury had to determine whether [the complainant] was justified in using deadly force …. …. The jury was also required to determine, however, whether appellant, viewed strictly from his

> standpoint, reasonably believed that [the complainant] was acting lawfully …. Since, as the jury was also instructed, "[a]ll persons are presumed to know the law," the jury was entitled to presume that appellant could also have recognized [the complainant]'s action to have been justifiable, should they find it was. If it is found that appellant in fact did reasonably believe [the complainant] was justified, he would have no right to self-defense.
>
> The jury was thus told it could reject appellant's claim of self-defense only if it believed [the complainant] acted lawfully, and it found that appellant himself, at the moment he acted, also reasonably believed [the complainant] acted lawfully. It was not allowed to assess the reasonableness of appellant's belief from any standpoint but his own.

Id. at 38. (emphasis added).

Bennett informs that this type of instruction *could* be given, but it must be given correctly. The jury charge in the present case did not give an application paragraph for the complainant's justification under 9.04. (CR 423; 7RR 32). It therefore did not explain to the jury that the complainant was "the actor" whose responsibility was at issue for that concept, nor did it tell the jury that to reject the Appellant's claim of self-defense, it would have to find both that the complainant was justified and that the Appellant did not reasonably believe the complainant was unjustified. Following the *Bennett* reasoning, error is presented in this case irrespective of the actual lawfulness of complainant's conduct being irrelevant.

c. No evidence was raised to justify a 9.04 instruction.

"A defendant is entitled, upon a timely request, to an instruction on any defensive issue raised by the evidence, provided that: 1) the defendant timely requests an instruction on that specific theory; and 2) the evidence raises that issue." *Rogers v.*

State, 105 S.W.3d 630, 639 (Tex. Crim. App. 2003). If the issue of self-defense is raised by the evidence, an accused is entitled to a jury instruction on self-defense "whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense." *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017)

i. Appellant used deadly force making 9.04 inapplicable to him.

In *Gamino*, the Court of Criminal Appeals observed that 9.04 is incorporated into the law of self defense and that if the evidence presented at trial triggers its application, then the accused would be entitled to an instruction on *non-deadly* force self-defense. 537 S.W.3d at 510-11. In *Gamino*, the defendant's testimony raised evidence that he produced his gun "for the limited purpose of creating an apprehension that he would use deadly force if necessary." *Id.* The accused in *Gamino* testified that he was disabled, it was three men against one, he felt like his life was in danger due to the actions of the three men, and that he produced his gun and yelled at the men to leave him and his girlfriend alone. *Id.* The 9.04 instruction was merited in that case because (1) the evidence raised it and (2) deadly force was not used. *Id.* This is unlike the present case where Appellant used deadly force, as opposed to non-deadly force, by shooting the complainant. This made 9.04 inapplicable to Appellant.

The Court of Criminal Appeals has stated that 9.04 comes with an express limitation, applying only when "the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary." *Pham v. State*, 639 S.W.3d 708,

713 (Tex. Crim. App. 2022). The actual use of deadly force goes beyond the scope of 9.04 because it is no longer a "mere **apprehension** of the use of deadly force." *Id.* (emphasis added); *Engel v. State*, 630 S.W.3d 192, 205 (Tex. App.—Eastland 2020, no pet.) (appellant was not entitled to a 9.04 instruction because he used deadly force and was charged with murder); *Paez v. State*, No. 07-24-00050-CR, 2025 WL 464325, at *4 (Tex. App.—Amarillo Feb. 11, 2025, no pet. h.) (not yet published) (the trial court did not err in refusing to apply a 9.04 instruction because appellant used deadly force by discharging the weapon); *Jaimes v. State*, No. 03-96-00230-CR, 1997 WL 420978, at *3 (Tex. App.—Austin July 24, 1997, pet. ref'd) (not designated for publication) (the trial court did not err in refusing to give a 9.04 instruction when the appellant used deadly force).

By discharging his weapon and shooting the complainant, the 9.04 instruction was inapplicable to Appellant. The court erred in including it.

ii. There was no evidence to raise it for the complainant's conduct.

Assuming arguendo that a 9.04 instruction was applicable to complainant, it was still inapplicable here because no evidence was raised to justify the instruction for the complainant's conduct.

Caselaw that has found enough evidence to raise the 9.04 instruction for the accused has hinged on the testimony of the accused. *See Gamino*, 537 S.W.3d at 512 (appellant's testimony - that he was disabled, it was three men against one, he felt like

his life was in danger due to the actions of the three men, and that he produced his gun and yelled at the men to leave him and his girlfriend alone – presented evidence that he used the gun for the limited purpose of creating an apprehension that he'd use deadly force if necessary); *See Reynolds v. State*, 371 S.W.3d 511, 522 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (finding that the trial court erred in failing to submit the 9.04 instruction when appellant testified that he did not intend to shoot anyone and he only brought the gun to scare off the group surrounding the car); *See Windham v. State*, No. 02-19-00063-CR, 2021 WL 386951, at *15-16 (Tex. App.—Fort Worth Feb. 4, 2021, no pet.) (mem. op., not designated for publication) (finding the trial court erred in refusing to give the 9.04 instruction when appellant testified that he was trying to protect his sons because he believed the complainant was attempting to use unlawful force against him by attempting to pin them against a guardrail). And in at least one case involving non-deadly force, the court found the accused's testimony insufficient to raise the 9.04 instruction. *Smith v. State*, No. 04-95-00337-CR, 1997 WL 94151, at *2 (Tex. App.—San Antonio Mar. 5, 1997, pet. ref'd) (not designated for publication) (although appellant testified that he was protecting his sons and did not intend to shoot anyone, the trial court properly denied the 9.04 instruction because appellant did not testify that brandishing his weapon was "conditional" or merely for purposes of "apprehension").

Each of the aforementioned cases involved (1) aggravated assault charges and (2) testimony from the accused on the purpose of their non deadly conduct. Neither

of those two things, including any evidence as to the complainant's purpose in creating an apprehension, are present here.

In reviewing the record, there is no evidence that the complainant was holding a gun for the limited purpose of creating an apprehension that he would use deadly force if necessary. The surveillance videos were silent so there is no exchange of words to analyze and, to the contrary, the videos showed the complainant going after the Appellant when he was already leaving. (4RR 188 St. Ex. 303[17]). Oscar Navarijo testified that he did not see or hear what happened outside between Appellant and the complainant. (4RR 187). The State asked questions of Investigator Crain regarding the complainant being able to claim self-defense, but Appellant objected, and the court properly sustained it. (6RR 7). The trial court even held a bench conference indicating that Investigator Crain "cannot make a determination on who is acting in self-defense or not." (6RR 8). However, the trial court also allowed Investigator Crain to testify as to being aware of a law where a person can use the presence of a weapon as a means to take control of something and it would not rise to deadly force. (6RR 10). That said, Investigator Crain had no personal knowledge as to Appellant's state of mind so he could not offer any evidence about the 9.04 issue. None of the testimony in the trial went to the crux of the 9.04 instruction which focuses on the **actor's purpose** being limited to creating an apprehension that he will use deadly force if necessary.

[17] Video "CH03 2022-07-24_0146718 2022-07-24_014643_ID02889."

Trial courts should not be empowered with including a 9.04 instruction under these facts. The evidence does not raise it and, as a matter of policy, the result would be the inclusion of a 9.04 instruction in every self-defense case where the deceased complainant has a weapon.

D. Harm

a. Standard of Review: "Some Harm"

If the error in the charge was the subject of a timely objection in the trial court, as in this case, then reversal is required if the error is "calculated to injure the rights of the defendant." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); TEX. CODE CRIM. PROC. art. 36.19. This simply means that there must be *some harm* to the accused from the error. *Id.* "The Court of Criminal Appeals has interpreted this to mean that any harm, regardless of degree, is sufficient to require reversal." *Lopez v. State*, 493 S.W.3d 126, 136 (Tex. App – Houston [1st Dist.] 2016, pet. ref'd). Appellant is thus entitled to relief if he demonstrates "some harm." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

b. The trial court commented on the weight of the evidence.

Texas Code of Criminal Procedure prohibits a trial court from making a statement that comments on the weight of the evidence both in the jury charge pursuant to Article 36.14 and outside of the jury charge pursuant to Article 38.05 as briefed in Issue I. *Young v. State*, 382 S.W.3d 414, 423 (Tex. App.—Texarkana 2012, pet. ref'd). Article 36.14 instructs the trial court judge to deliver:

> …a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.

TEX. CODE CRIM. PROC. art. 36.14.

A trial court comments on the weight of the evidence when it makes "a statement that implies approval of the State's argument, that indicates any disbelief in the defense's position, or that diminishes the credibility of the defense's approach to the case." *Id.* citing *Hoang v. State*, 997 S.W.2d 678, 681 (Tex.App.-Texarkana 1999, no pet.). A trial court also comments on the weight of the evidence if the charge "assumes the truth of a controverted issue" or "directs undue attention" to certain evidence. *Lacaze v. State*, 346 S.W.3d 113, 118 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Even a facially neutral and legally accurate instruction may constitute an improper comment on the weight of the evidence. *Kirsch*, 357 S.W.3d at 651.

In the present case, the trial court's 9.04 instruction tracked the statute – making that portion legally accurate – but failed to include an application paragraph which made the instruction incomplete as previously discussed. (CR 423). In not including the application paragraph, the trial court stated during the jury charge conference, "I'm not going to write that the victim - - if they find that the victim had or was carrying a weapon for this reason - - was justified in doing so." (7RR 32). This indicates that the trial judge was fully aware that the 9.04 instruction pertained to the

complainant's conduct. The trial court therefore (1) placed the complainant's conduct at issue and (2) did so without a proper jury charge.

Thus, the trial court implied approval of the State's argument that the complainant produced a weapon merely for apprehension. The trial court assumed the truth of the complainant's conduct despite no evidence existing to raise the 9.04 instruction for him in the first place. At a minimum, this directed undue attention to the complainant's non-deadly conduct. *See Walters*, 247 S.W.3d at 212 (a trial court comments on the weight of the evidence where the charge focuses the jury's attention on the specific type of evidence that may support a required finding).

This violated Appellant's presumption of innocence[18] and lowered the State's burden to prove murder beyond a reasonable doubt. In giving credence to the complainant's non deadly conduct, the trial court shifted the jury's attention away from Appellant defending himself against the complainant as he reasonably believed it.

c. The 9.04 instruction infringed upon Appellant's right to present a meaningful defense.

Although the actor in the jury instruction was not identified as pertaining to the Appellant nor the complainant, closing arguments verbally directed the jury to the 9.04 instruction applying to the complainant. (7RR 73). In that vein, the State may

[18] For brevity, Appellant incorporates the law on the presumption of innocence briefed in Issue I in this harm analysis.

argue that Appellant's closing argument clarified any confusion or issue caused by the 9.04 instruction. However, Appellant's argument in closing merely goes to the *degree* of harm, which this Court should not assess in a "some harm" review. *See Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986).

Further, Appellant suffered harm in other ways as well. Section 9.04 is a statutory defense incorporated into the law of self-defense. *Gamino*, 537 S.W.3d at 510. It is a justification excluding criminal responsibility. TEX. PEN. CODE CH. 9. The Court of Criminal Appeals has stated that "which defensive issues to request are strategic decisions generally left to the lawyer and the client." *Posey v. State*, 966 S.W.2d 57, 63 (Tex. Crim. App. 1998). A contrary holding "could impose on defendants unwanted defensive issues in the charge" resulting in appellants complaining about it on appeal. *Id.* A contrary holding "might encourage a defendant to retry the case on appeal under a new defensive theory effectively giving him two bites at the same apple." *Id.* Article 36.14 also does not impose a duty on trial courts "to sua sponte instruct the jury on unrequested defensive issues," even on those raised by the evidence."" *Aguilar v. State*, 702 S.W.3d 797, 803 (Tex. App.—Houston [1st Dist.] 2024, no pet.) citing *Posey*, 966 S.W.2d at 59-60, 62. That is because an unrequested defensive issue is not the law "applicable to the case." *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013).

Appellant did not request the 9.04 instruction. Rather, at the State's request, the trial court imposed the defensive instruction upon him. Texas law is clear that

defensive instructions are strategic decisions left to the accused and his attorney. *Posey*, 966 S.W.2d at 63. In *Posey*, the court made clear that the imposition of unwanted defensive issues in a jury charge could result in appellate complaints. *Id.* That is where Appellant finds himself today – albeit the defensive instruction was for the complainant, adding other layers of complexity – complaining on appeal about an unwanted instruction imposed upon him.

Appellant's Sixth Amendment right to counsel and right to present a defense was denied by the forced jury instruction. The purpose of the protections afforded by the Sixth Amendment right to counsel is to bring balance and parity to a system that pits individual defendants against governmental opponents. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Due Process includes the right of an accused to present a defense. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). Appellant's 6th Amendment and Due Process protections were infringed upon when his defense strategy no longer became one of his own choosing. *See Potier*, 68 S.W.3d at 664-65 (Court explaining the effect of denying a defendant his theory of the case is of constitutional dimension).

d. The State's closing argument[19] capitalized on the jury charge error

In its closing summation, the State also pointed to the 9.04 instruction in arguing that the complainant's conduct was justified. The State argued that the complainant was merely **diffusing** the situation with his weapon:

[19] Appellant delves into the State's closing arguments in Issue V. For brevity, Appellant incorporates the law and analyses from Issue V into this subsection.

> And just like we talked about in voir dire, the law tells you what is presumed reasonable, right? It's telling you when you are justified in using self-defense. And in this section of the law -- it's in your charge -- first sentence, "The threat of force is justified when the use of force is justified." What does that mean? When I am justified to defend myself, then I can defend myself. Last portion, "doesn't constitute the use of deadly force." What is that saying right there? It's saying that -- can I show you a weapon to diffuse a situation where I could have otherwise shot and killed you, but I don't, I just show you a weapon to try to diffuse the situation?
>
> [Complainant's] trying to diffuse the situation.

(7RR 84).

> And just because [complainant] brings his gun to diffuse the situation – I mean, honestly he would be dumb if he didn't bring his gun.

(7RR 85).

> How horrible and tragic would it be that when a homeowner -- when a victim tries to diffuse a situation by just displaying a weapon where he could have come out and shot and killed that person and he didn't -- tries to diffuse the situation, take a path of least resistance, send him on his way or calm him down or stay the night, that then that guy gets to wear a cloak of self-defense and claim, "he threatened me, so I killed him"?

(7RR 89).

The State may argue that it's closing argument also clarified any confusion or issue caused by the 9.04 instruction. However, that would be misguided. The State's closing argument – on top of its misstatements of law delved into in Issue V – focused on the complainant's conduct being justified. The State doing so, without a complete and proper jury instruction, coupled with the written instruction misleadingly referring to Appellant, shows at least "some harm" under *Almanza*.

Again, the incomplete instruction argument is only if this Court follows *Bennett*; there is certainly harm if this Court agrees that the 9.04 instruction should not have been included at all.

ISSUE IV: The State made numerous improper comments during its rebuttal closing argument. The State repeatedly misstated the law and commented on Appellant's Fifth Amendment right from self-incrimination violating his due process. The improper comments confused and impacted the jury.

A. Standard of Review

This Court reviews the trial court's rulings on objections to jury argument for abuse of discretion and analyzes the closing argument in light of the entire record. *Smith v. State*, 483 S.W.3d 648, 657 (Tex. App. – Houston [14th Dist.] 2015, no pet.).

1. The State made numerous improper remarks in closing argument by misstating the law and injecting facts outside the record.

"The sole purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence." *United States v. Dorr,* 636 F.2d 117, 120 (5th Cir. 1981); *United States v. Mendoza,* 522 F.3d 482, 491 (5th Cir. 2008). The State went beyond this purpose in their rebuttal closing argument. While there were numerous improper comments, Appellant will only discuss those that were most harmful.

A. Applicable Law

"The law provides for, and presumes, a fair trial free from improper argument by the State." *Thompson v. State*, 89 S.W.3d 843, 850 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd), citing *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). "The purpose of closing argument is to facilitate the jury's proper analysis of the

evidence so that it may 'arrive at a just and reasonable conclusion based on the evidence alone not on any fact not admitted into evidence.'" *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019), quoting *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980). "Jury argument must be confined to four permissible areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; or, (4) a plea for law enforcement." *Wilson v. State*, 938 S.W.2d 57 (Tex. Crim. App. 1996), citing *Campbell*, 610 S.W.2d at 756 and *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). "[A]rguments that go beyond these areas too often place before the jury unsworn, and most times believable, testimony of the attorney." *Alejandro*, 493 S.W.2d at 232. Courts should not hesitate to reverse when it appears the State has departed from one of these areas and engaged in conduct calculated to deny the accused a fair and impartial trial. *Johnson v. State*, 604 S.W.2d 128, 135 (Tex. Crim. App. [Panel Op.] 1980).

"A trial court has broad discretion to control the scope of closing argument." *Williams v. State*, 417 S.W.3d 162, 174 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). "The State is afforded wide latitude in its jury arguments and may draw all reasonable, fair, and legitimate inferences from the evidence." *Id.*, citing *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988). "It has [also] long been established that a prosecutor cannot use closing argument to place matters before the jury that are outside of the record and prejudicial to the accused." *Thompson*, 89 S.W.3d at 850,

citing *Everett v. State*, 707 S.W.2d 638, 641 (Tex. Crim. App. 1986). "Arguments referencing matters that are not in evidence and may not be inferred from the evidence are usually 'designed to arouse the passion and prejudice of the jury and as such are highly inappropriate.'" *Id.*, quoting *Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990).

The Court of Criminal Appeals "has held that improper jury argument does not constitute reversible error unless (1) it is manifestly improper, harmful, and prejudicial, (2) is violative of a statute, or (3) injects new and harmful facts into the case." *Everett*, 707 S.W.2d at 640. "The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial." *Smith*, 483 S.W.3d at 657 citing *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).

B. Analysis

During their rebuttal argument, the State made numerous inappropriate arguments that either were: (1) manifestly improper, harmful, and prejudicial, (2) violative of a statute, and (3) interjected new and harmful facts into the case. *See Watts v. State*, 371 S.W.3d 448, 457 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008)); *Peak v. State*, 57 S.W.3d 14, 18 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Error regarding these improper arguments were preserved as Appellant properly objected and the trial court overruled most of the objections. (7RR 82-85,

88, 90, 92); See *Dickerson v. State,* 866 S.W.2d 696, 698 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

During closing arguments, the State's theme was that Appellant had no right to claim self-defense and compared Appellant to a "bank robber", "bad guy", or "burglar". (7RR 81-82). By doing that, the State drew confusion, speculation, and interjected facts not in evidence. (7RR 81-82). This form of persuasion is improper argument and taints the jury to think of Appellant as a bank robber or burglar, which was not the charge or case at hand.

The State further argued contrary to the law:

> State: And this section of the law—it's in your charge—first sentence, "The threat of force is justified when the use of force is justified." What does that mean? When I am justified to defend myself, then I can defend myself. The last portion "doesn't constitute the use of deadly force." What is that saying right there? It's saying that—can I show you a weapon to diffuse a situation where I could have otherwise shot and killed you, but I don't, I just show you a weapon to try to diffuse the situation? You don't get to say, "Oh, that's a threat, so now I'm going to shoot and kill you." You don't get to say that. And this is talking about [complainant]. [Complainant]'s trying to diffuse the situation. And let's be honest, he could have went out there and shot him. He had every right to do that. He didn't have—he had no duty—
>
> So the Defendant doesn't get to say, "oh, because I felt threatened, I get to shoot and kill him for self-defense." That makes absolutely no sense. And the law does not allow it.

(7RR 83-84).

Appellant's objections to these misstatements were overruled. *Id.*

The law of self-defense requires the jury to view the reasonableness of the defendant's actions solely from the standpoint of the accused. *Jones*, 544 S.W.2d at 142. Although the jury charge instructed the jury to view the circumstances from the accused's standpoint alone, the State repeatedly applied the self-defense issue to the complainant.

In *Ex parte Drinkert*, the appellant contended that his trial counsel's performance was deficient for failing to object to the State's argument that the jury should consider the complainant's state of mind in determining whether he had the right to defend his property. *Ex Parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991). In finding the State's misapplication of self-defense erroneous, the court stated, "This argument was not only contrary to the court's charge, which instructed the jury to consider self-defense and defense of property from applicant's standpoint, but it was also a misstatement of the applicable law. The law of self-defense and defense of property requires the jury to view the reasonableness of the defendant's actions." *Id.*

In *Peak v. State,* this Court reviewed a similar record of prosecutorial misconduct—and mixed rulings from the trial court—and found the errors reversible:

> The prosecutor engaged in serious misconduct by repeatedly misstating the law. This was likely a source of confusion to the jury because the court overruled one of the appellant's objections to the prosecutor's improper jury argument while previously and subsequently sustaining similar objections…the trial court's failure to take corrective measures

> to cure improper argument and the prosecutor's emphasis on the effect of the court's ruling significantly contributed to the harm.

Peak, 57 S.W.3d at 21.

Here, the State's misstatements and misapplication of the law likely confused the jury to think of self-defense through the complainant's standpoint, and not that of Appellant. The complainant was not on trial – Mr. Miranda was.

C. Harm

Non-constitutional error is governed by Texas Rules of Appellate Procedure 44.2(b) and must be disregarded unless it affects the substantial rights of the defendant. TEX. R. APP. P. 44.2(b); *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000). An accused's substantial rights are affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997), as corrected (Oct. 3, 1997). A criminal conviction may be overturned if, after examining the record as a whole, the court does not have a fair assurance that the error did not influence the jury or did not have but slight effect. *See Johnson v. State,* 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

To conduct a harm analysis of improper argument, courts looked to three factors: (1) the severity of the misconduct, (2) measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

a. **Severity of the misconduct**

The severity of the State's misconduct has been defined as "the magnitude of the prejudicial effect" of the prosecutor's remarks. *Mosley,* 983 S.W.2d at 259. Here, the State repeatedly misstated the law of self-defense and continuously applied self-defense to the complainant. The State's remarks likely led the jury to misapply the self-defense charge and confused them.

"Moreover, it is well-settled and self-evident that an 'improper argument may present Fourteenth Amendment due process claim if the prosecutor's argument so infected the trial with unfairness' as to make the result 'a denial of due process.'" *Thompson*, 89 S.W.3d at 852 citing *Miller v. State*, 741 S.W.2d 382, 391 (Tex.Crim.App.1987) (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

b. **Measures adopted to cure the misconduct**

The second *Mosley* factor has been defined as "the efficacy of any cautionary instruction by the judge." 983 S.W.2d at 259. The trial court overruled every objection concerning the misstatement of the law except for one. (7RR 82 -84, 88). The absence of measures adopted to cure the State's improper argument means that this factor weighs in Appellant's favor.

c. **The certainty of conviction absent the misconduct**

The third *Mosley* factor has been defined as "the strength of the evidence supporting the conviction. 983 S.W.2d at 259. Although the altercation between Appellant and complainant was on video, the crux of this case was about Appellant's

state of mind – fearing for his life to such a degree that he had to shoot the complainant. The misconduct, with the improper jury charge, conflated whose state of mind was at issue for self-defense and a conviction cannot be certain due to this misconduct. The improper statements of the law argued by the State require reversal in this case.

2. The State commented on Appellant's Fifth Amendment right from self-incrimination. This violated Appellant's due process, and the trial court erred in denying his motion for mistrial.

During closing arguments, the State violated Appellant's Fifth Amendment right to remain silent:

> Not once did he turn around after he executed him on the ground of his own property. **Never gave a statement.**

(7RR 89).

The trial court sustained an objection to this comment but Appellant's motion for mistrial was overruled. *Id.* The trial court gave no further instructions to disregard or "cure" the State's comment on Appellant's silence.

A. Applicable Law

The Fifth Amendment to the United States Constitution provides that an accused in a criminal prosecution shall not be compelled to give evidence against himself. U.S. CONST. amend. V. The Texas Constitution, Article 1, Section 10, contains a similar provision. TEX. CONST. art. 1 §10. "The proposition that a criminal defendant cannot be compelled to take the stand and give evidence against himself is

so well understood that it requires no citation of authority to support it." *Brumfield v. State*, 445 S.W.2d 732, 735 (Tex. Crim. App. 1969) (opinion on rehearing). It is a violation of due process for a state prosecutor to use an accused's post-arrest silence after receiving *Miranda* warnings at the time of his arrest. U.S. CONST. amends. V, XIV. *See also Doyle v. Ohio*, 426 U.S. 610, 611 (1976); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

B. Analysis

To effectuate the self-incrimination clause of the Fifth Amendment, evidence of statements made by the defendant to law enforcement while under custodial interrogation could not be admitted in the accused's criminal prosecution unless preceded by *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. at 479. In *Doyle,* the Supreme Court held that the State's introduction at trial of evidence of the accused's silence after being given *Miranda* warnings following arrest violates the due process clause. 426 U.S. at 611. "Improper comments by a prosecutor may constitute reversible error where the defendant's right to a fair trial is substantially affected." *United States v. Mendoza*, 522 F.3d 482 (5th Cir. 2008) citing *United States v. Andrews,* 22 F.3d 1328, 1341 (5th Cir. 1994).

Here, the State violated Appellant's due process and infringed upon his Fifth Amendment rights against self-incrimination. The trial court also failed to remedy the prosecutor's improper comment. As stated in *Miranda,* "It is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police

custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *United States v. Martinez-Larraga*, 517 F.3d 258 (5th Cir. 2008) citing *Miranda v. Arizona*, 384 U.S. 436 n.37 (1966).

Here, the State's conduct is like the conduct of the prosecutor in *Gongora* where the State argued to the jury the accused's guilt based on his failure to testify. *Gongora v. Thaler*, 710 F.3d 267, 275 (5th Cir. 2013). On appeal, the court ruled that the State's comments "constituted constitutional error because the prosecutor intended to comment on Gongora's silence and that 'the character of the remarks were such that the jury would necessarily construe them as comments on Gongora's silence.'" *Id.* at 277. Similarly, the State here commented on Appellant's silence. Like in *Gongora,* the State here argued that because he "never gave a statement," Appellant must be guilty. (7RR 89). However, unlike *Gorgora*, the trial court did not follow by giving "cautionary and curative instructions" to the jury. 710 F.3d at 277. As indicated in *Mendoza,* when a prosecutor makes improper comments and remarks, a district court should seek to cure any harm they might have caused. *Mendoza*, 522 F.3d at 496. This was not afforded to Appellant.

C. Harm

"Because a court's improper denial of a motion for mistrial when the State has commented on a defendant's failure to testify impacts the defendant's Fifth Amendment right to remain silent, we have determined that such error is one of

constitutional magnitude." *Roberson v. State*, 100 S.W.3d 36, 43-44 (Tex. App.—Waco 2002, pet. ref'd). The State's comments present constitutional error because the error violated Appellant's right not to self-incriminate. U.S. CONST. amend. V, TEX. R. APP. P. 44.2(a). Appellant submits this error was not harmless and this court must reverse his judgment of conviction.

ISSUE V: The written judgment should be reformed to correctly reflect the Appellant has the right of appeal.

A. Applicable Law

"An appellate court has the power to correct a trial court judgment 'to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.'" *Morris v. State*, 496 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), quoting *Nolan v. State*, 39 S.W.3d 697 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record." *Id.*, citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd).

B. Analysis

The judgment in this case contains the following language:

> The Court enters an affirmative finding that Defendant has been found guilty of a felony. **APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED.**

(CR 440).

However, the trial court's certification indicates that this case "is not a plea-bargain case, and the defendant has the right of appeal." (CR 438). Nothing in the record demonstrates that Appellant waived his right to appeal. Because of this, Appellant requests this Court to correct and reform the trial court judgments to delete the notation "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." *See Morris*, 496 S.W.3d at 836.

CONCLUSION & PRAYER

Appellant, Israel Miranda, prays this Court reverse the lower court's judgment and remand this case for a new trial. Mr. Miranda also prays for such other relief that this Court may deem appropriate.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing brief was e-filed with the Fourteenth Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was also sent on the same date by first-class mail to:

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/s/ Fernanda Benavides
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4, undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e). However, this document does not comply with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this brief contains 17, 283 words (excluding the items exempted in Rule 9.4(i)(1)); undersigned counsel has therefore filed a motion to extend the type-volume limitation to 18, 000 words along with this brief.

2. This brief is printed in a proportionally spaced, serif typeface using Garamond 14-point font in text and produced by Microsoft Word software.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Tex. R. App. Proc. 9.4(j), may result in the Court's striking this brief and imposing sanctions against the person who signed it.

/s/ Fernanda Benavides
Fernanda Benavides

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