

No. 01-24-00703-CR

In The Court of Appeals
For the First District of Texas

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DEBORAH M. YOUNG
Clerk of The Court

Constantine Argyriou
Appellant

v.

The State of Texas
Appellee

On Appeal from Cause Number 1871120
From the 487th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes the brief sufficiently addresses the merits of the case and does not request oral argument.

STATEMENT OF THE CASE

Mr. Argyriou was indicted for aggravated assault of a public servant on June 5, 2024. (C.R. 12). Trial commenced on September 6, 2024. (3 R.R. 1). On September 11, 2024, a jury found Mr. Argyriou guilty as charged in the indictment. (6 R.R. 276). The same jury assessed punishment at 50 years confinement in the Texas Department of Criminal Justice — Institutional Division. (C.R. 418). Notice of appeal was filed on September 12, 2024. (C.R. 489).

ISSUES PRESENTED

1. The trial court erred by failing to instruct the jury to disregard the State's presentation of excluded, altered media.
2. The trial court erred by failing to grant a mistrial after the State's presentation of excluded, altered media.

3. The trial court erred in denying Mr. Argyriou's motion for mistrial after the State knowingly violated its ruling by presenting excluded, altered media to the jury.

STATEMENT OF FACTS

On November 5th, 2017 at his home on Walnut Glen drive, Mr. Argyriou woke up to discover his vehicle was missing. (6 R.R. 121, 131). Mr. Argyriou spoke to his mother, Silvia, who informed him she had taken it and hidden it. (6 R.R. 131-132). Mr. Argyriou and Silvia argued about the return of the truck. Mr. Argyriou did not know that at the end of the argument, Silvia called 911 because he was in a different room preparing to leave the house. (6 R.R. 185; SX1). Mr. Argyriou left the house to clear his head. (6 R.R. 135) Mr. Argyriou took his cell phone, a charging bank, a Wi-Fi hotspot, a tobacco pipe, and his .45 handgun. (6 R.R. 136-137). He began a familiar walking route where he often played the popular mobile GPS game Pokémon Go. (6 R.R. 140. 143-146).

Shortly after Mr. Argyriou left, Deputy Gay arrived at the house and had a brief discussion with Silvia and a next-door

neighbor. (6 R.R. 27). Deputy Gay learned that Mr. Argyriou had walked toward Fallbrook, was wearing a red hoodie, and may be armed. (6 R.R. 28-30). With that description, Deputy Gay realized he had seen Mr. Argyriou on his way to the house. (6 R.R. 26, 30). Deputy Gay left the house and went to find Mr. Argyriou, locating him standing just off the sidewalk in a nearby field. (6 R.R. 30-31; SX172). Deputy Gay exited his marked patrol car, wearing his full police uniform and approached Mr. Argyriou with his taser drawn but did not identify himself as police. (6 R.R. 31, 36-37). Instead, Deputy Gay generically called out to Mr. Argyriou. (SX 9). Mr. Argyriou did not hear Deputy Gay. (6 R.R. 152). The first that Mr. Argyriou noticed another person near him was when he felt someone touch his arm. (6 R.R. 153). Deputy Gay told Mr. Argyriou to stop and drop his phone, that he was being detained. (6 R.R. 37; SX 9).

Mr. Argyriou was confused and concerned by the aggressive approach and believed that Deputy Gay might not have actually been a police officer, but just “somebody dressed like one.” (6 R.R.

179, 185, 221, 233).¹ As a result, Mr. Argyriou did not comply and began to back up into the field. (6 R.R. 38) Deputy Gay grabbed Mr. Argyriou's left arm to stop him from leaving and Mr. Argyriou, unsure of what was happening, attempted to jerk out of his grasp. (6 R.R. 39, 153).

The struggle continued for a brief time before Deputy Gay decided that Mr. Argyriou was not going to comply and fired his taser. (6 R.R. 40-43). Mr. Argyriou had not realized Deputy Gay had a taser. (6 R.R. 159).² The taser darts stuck partially into Mr. Argyriou's clothing and did not deliver a charge until he reflexively grabbed the wires while beginning to flee, completing the circuit and he fell to the ground about 10 feet from Deputy Gay. (6 R.R. 43-45; 160-162).

Deputy Gay approached Mr. Argyriou, with one hand on the firearm in his duty belt. (6 R.R. 168). Concerned for his safety, Mr.

¹ At trial, Mr. Argyriou stated he was now aware that Deputy Gay was indeed a police officer after seeing him on television. (6 R.R. 153).

² At trial, Mr. Argyriou acknowledged Deputy Gay's taser is visible in his hand on the dash cam video, but said he did not recognize the item as a taser during the event. (SX 9; 6 R.R. 159).

Argyriou removed his pistol from his waistband and fired with the weapon still at his hip. (6 R.R. 45-47, 168-169). Mr. Argyriou did not believe he had struck Deputy Gay since Deputy Gay did not seem to react. (6 R.R. 172).

Mr. Argyriou believed Deputy Gay was preparing to shoot and kill him. (6 R.R. 179). Mr. Argyriou fired another shot, aware this second shot hit Deputy Gay in the leg as the deputy fell to the ground. (6 R.R. 172). Deputy Gay was attempting to turn and run as he was hit and fell, and Mr. Argyriou, seeing Deputy Gay reach for his firearm again, fired several more shots, striking Deputy Gay in the legs again. (6 R.R. 49, 55-56, 174).

Mr. Argyriou fled along the bayou, discarding the gun for fear that if he had the firearm when law enforcement located him, he would be in mortal danger. (6 R.R. 235). Mr. Argyriou thought he should call law enforcement about the incident but had dropped his phone in the chaos. (6 R.R. 180). Mr. Argyriou decided to go to his friend Rob's house to make the call, (6 R.R. 181-182). Disoriented, Mr. Argyriou made a wrong turn and realized he

could not continue to Rob's house without being seen. (6 R.R. 180-181). Mr. Argyriou was afraid he would be killed by Precinct 4 deputies searching for him, and thought he should wait until daylight to turn himself in; so he stopped and sat down under a tree, where he was located by law enforcement. (6 R.R. 181-183).

Relevant Trial Proceedings

Mr. Argyriou testified that he shot Deputy Gay in self-defense. (6 R.R. 167-170). Appropriately, the jury charge contained a self-defense instruction. (C.R. 454-465). During closing arguments, the State showed the jury a PowerPoint presentation with an assortment of media, photos, and video clips from Deputy Gay's dashcam, and audio clips from the 911 calls. (SX 204). The clips and photos were annotated with subtitles and testimony quotes that the State added. (6 R.R. 256-257). Defense counsel objected to the subtitles because there was no official transcription of the video or the trial, and given that the audio is rather poor, the State's interpretation was debatable at best. (6 R.R. 256).

Defense noted that the State had previously been told they were not allowed to play the video with the added subtitles. (6 R.R. 256).

The trial court overruled the objection, with the caveat that the State must tell the jury they were not real subtitles. (6 R.R. 257). The State did not do so until prompted by the trial court and indicated the quotes were real quotations. (6 R.R. 258).

Defense counsel asked to make a motion and was allowed to do so after the jury was retired. (6 R.R. 267). Defense counsel moved for a mistrial for the same set of reasons. (6 R.R. 267-269). The State acknowledged they were aware of the trial court's previous ruling on the media and argued that use during closing argument without the trial court's permission was okay because it wasn't shown to the jury during witness testimony and wasn't offered as a demonstrative. (6 R.R. 272). The State argued that the subtitles on the video were work product, and that the subtitle on the photo was a quotation from trial. (6 R.R. 258, 269, 272). The subtitle in quotation marks on the photo was not a direct quotation

and appears to be derived from this portion of Mr. Argyriou's testimony:

Q. Did you ever move in his direction at all?

A. No, never.

Q. As -- relative to Deputy Gay, throughout the moment you first realized he was there until this was over, what direction were you always trying to go relative to him?

A. Away from him. (6 R.R. 236).

The trial court ruled that the State could continue, but must clarify where the subtitles came from. (6 R.R. 256-258). The State did not clarify until prompted by the trial court. (6 R.R. 258).

After the jury was retired to deliberate, defense counsel made a motion for a mistrial. (6 R.R. 267-270). The trial court confirmed that the photo and videos in question were previously ruled inadmissible and should not have been shown to the jury without permission. (6 R.R. 267). The trial court overruled defense counsel's motion, and the jury was brought back out and instructed that the subtitles were not evidence. (6 R.R. 274). The jury was not instructed to disregard the subtitles.

SUMMARY OF THE ARGUMENT

1. The trial court erred by failing to instruct the jury to disregard the State's presentation of excluded, altered media. After reconsidering its ruling and determining that the altered media should not have been shown to the jury, the trial court should have issued a curative instruction to disregard it. Instead, the court merely stated that the subtitles were not evidence, leaving the jury free to consider the prejudicial material. This failure affected Mr. Argyriou's substantial rights, as the State's altered media targeted the central issue at trial—misrepresenting Mr. Argyriou as the aggressor despite the weak evidence against him.
2. The trial court erred by failing to grant a mistrial after the State's presentation of excluded, altered media. The trial court's failure to instruct the jury to disregard the altered media left the jury free to consider highly prejudicial material that lacked probative value. Given the improper influence of the altered media, a mistrial was the only appropriate remedy. Allowing

the jury to reach a verdict under these circumstances constituted error.

3. The trial court erred in denying Mr. Argyriou's motion for mistrial after the State knowingly violated its ruling by presenting excluded, altered media to the jury. Willfully disregarding a trial court's order constitutes prosecutorial misconduct. The State's deliberate violation of the court's ruling on the altered media was highly prejudicial to Mr. Argyriou, as it contained misquotations and inflammatory subtitles deemed too prejudicial for admission. By presenting and discussing this excluded material during closing arguments, the State improperly influenced the jury. The trial court's failure to appropriately remedy this misconduct was error. Mr. Argyriou's conviction and judgment must be reversed.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY TO DISREGARD THE STATE’S PRESENTATION OF EXCLUDED, ALTERED MEDIA.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL AFTER THE STATE’S PRESENTATION OF EXCLUDED, ALTERED MEDIA.

Standard of Review

Appellate review of the trial court’s admission of evidence is limited to whether the trial court has abused its discretion. *Willover v. State*, 70 S.W.3d 841,845 (Tex. Crim. App. 2002). An abuse of discretion occurs when trial court acts “arbitrarily or unreasonably” or “without reference to any guiding rules and principles.” *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). A trial court abuses its discretion when the decision made falls outside the zone of reasonable disagreement. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh’g)).

While this standard is deferential, it does not insulate the trial court's decision from reversal. *Montgomery v. State*, 810 S.W.2d 372,392 (Tex. Crim .App. 1991)(op. on reh'g). "Abuse of discretion does not imply intentional wrong or bad faith, or misconduct, but means only an erroneous conclusion." *Hebert v. State*, 836 S.W.2d 252, 255 (Tex. App.—Houston [1st Dist.]1992, pet. ref'd). "Abuse of discretion is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge." *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5th Cir. 1985). A trial court lacks the discretion to determine what the law is, or in applying the law to the facts, and has no discretion to misinterpret the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); see also *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995)(review for abuse of discretion is not "tantamount to no review at all").

A. Proper Jury Arguments

The law provides for, and presumes, a fair trial, free from improper argument by the prosecuting attorney. *Borjan v. State*, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990). Accordingly, prosecutors

should not make improper arguments or sidebar remarks because defendant should be convicted upon evidence presented, without attempts to inflame or prejudice the minds of the jurors. *Stein v. State*, 492 S.W.2d 548, 551 (Tex. Crim. App. 1973); *Temple v. State*, 342 S.W.3d 572, 598 (Tex. App.—Houston [14th Dist.] 2011). Proper jury argument generally falls within one of four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). Counsel may draw inferences from the evidence so long as those inferences are reasonable and offered in good faith. *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997). Even when a jury argument exceeds these parameters, it will not constitute reversible error unless the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Argument that attempts to introduce matters not in the record is

improper. See *Berryhill v. State*, 501 S.W.2d 86, 87 (Tex. Crim. App. 1973).

Three factors are typically used to analyze severity of improper jury arguments: (1) severity of the misconduct (the magnitude of the prejudicial effect of the improper argument); (2) measures adopted to cure the misconduct; and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000).

To preserve a complaint about improper jury argument for appellate review, the defendant should (1) make a timely and specific objection, (2) request an instruction to disregard if the objection is sustained, and (3) move for a mistrial if the instruction to disregard is granted. *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); TEX. R. APP. P. 33.1(a).

Typically an instruction to disregard will cure the prejudicial effect. *Wesbrook v. State*, 29 S.W.3d at 115-16. An instruction to disregard is presumptively inadequate only in the most blatant

cases; only offensive or flagrantly improper conduct warrants reversal when there has been an instruction to disregard. *Wilkerson v. State*, 881 S.W.2d 321, 327 (Tex. Crim. App. 1994). In other words, an instruction to disregard will be presumed effective unless the facts of the case suggest the impossibility of removing the impression on the minds of the jury. *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988).

B. Harm Standards

Erroneous rulings related to jury argument are generally treated as non-constitutional error. TEX. R. APP. P. 44.2(b); *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000). Non-constitutional error must affect a defendant's substantial rights to be harmful. See TEX. R. APP. P. 44.2(b). "A criminal conviction should not be overturned for non-constitutional error if the appellate court, after reviewing the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

C. The State's Jury Argument was Severe and Improper

The trial court agreed the State made an improper jury argument because the prosecutor's incorrect quotations were not a summation of the evidence, were not reasonable deductions, were not answers to arguments of opposing counsel, and was not a plea for law enforcement. See *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). At best, they were a careless reconstitution, at worse flagrant misrepresentations of the evidence. Taking each of the *Martinez* factors in order:³

1. Severity of the misconduct

Presenting altered media that the trial court previously excluded due to its misrepresentations was severe and prejudicial. The State deliberately defied the Trial Court's ruling, knowingly presenting the jury with misrepresentations that were directly in relation to Mr. Argyriou's affirmative defense. The State strategically displayed the altered media during closing

³ *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000).

arguments, ensuring maximum impact at the most critical stage of the trial. This blatant misconduct directly undermined Mr. Argyriou's affirmative defense and deprived him of a fair trial.

2. Measures adopted to cure the misconduct

The measures adopted to cure the misconduct were inadequate. The jury was allowed to continue viewing the altered media undeterred and began deliberations without proper admonishment. It wasn't until after deliberations had already commenced that any attempt at correction was made, and even then, the jury was never instructed to disregard the prejudicial material. The failure to take meaningful action only compounded the injustice, allowing the tainted evidence to linger in the jury's mind throughout the deliberation process.

3. The certainty of conviction absent the misconduct

The misconduct struck at the very core of the trial's central issue. Mr. Argyriou was presenting a legitimate affirmative defense; asserting that Deputy Gay's actions instilled a genuine fear for his life. The State's actions undermined this defense,

skewing the jury's perception of the facts and jeopardizing Mr. Argyriou's right to a fair trial.

There was no certainty of conviction in the instant case: In a self-defense case involving a police officer, the jury is asked to decide: (1) if, before Mr. Argyriou offered any resistance, Deputy Gay used or attempted to use greater force than necessary to make the arrest or search; and (2) If Mr. Argyriou reasonably believed the force was immediately necessary to protect himself against Deputy Gay's use or attempted use of greater force than necessary. See TEX. PEN. CODE § 9.31. The altered media presented by the State was a deliberate attempt to distort the facts and paint Mr. Argyriou as the aggressor, despite testimony that failed to support such a claim. The altered media portrayed Mr. Argyriou as far more aggressive than the reality, and incorrectly assigned to him an intent to evade that was never present in the testimony. The State's false assertion that Mr. Argyriou claimed he was "always running away" was unfounded. Mr. Argyriou never said such a thing at any point during the encounter or in his trial testimony.

(SX 204). This misrepresentation of the facts was not only misleading but unjust.

The testimony in this case between Deputy Gay and Mr. Argyriou was incredibly similar. Their accounts of the events that took place vary in only slight details, largely in the chaotic seconds between Mr. Argyriou being tased and firing his weapon, such as exactly which direction Mr. Argyriou was facing and the exact moment Deputy Gay attempted to distance himself. (6 R.R. 43-44, 48-49, 158, 164-165, 171).

It is undisputed that:

- Deputy Gay believed that Mr. Argyriou did not notice him at first. (6 R.R. 103).
- Deputy Gay did not identify himself to Mr. Argyriou at any point during the encounter. (6 R.R. 31, 36-37).
- Deputy Gay did not state any purpose for the encounter. (6 R.R. 31, 36-37).
- Deputy Gay did not verify Mr. Argyriou's identity as the correct target at any point during the encounter.

- Deputy Gay immediately begins the encounter by shouting commands at Mr. Argyriou. (6 R.R. 37).
- Deputy Gay believed that Mr. Argyriou likely could not hear him because he was wearing earbuds and did not react. (6 R.R. 102-103).
- Deputy Gay rapidly escalates the situation by attempting to grab Mr. Argyriou. (6 R.R. 39).
- Mr. Argyriou, understandably confused attempts to back away on instinct rather than freeze solid as a statute. (6 R.R. 39).
- Without warning, 23 seconds after stepping out of his car, Deputy Gay fires his taser. (6 R.R. 104).

Mr. Argyriou repeatedly expressed his confusion to the jury that given the unusual and aggressive way he was approached he wasn't even sure Deputy Gay was an actual officer or just "somebody dressed like one." (6 R.R. 179, 185, 221, 233). There was ample testimony at trial that it was reasonable Mr. Argyriou believed self-defense was warranted.

The presentation format of the altered media itself is problematic. The State's snippets of media cut apart the audio, separating the initial yelled commands by Deputy Gay from Mr. Argyriou's confused responses. This served to disconnect the timeline of Mr. Argyriou being rapidly approached by an unidentified, yelling stranger from Mr. Argyriou's baffled verbal responses and his shock at being incapacitated by a taser. The dissected audio downplays Deputy Gay's unprofessional behavior that violated standard police procedure. After declaring he is detaining Mr. Argyriou, Deputy Gay never says a single word. Instead, he silently grabs Mr. Argyriou, then tases him multiple times. (6 R.R. 168-169).

In order to obtain a conviction, the State had to convince the jury that Mr. Argyriou was the first aggressor in the situation, and simply stepping back from a person who was yelling and grabbing at him was not going to be sufficient. The trial testimony did not present a picture of certain guilt to the jury.

D. Over Objection, the Trial Court Failed to Instruct the Jury to Disregard or to Grant a Mistrial and Mr. Argyriou's Substantial Rights were Affected

Typically, curative instructions to disregard an improper jury argument are sufficient and a trial court does not need to declare a mistrial. However, in the instant case, the trial court did neither. The trial court failed to issue an instruction to disregard the excluded, altered media, during final argument and it was outside the “zone of reasonable disagreement” to allow the altered media to continue influencing the jury’s decision-making process. By doing so Mr. Argyriou’s substantial rights were affected by permitting the jury to consider prejudicial material that had already been excluded.

When the trial court reconsidered the issue, it failed to take meaningful corrective action. Rather than issuing a proper instruction to disregard, the trial court made an inadequate and confusing announcement that only addressed a small portion of the State’s improper presentation, focusing solely on the subtitles in the dash cam video. (6 R.R. 273-274). The trial court’s vague announcement left the jury without clear guidance, allowing them

to continue deliberating with the misrepresentations still in their minds.

POINT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED IN DENYING MR. ARGYRIOU’S MOTION FOR MISTRIAL AFTER THE STATE KNOWINGLY VIOLATED ITS RULING BY PRESENTING EXCLUDED, ALTERED MEDIA TO THE JURY.

A. Standard of Review

Appellate review of the trial court’s admission of evidence is limited to whether the trial court has abused its discretion. *Willover v. State*, 70 S.W.3d 841,845 (Tex. Crim. App. 2002). An abuse of discretion occurs when trial court acts “arbitrarily or unreasonably” or “without reference to any guiding rules and principles.” *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). A trial court abuses its discretion when the decision made falls outside the zone of reasonable disagreement. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh’g)).

While this standard is deferential, it does not insulate the trial court's decision from reversal. *Montgomery v. State*, 810 S.W.2d 372,392 (Tex. Crim .App. 1991)(op. on reh'g). "Abuse of discretion does not imply intentional wrong or bad faith, or misconduct, but means only an erroneous conclusion." *Hebert v. State*, 836 S.W.2d 252, 255 (Tex. App.—Houston [1st Dist.]1992, pet. ref'd). "Abuse of discretion is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge." *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5th Cir. 1985). A trial court lacks the discretion to determine what the law is, or in applying the law to the facts, and has no discretion to misinterpret the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); see also *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995)(review for abuse of discretion is not "tantamount to no review at all").

Violation of Trial Court Rulings is Prosecutorial Misconduct

When the State violates an express court order, it falls under the umbrella of prosecutorial misconduct and a mistrial may be

appropriate. See *Stahl v. State*, 749 S.W.2d 826, 831 (Tex. Crim. App. 1988). If defense counsel objects and a trial court fails to instruct the jury to disregard or declare a mistrial, reversal will be required when the conduct of the prosecutor could have served no other purpose than to deprive the appellant of a fair trial by prejudicing the jury against him. *Koller v. State*, 518 S.W.2d 373 (Tex. Crim. App. 1975).

Reviewing Courts look at the misconduct on a case-by-case basis. *Stahl*, 749 S.W.2d 826. In identifying prosecutorial misconduct constituting reversible error, the court listed three factors: (1) defense counsel objections to prosecutor conduct, (2) prosecutorial actions in deliberate violation of an express court order, and (3) “prosecutorial misconduct so blatant as to border on being contumacious.” *Id.* The Court noted that this was not an express three factor test, and not all those elements need be present, and that it was not an exclusive list of possible forms of misconduct. *Id.*

B. The State Deliberately Violated the Trial Court's Ruling and Deprived Mr. Argyriou of his Right to a Fair Trial

The altered media presented by the State was in direct violation of the trial court's ruling. The State acknowledged that it was aware it was not supposed to show the presentation to the jury. (6 R.R. 272). The State indicated that because the jury had not seen the altered media during witness testimony, that somehow made it permissible to show during closing argument without re-approaching the trial court. (6 R.R. 272). This is not a case where the State mistakenly included a photograph or was surprised by a witness giving an unexpected answer. Mr. Argyriou's motion for mistrial was not a choice made in response to ordinary reversible error but was precipitated by the prosecutor deliberately disregarding the ruling of the court. At best, the prosecutor recklessly crossed the line between acceptable adversarial conduct and impropriety. The trial court's acknowledgment of the misconduct and its failure to take appropriate curative action was an abuse of discretion. The jury

was allowed to continue considering the altered media during their deliberations and Mr. Argyriou's substantial rights were affected.

CONCLUSION AND PRAYER

For the reasons stated above, Mr. Argyriou prays that this Honorable Court sustain his point of error, reverse the judgement of conviction entered below, and remand the cause for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.



BreAnna Schwartz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 4,496 words printed in a proportionally spaced typeface.



BreAnna Schwartz

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