No. 01-24-00925-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
AT HOUSTON

MELANIE DIANNE MARENAH
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1721561
From the 339th District Court of Harris County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Ike Okorafor Associate Judge – Voir Dire Only Hon. Te'iva Bell 339th District Court Harris County, Texas 1201 Franklin Street, 14th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On October 13, 2021, a Harris County grand jury returned an indictment charging Appellant with the offense of murder alleged to have occurred on or about December 10, 2020. (C.R. at 29). On November 14, 2024, a jury found Appellant guilty as charged in the indictment and on that same date assessed her punishment at 38 years in the Texas Department of Criminal Justice – Institutional Division. (6 R.R. at 4; 7 R.R. at 35-38; C.R. at 432-434). The trial court certified Appellant's right of appeal and Appellant timely filed her notice of appeal on November 14, 2024. (C.R. at 436, 438-439). No motion for new trial was filed.

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel does not request oral argument. However, should the State of Texas or the Court request oral argument, Appellant requests the opportunity to participate in oral argument.

ISSUES PRESENTED

1. **Whether Appellant is entitled to an out-of-time motion new trial because she was denied her right to counsel under the Sixth Amendment of the United States Constitution when the trial court failed to appoint appellate counsel until almost two months after sentence was imposed?**

2. **Whether the trial court committed reversible error in failing to submit an instruction pursuant to Texas Penal Code Section 9.32(b), which establishes a presumption of reasonableness if an actor knew or had reason to believe that the person against whom she used deadly force against was attempting to commit murder?**

STATEMENT OF FACTS

On December 10, 2020, Officer Penne Henson with the Houston Police Department was called out to an apartment complex in the Galleria area at 9:10 a.m. (3 R.R. at 47-48; 8 R.R. State's Ex. 6). The call was for an assault just occurred with injury. (3 R.R. at 51). Houston Fire Department was already on scene and the Complainant was on the floor, deceased. (3 R.R. at 57-58).[1] Officer Henson testified that the Complainant had a few scratches on his face and described the apartment as pretty empty. (3 R.R. at 73, 76). Officer Henson collected a hammer from the Appellant that was

[1] Andrew Elder, a firefighter/paramedic, testified that the Complainant was unresponsive and had no carotid pulse. (3 R.R. at 107). In addition, there was slight lividity in his lower back, stiff neck and jaw, and the Complainant was cold to the touch on his extremities and abdomen. (3 R.R. at 107). Ultimately, he was declared dead on arrival. (3 R.R. at 107).

under the sink. (3 R.R. at 59-62). Officer Henson took a statement from the Appellant, who was described as cooperative and crying at times. (3 R.R. at 72, 81).[2] Appellant had a scratch on her neck and arm. (3 R.R. at 81-82).

Shaun Sylvester is a detective with the Homicide Division of the Houston Police Department. (4 R.R. at 8). The first thing that stood out to him about the Appellant's apartment was that it appeared to be in a transient state and he could not establish whether people were moving in or out. (4 R.R. at 16). The apartment was sparsely decorated and there was a couch and a bed, but nothing was in the closets and in the drawers. (4 R.R. at 17). No narcotics were found in the apartment and Det. Sylvester did not observe any in the home. (3 R.R. at 168-169; 4 R.R. at 33-34, 73). At the front doorway there was some claw marks in the wall right inside the front door. (3 R.R. at 137; 4 R.R. at 18). The marks appeared to be two rectangular indentions in the wall, like the claw of a hammer. (4 R.R. at 18). These types of marks were also observed adjacent to this wall and also in the bedroom closet. (4 R.R. at 20). The depth of the marks in the bedroom stood out to Det. Sylvester as they were pretty deep. (4 R.R. at

[2] EMS records indicated that Appellant had stated that she hit the Complainant in the chest with a hammer at approximately 2:00 a.m. and that was the last time she saw him. (3 R.R. at 113; 8 R.R. State's Ex. 212).

20). Next to these claw marks was blood transfer, which indicated to Det. Sylvester that there was some type of injury sustained and transferred onto that door. (4 R.R. at 21). Claw marks were also on the sofa cushion and there were possible bloodstains on the couch. (3 R.R. at 140-142; 4 R.R. at 23; 8 R.R. State's Ex. 227 & 228). Possible blood was also observed in the floor area leading into the kitchen near the Complainant's head. (3 R.R. at 145; 8 R.R. State's Ex. 235 & 236). Det. Sylvester testified that there were droplets on the bed and above the wall of the mattress where the pillows were. (3 R.R. at 165-167, 169-172; 4 R.R. at 21-22). However, the mattress had nothing on top of it; no sheets, no fitted sheets, and no blankets. (4 R.R. at 35). In addition, there was also a smear – transfer type of smear on the light switch in the bathroom and also on the couch. (4 R.R. at 21-22). The bloodstains on the bed and on the couch indicated to Det. Sylvester that blood-letter events occurred at these locations. (4 R.R. at 22-24). Possible blood was also located near the light switch and door jam near the door to the bathroom. (3 R.R. at 161-162).

Det. Sylvester could only see the marks on his face and towards his wrist when he initially viewed the body. (4 R.R. at 26). He was thinking that the Complainant sustained some type of head injury or internal

bleeding that could not be observed, as there was no free blood around the Complainant. (4 R.R. at 26). When the medical examiner assessed the body, Det. Sylvester observed marks on the Complainant's chest when clothing was removed. (4 R.R. at 27; 7 R.R. State's Ex. 318). These marks were described as surface level wounds and did not stand out as the reason for the Complainant's death. (4 R.R. at 27-28). Injuries were also observed on the Complainant's ears. (4 R.R. at 29). Two screwdrivers were found in the kitchen, along with a pair of scissors. (3 R.R. at 147-148; 4 R.R. at 29; 8 R.R. State's Ex. 245-247). One screwdriver was on the counter and the other was underneath the counter where the hammer was. (3 R.R. at 147-148; 4 R.R. at 30-31). No blood was documented on the screwdrivers. (3 R.R. at 158-159). There were no eyewitnesses to the incident. (4 R.R. at 38).

Appellant was in the patrol vehicle while Det. Sylvester was on scene. (4 R.R. at 38). Det. Sylvester took her statement at 1200 Travis. (4 R.R. at 39). He also received consent from her to search the vehicle she was driving, her apartment, and to take a buccal swab from her over the next couple of months. (4 R.R. at 39-40, 58; 7 R.R. State's Ex. 134, 135, 136). Within the trunk of the vehicle several items were discovered. (4 R.R. at

44). One of the items had some toiletries in it, personal items, deodorant, and things of that nature. (4 R.R. at 44). A green blanket and a backpack belonging to the Complainant were also discovered. (4 R.R. at 44-46). A phone and wallet was found in the backpack, with the wallet containing the Complainant's ID and other cards. (4 R.R. at 45-46). No blood was observed on any of the items in the trunk. (4 R.R. at 46-47). Photographs taken of the Appellant showed some light scratches below the neck or collarbone area. (4 R.R. at 48).[3] Appellant also had a laceration on her right arm. (3 R.R. at 233; 8 R.R. State's Ex. 359). Det. Sylvester agreed that if someone's breath was being impeded there's an apparent danger to that and that a person could pass out or even die. (4 R.R. at 64). No medical examination was performed on the Complainant. (4 R.R. at 66-67). Det. Sylvester agreed that he was not there to give an opinion whether or not self-defense was or was not a role in this case. (4 R.R. at 88).

Nicole Michelson was a forensic DNA analysist with the Houston Forensic Science Center. (4 R.R. at 96). She analyzed known DNA samples from the Appellant and the Complainant and compared them to items of evidence received by the lab. (4 R.R. at 106-114). She noted that testing

[3] Other testimony characterized these as a laceration on the neck, starting in the chest area. (3 R.R. at 231-232)

cannot determine when DNA was deposited or how long it has been there. (4 R.R. at 127). Contact DNA from the handle of the hammer was interpreted as a mixture of two individual with at least one male contributor. (4 R.R. at 114-116).[4] The DNA results obtained were approximately 43.0 quintillion times more likely that they originated from the Complainant than two unknown individuals, providing very strong support the Complainant was a contributor to the mixture. (4 R.R. at 114-115). In addition, the DNA results were approximately 449 times more likely that they originated from the Appellant than an unknown related individual than if they were originated from two unknown related individuals, providing moderate support that she was a contributor. (4 R.R. at 115). Swabs from the handle of the scissors were interpreted as a mixture of two individuals with a least one male contributor. (4 R.R. at 117). The DNA results were 3.56 trazillion times more likely that they would originate from the Appellant and Complainant than if they originated from two unrelated individuals, providing very strong support that Appellant and the Complainant were contributors to the DNA. (4 R.R. at 117). Swabs from the handle portion of a screwdriver were interpreted as a mixture of two

[4] She did not analyze any purported blood on the hammer. (4 R.R. at 127).

individuals with at least one male contributor. (4 R.R. at 118). The results were approximately 6.79 gazillion times more likely that they originated from the Complainant and Appellant than if they originated from two unknown related individuals, providing very strong support that Appellant and the Complainant were contributors to the DNA. (4 R.R. at 118). A swab from a different screwdriver provided similar results, that the DNA results were 4.55 undecillion times more likely that they originated from the Complainant and Appellant than if they originated from two unknown related individuals, providing very strong support that Appellant and the Complainant were contributors to the DNA. (4 R.R. at 118).

Possible blood DNA from evidence marker 8 was interpreted as a mixture of three individuals, with at least one male. (4 R.R. at 118-119). The DNA results were approximately 355 octillion times more likely it originated from the Complainant and two unknown related individuals, providing very strong support that Complainant was a contributor to the DNA. (4 R.R. at 119). The DNA results were 138,000 times more likely that they originated from the Appellant and two unknown unrelated individuals, than if they originated from three unknown unrelated individuals, providing strong support that Appellant was a contributor to the DNA. (4 R.R. at 119).

Results from evidence markers 9, 11, and 14 were grouped together because they had the same result on the same profile. (4 R.R. at 120). A single source male profile was obtained and the DNA results were approximately 705 octillion times more likely that they originated from the Complainant than if they originated from an unknown unrelated individual, providing very strong support that Complainant was a contributor the DNA. (4 R.R. at 120) Appellant was excluded as a possible contributor. (4 R.R. at 120).

Marquiske Odums is the Complainant's older brother. (4 R.R. at 132). Complainant lived with his brother from 2016 until his death. (4 R.R. at 133). While they lived together, Mr. Odums met the Appellant, who was the Complainant's girlfriend. (4 R.R. at 133). Appellant and the Complainant started dating around 2018 and she began living with them that same year. (4 R.R. at 134). In total, about four individuals lived in the house. (4 R.R. at 136). While Appellant lived with them, Mr. Odums did not observe or hear any arguments between the Complainant and Appellant. (4 R.R. at 136). When asked whether he observed any physical altercations, Mr. Odums testified that he "saw something that I thought was strange. Yes, I did." (4 R.R. at 136). Mr. Odums testified that by strange he meant that it looked

like it could be dangerous what he saw, but not necessarily life-threatening. (4 R.R. at 144).

He described three incidents between the Complainant and the Appellant while they lived together. (4 R.R. at 145). The first incident occurred in 2018. (4 R.R. at 145). Mr. Odums was sitting at the dining room table when he saw the Complainant running out of his room towards the dining room and Appellant behind him. (4 R.R. at 145). Complainant was running slowly and the Appellant was stabbing him in the back and across the right of his face with a butter knife, causing cuts. (4 R.R. at 145-146). Mr. Odums did not hear anything before this. (4 R.R. at 146). The most Complainant did was try to keep his back turned so he would not receive any direct blows to the front of his face or his body. (4 R.R. at 147). The second incident occurred in 2019. (4 R.R. at 148). Mr. Odums was again sitting at the dining room table with the Complainant came out doing a running motion. (4 R.R. at 148). Appellant was right behind him with a pair of scissors stabbing him in the back. (4 R.R. at 148). Mr. Odums did not recall seeing anything that happened before. (4 R.R. at 148). Complainant ran at a slow place, which made Mr. Odums feel like that it was not life-threatening. (4 R.R. at 149). He observed injuries to the Complainant's

upper back. (4 R.R. at 149). Afterwards, Appellant and the Complainant went back into their room together. (4 R.R. at 149-150). The third incident also occurred in 2019 and Mr. Odums was again sitting in the dining room. (4 R.R. at 150). Complainant came out of the bedroom in a slow running motion with the Appellant behind him with a butter knife stabbing him in the back. (4 R.R. at 150-151). Mr. Odums did not recall seeing anything that happened before. (4 R.R. at 151). The police were not called in response to any of these incidents, nor did the Complainant seek any medical attention. (4 R.R. at 147, 151, 168).

Appellant left in 2020. (4 R.R. at 152-153). After Appellant moved, she and the Complainant stayed together for a couple of weeks and Complainant went over to her apartment, but he would come back and stay with his brother. (4 R.R. at 153-154). In October of 2020, Complainant was seeing someone else. (4 R.R. at 155). Mr. Odums testified that Appellant and the Complainant talked again a day before the Complainant died. (4 R.R. at 157). On December 9, Mr. Odums observed the Complainant leaving their apartment in the afternoon and believed he was heading to the Appellant's apartment. (4 R.R. at 158-159).

Dr. Paulyann Maclayton is the assistant medical examiner at the Harris County Institute of Forensic Sciences who performed the autopsy of the Complainant. (4 R.R. at 176, 182). Complainant had a contusion on his lip. (4 R.R. at 214). He had abrasions on his nose, his right cheek, and on the left side of his face. (4 R.R. at 187, 191; 8 R.R. State's Ex. 372 & 373).[5] Complainant also had abrasions on his left ear behind the ear and right in front of the ear, on his torso, and right forearm. (4 R.R. at 187-188, 211-212). Two of the marks behind the ear were somewhat linear and parallel, towards the right, suggestive of something that was kind of close to each other, like fingers. (4 R.R. at 189-190). A hammer claw and a screwdriver could cause that injury as well. (4 R.R. at 190). On the Complainant's scalp there was a laceration caused by a blunt force object hitting the head. (4 R.R. at 193; 8 R.R. State's Ex. 380 & 381). This wound had an irregular shape and some abrasions around the margins. (4 R.R. at 193). There was also some tissue bridging which is basically seeing strings of tissue within the wound. (4 R.R. at 193). Dr. Maclayton agreed that she would expect if someone was hit in the head with a hammer to see this type of injury. (4 R.R. at 194).

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[5] An abrasion is just a scraping of the skin so it can be caused by like a scratch. (4 R.R. at 187).

On the Complainant's chest, there were some abrasions and a stab wound on the left side. (4 R.R. at 194; 8 R.R. State's Ex. 383 & 384). The abrasion could have been caused by the claw of a hammer. (4 R.R. at 195). The edges of the stab wound were nice and smooth and the wound penetrated very deeply. (4 R.R. at 196). Dr. Maclayton described the wound as kind of a teardrop shape. (4 R.R. at 196). There were defects in the Complainant's clothing associated with the stab wound. (4 R.R. at 185, 198-200). The path of the stab wound was front to back, right to left, with no significant vertical deviation, with approximate depth of 14.7 centimeters, which is approximately 6 inches. (4 R.R. at 200-201). The wound track was not going upward or was not really going downward. (4 R.R. at 202). The wound track went through the heart and into the left lung, leading to 150 milliliters of blood being in pericardial sack. (4 R.R. at 202, 206-207). Blood was also spilling into the left chest internally. (4 R.R. at 208). The shape of the wound helped Dr. Maclayton get an idea that it was something pretty narrow, long, and thin, may have had some irregularity to the shape, like a sharp point, something like a flathead screwdriver. (4 R.R. at 203-204; 8 R.R. State's Ex. 245). She did not anticipate that the hammer could cause the stab wound to the chest. (4 R.R. at 205). While the claw could create a

stab wound, Dr. Maclayton anticipated a different depth to the wound. (4 R.R. at 206). As a result, in her opinion the hammer located in the apartment did not cause the stab wound to the chest. (4 R.R. at 206).[6] She did not believe that the Complainant would have lived beyond a few minutes. (4 R.R. at 209). Finally, there was a semi-circular impression on the right forearm that initially looked like a bite mark, but there was no internal hemorrhage associated with it. (4 R.R. at 211-213). However, there was not enough evidence to definitely state it was a bite mark. (4 R.R. at 212). She testified that it was possible this could be a defensive wound. (4 R.R. at 224). No substances were observed to be in the Complainant's body, but the toxicology did not test for marijuana. (4 R.R. at 215, 217). Complainant's cause of death was a stab wound to the chest. (4 R.R. at 183, 216).

Appellant's mother, Wanda Robinson, testified that she met the Complainant while her daughter dated him. (5 R.R. at 5). Ms. Robinson believed that they dated for two or three years, but did not approve of them dating. (5 R.R. at 7, 14). She described an incident where she was speaking

[6] Dr Maclayton agreed that it was possible the Complainant had the screwdriver in his hand and he fell on the screwdriver. (4 R.R. at 226). However, it would have to be very accurate that the screwdriver is standing up. (4 R.R. at 226, 240-241).

with the Appellant and the Complainant jerked the keys from the Appellant's hand. (5 R.R. at 9). Ms. Robinson also observed controlling type of behavior from the Complainant. (5 R.R. at 9). In addition, she testified regarding an incident where she ultimately called 911 after she had received a phone call from the Appellant's phone, but the phone hung up. (5 R.R. at 10-12). After she called the Complainant's phone, she became concerned because it appeared to her that the Appellant was in distress in the background. (5 R.R. at 11). Mrs. Robinson testified that her daughter and the Complainant wanted to start a family together and her daughter became pregnant in 2019. (5 R.R. at 14). However, the pregnancy became toxic as Appellant became very ill and had to be rushed to the hospital. (5 R.R. at 14). Appellant had three heart attacks and ultimately lost the baby. (5 R.R. at 14). Ms. Robinson found out what occurred on December 10 when her oldest daughter called her. (5 R.R. at 18).

Appellant testified that her relationship with the Complainant began in 2018. (5 R.R. at 35). Appellant did not recall any incidents where she chased the Complainant out of room. (5 R.R. at 36). The only incident she recalled was when she was trying to leave and the Complainant blocked the door and tried to stop her. (5 R.R. at 36-37). They had an argument and she

was going to go to her mother's house, but the Complainant blocked her from leaving. (5 R.R. at 37). Appellant then started digging her nails into him, scratching him, doing whatever she could to get out, as she felt she was being held against her will/trapped. (5 R.R. at 37-38). In another incident, Appellant testified that she was in the bedroom with the Complainant and they had a disagreement. (5 R.R. at 38-39). She tried to get out of the room and he would not let her. (5 R.R. at 39). Appellant grabbed her phone and tried to call somebody, but the Complainant knocked the phone out of her hand. (5 R.R. at 39).

On the morning of December 10, Appellant planned to do Walmart deliveries with the Complainant and then go to a friend's house. (5 R.R. at 41-42). Appellant went to sleep after returning to her apartment and she was awakened by the Complainant talking loud. (5 R.R. at 42-43). Complainant got on top of her and started shaking her by the shoulders while she was laying on her back, asking her where his weed was. (5 R.R. at 43-44). Appellant could not really breathe because Complainant was sitting on her stomach. (5 R.R. at 45). This lasted about 10 minutes. (5 R.R. at 45). Appellant asked him to let her take him back to his brother's house, but he did not want to go. (5 R.R. at 46-47). Complainant got up on his own to

continue looking for his weed and Appellant tried to go back to sleep. (5 R.R. at 47). After a few minutes, Complainant returned and was yelling again. (5 R.R. at 50). Appellant went into the living room to help him find his weed while he was cursing at her. (5 R.R. at 50-51). Appellant was in fear. (5 R.R. at 52). While she was by the couch, Complainant pushed her onto the couch and hit her in the back of her head causing her to see flashes. (5 R.R. at 52-53). She was stunned and then returned to the bedroom with the Complainant following her. (5 R.R. at 53-54). As she went to lay down on the bed, Complainant snatched the covers off, turned her over, got on top of her, and starting choking her. (5 R.R. at 55). Appellant dug her nails into his skin trying to make him stop. (5 R.R. at 55). She aimed for his arms, hands, neck, face; whatever she could get ahold of. (5 R.R. at 55). This lasted for about 8 to 9 minutes and she nearly lost consciousness, passing out for a split second. (5 R.R. at 56). Appellant thought he was trying to kill her. (5 R.R. at 57). Complainant then walked out of the room and Appellant tried to grab her phone and call her friend Myocia to help mediate the situation, but Complainant slapped the phone out of her hand when she was by the door. (5 R.R. at 58-59). He also started punching her. (5 R.R. at 59). She started crying and begged him to

stop, but Complainant did not say anything and kept attacking her. (5 R.R. at 61-62). He then just stopped and Appellant went into the living room where he pushed her back onto the couch and again chocked her with one hand for about 2 or 3 minutes. (5 R.R. at 62-64). Appellant kept telling the Complainant to stop and she tried to distance herself by trying to go to another room, as she felt her life was in danger. (5 R.R. at 64). She again felt like she was again going to pass out. (5 R.R. at 63-65). Afterwards, Appellant retrieved her keys and the Complainant punched her twice in the back of her head again and she fell by the front of the bedroom door. (5 R.R. at 66). She was in fear for her life. (5 R.R. at 67).

Appellant then went into the kitchen. (5 R.R. at 68). As Complainant blocked her from leaving the kitchen, Appellant tried to bite him, but he punched her in the face and body. (5 R.R. at 68-71). She eventually grabbed the hammer and swung it at the Complainant after he started choking her again. (5 R.R. at 71). She did not know how many times she swung the hammer, but she was not aiming for a particular spot. (5 R.R. at 72-73). Afterwards, Appellant turned around, put the hammer back on the counter, went back to her room, closed the door, and tried to go back to

sleep. (5 R.R. at 73-74).[7] She did not know what happened to the Complainant and he was still in the dining room area across from the kitchen. (5 R.R. at 73). After Appellant woke up, she saw the Complainant laying on the floor like he was asleep and she could not tell something was wrong. (5 R.R. at 75-76). Appellant walked past him and left with her friend. (5 R.R. at 76). When they returned, Complainant was still on the floor and Appellant called 9-1-1 after Complainant was cold to the touch and her friend convinced her to. (5 R.R. at 77-78, 134). She tried CPR. (5 R.R. at 78). Appellant talked to law enforcement and told them what happened to the best of her ability. (5 R.R. at 80-81). Pictures of her were taken, but she received no medical evaluation. (5 R.R. at 81). On cross-examination, Appellant conceded that she did not tell law enforcement about how she was punched several times on the sofa and at the front door. (5 R.R. at 100).[8] She also denied using the screwdriver and testified that it was out because Complainant had taken down or put up some curtains several months earlier. (5 R.R. at 105-107, 142). Appellant also testified

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[7] On cross-examination, Appellant testified that she put the hammer back under the sink. (5 R.R. at 108-109).

[8] On cross-examination, the State extensively questioned Appellant regarding numerous purported inconsistences between her trial testimony and the statement she gave law enforcement. (5 R.R. at 124-129).

that she packed up the blankets and toiletries to go to her friend Myocia's house, as she did not want to go back to the apartment with the Complainant awake and being argumentative again. (5 R.R. at 134).

SUMMARY OF THE ARGUMENT

Initially, Appellant contends that the failure of the trial court to timely appoint counsel on appeal resulted in the denial of her Sixth Amendment right to counsel during a critical stage in the proceedings against her when motion for new trial could have been filed. As a result of Appellant being deprived counsel for the entire thirty-day period for the filing a motion for new trial, harm is presumed and this Court should abate this appeal to allow her an opportunity to file an out of time motion for new trial.

In addition, Appellant contends that the trial court's erroneously failed to *sua sponte* provide an instruction regarding the presumption of reasonableness for the use of deadly force under certain circumstances pursuant to Texas Penal Code § 9.32(b). The evidence presented at trial would have allowed a reasonable jury to infer that the Complainant was attempting to murder the Appellant. There was also no evidence that the Appellant provoked the Complainant. Finally, the evidence did not clearly establish beyond a reasonable doubt that the Appellant was engaged in any

criminal activity at the time she killed the Complainant. As a result of the trial court's failure to provide an instruction pursuant to Section 9.32(b), Appellant suffered egregious harm.

ARGUMENT

1. Whether Appellant is entitled to an out-of-time motion new trial because she was denied her right to counsel under the Sixth Amendment of the United States Constitution when the trial court failed to appoint appellate counsel until almost two months after sentence was imposed?

A. Applicable Law

A defendant in our system has a constitutional right to counsel. U.S. CONST. AMENDS. V, VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). She also has a right for the assistance of counsel to be constitutionally adequate. *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant is constitutionally entitled to the assistance of counsel at each critical stage of a criminal prosecution, absent a valid waiver. *Montejo v. Louisiana*, 566 U.S. 778, 786 (2009). See also *Carnell v. State*, 535 S.W.3d 569, 571 (Tex. App.—Houston [1st Dist.] 2017, no pet.). "A criminal defendant has thirty days after the trial court imposes his sentence to file a motion for new trial." *Monakino v. State*, 535 S.W.3d 559, 563 (Tex. App.—Houston [1st Dist.] 2016, order), citing TEX. R. APP. P. 21.4. "A motion for

new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record." TEX. R. APP. P. 21.2. The thirty-day time period in which to file a motion for new trial is a critical stage of a criminal proceeding and a defendant has a constitutional right to counsel during that period. *Cooks v. State,* 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). "If the defendant is denied effective representation at that stage, and the defendant is harmed by that violation, he is entitled to relief." *Griffith v. State*, 507 S.W.3d 720, 721 (Tex. Crim. App. 2016) (Hervey, J., concurring on denial of PDR). "The proper remedy is to 'reset the appellate deadlines and abate the appeal,' allowing an out-of-time motion for new trial to be filed." *Id*.

If the defendant was represented at trial and the record does not reflect that trial counsel withdrew or was replaced by new counsel after sentencing, there is a presumption that trial counsel continued to effectively represent the defendant during the time limit for filing a motion for new trial. *Cooks*, 240 S.W.3d at 911. "There is a corresponding rebuttable presumption that, when no motion for new trial on behalf of the defendant is filed, this decision was made because the defendant, with the benefit of counsel's advice and representation, considered and rejected that option."

Monakino, 535 S.W.3d at 563, citing *Cooks*, 240 S.W.3d at 911 n. 6 and *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998). "Even when a defendant can rebut the presumption that his trial counsel continued to represent him during the time period for filing a motion for new trial by presenting evidence that he was deprived of adequate counsel during this stage, 'this deprivation of counsel is subject to a harmless error or prejudice analysis.'" *Id*., citing *Cooks*, 240 S.W.3d at 911. "To establish harm, and thus entitlement to an abatement of an appeal to file an out-of-time motion for new trial, the appellant must demonstrate a 'facially plausible claim' that could have been developed in a motion for new trial." *Id*.

However, if a defendant is deprived of counsel for the entire thirty-day period, harm is presumed. See *Carnell*, 535 S.W.3d at 574, citing *Batiste v. State*, 888 S.W.2d 9, 14 (Tex. Crim. App. 1994) and *Prudhomme v. State*, 28 S.W.3d 114, 120 (Tex. Crim. App. 2000). See also *Parker v. State*, 604 S.W.3d 555, 559 (Tex. App.—Houston [14th Dist.] 2020, order) ("Because appellant was deprived of counsel for the entire period, we presume that he was harmed…We therefore hold that appellant is entitled to an abatement of this appeal to file a motion for new trial.") (citations omitted).

B. Analysis

On November 14, 2024, a jury found Appellant guilty as charged in the indictment and assessed her punishment at 38 years in the Texas Department of Criminal Justice – Institutional Division. (6 R.R. at 4; 7 R.R. at 35-38; C.R. at 432-434). Appellant's deadline to file a motion for new trial began on November 14, 2024, and ended on December 16, 2024, as the thirtieth day fell on a Saturday. See TEX. R. APP. P. 4.1(a) and 21.4. On November 14, 2024, Appellant's retained trial counsel filed (1) a notice of appeal, (2) a motion to withdraw as the Appellant's attorney, and (3) a request for appointment of appellate counsel. (C.R. at 138-439). The trial court granted trial counsel's motion to withdraw on November 14, 2024, and determined that Appellant was indigent. (C.R. at 439). However, the trial court did not appoint the Appellant appellate counsel until January 9, 2025. (S.C.R. at 3).

The record demonstrates that the trial court certified Appellant's right of appeal and found her indigent. (C.R. at 436, 439). The record also demonstrates that Appellant's trial counsel was allowed to withdraw on November 14, 2024, and appellate counsel was not appointed to represent the Appellant until January 9, 2025, nearly a month after the deadline to

file a motion for new trial had passed. Appellant was not represented by counsel during the thirty-day period in which she could file a motion for new trial and was deprived of her right to counsel for the entire thirty-day period for filing a motion for new trial. See *Carnell*, 535 S.W.3d at 574. As Appellant was deprived of counsel for the entire period for filing a motion for new trial, harm is presumed. *Id*. See also *Parker*, 604 S.W.3d at 559.

Based on the foregoing, Appellant was denied her right counsel at a critical stage in the proceeding and she asks this Court to abate her appeal and remand her case back to the trial court to permit her an opportunity to file an out of time motion for new trial.

2. Whether the trial court committed reversible error in failing to submit an instruction pursuant to Texas Penal Code Section 9.32(b), which establishes a presumption of reasonableness if an actor knew or had reason to believe that the person against whom she used deadly force against was attempting to commit murder?

A. Applicable Law and Standard of Review

"A trial judge has an absolute duty to prepare a jury charge that accurately sets out the law applicable to the case." *Paz v. State*, 548 S.W.3d 778, 789 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) (op. on reh'g). See also TEX. CODE OF CRIM. PROC. ART. 36.14. This is true even when defense counsel fails to object. *Mendez v. State*, 545 S.W.3d 548, 552 (Tex. Crim.

App. 2018). "'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.'" *Reeves v. State*, 420 S.W.3d 812, 818 (Tex. Crim. App. 2013), quoting *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

Texas Penal Code § 9.32 provides in relevant part:

> (a) A person is justified in using deadly force against another:
>
> (1) if the actor would be justified in using force against the other under Section 9.31; and
>
> (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
>
> (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or
>
> (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.
>
> (b) the actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:
>
> (1) knew or had reason to believe that the person against whom the deadly force was used:
>
> (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by Subsection (a)(2)(B);

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

"The Penal Code requires that a presumption that favors the defendant be submitted to the jury 'if there is sufficient evidence of the facts that give rise to the presumption…unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact.'" *Morales v. State*, 357 S.W.3d 1, 7 (Tex. Crim. App. 2011), quoting TEX. PEN. CODE § 2.05(b)(1).

In analyzing a jury charge issue, "an appellate court's first duty is to decide whether error exists." *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). If error exists, the court then analyzes that error for harm. *Id*. The degree of harm necessary for reversal depends upon whether the defendant preserved the error by objection. *Id*. Where a defendant fails

to object to or states that he has no objection to the charge, the court will reverse when the error was so egregious and created such harm that the defendant did not have a fair trial. See *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004) and *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Egregious harm must be determined on a case-by-case basis. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). To determine whether a defendant has sustained egregious harm from a non-objected-to error in the jury charge, appellate courts consider (1) the entire charge; (2) the state of the evidence, including contested issues; (3) arguments of counsel; and (4) any other relevant information. *Perez-Mancha v. State*, 589 S.W.3d 909, 911 (Tex. App—Houston [14th Dist.] 2019, no pet.), citing *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011); *Almanza*, 686 S.W.2d at 171; and *Villarreal v. State*, 453 S.W.3d 429 (Tex. Crim. App. 2015). "Appellant must show he suffered actual rather than theoretical harm." *Id.*, citing *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." *Ngo v. State,* 175 S.W.3d 738, 750 (Tex. Crim. App. 2005). "Neither party bears a burden of production or

persuasion with respect to an *Almanza* harm analysis, the question being simply what the record demonstrates." *Hollander v. State*, 414 S.W.3d 746, 750 (Tex. Crim. App. 2013) (citations omitted).

B. Analysis

1) The trial court erred by omitting an instruction regarding the presumption of reasonableness on the use of deadly force

Appellant contends that the evidence clearly demonstrated she was entitled to a jury instruction regarding the presumption provided for by Section 9.32(b).

Appellant testified that during her encounter with the Complainant, he at one point entered the bedroom and began yelling at her. (5 R.R. at 50). After leaving the bedroom to go into the living room, Complainant pushed Appellant onto the couch and hit her in the back of her head, causing her to see flashes. (5 R.R. at 52-53). Appellant was stunned and she then returned to the bedroom with the Complainant following her. (5 R.R. at 53-54). As she went to lay down on the bed, Complainant snatched the covers off, turned her over, got on top of her and starting choking her. (5 R.R. at 55). This lasted for about 8 to 9 minutes and she started to losing consciousness, passing out for a split second. (5 R.R. at 56). Appellant thought he was trying to kill or hurt her real bad, as Complainant was

choking her. (5 R.R. at 57). According to the Appellant, the Complainant continued to follow her around the apartment, trying to prevent her from moving around, and punching and choking her at various locations throughout the apartment. (5 R.R. at 57-67). She was in fear for her life. (5 R.R. at 67). Appellant then went into the kitchen. (5 R.R. at 68). As Complainant blocked her from leaving the kitchen, Appellant tried to bite him, but he punched her in the face and body. (5 R.R. at 68-71). She eventually grabbed the hammer and swung it at the Complainant after he started choking her again. (5 R.R. at 71). She did not know how many times she swung the hammer, but she was not aiming for a particular spot. (5 R.R. at 72-73). Afterwards, Appellant turned around, put the hammer back on the counter, went back to her room, closed the door, and tried to go back to sleep. (5 R.R. at 73-74).

Under Texas Penal Code Section 19.02(b), a person commits the offense of murder if that person:

> 1) Intentionally or knowingly causes the death of an individual;
>
> 2) Intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

TEX. PEN. CODE § 19.02(b)(1), (2)

"Under Section 19.02(b)(2), the *mens rea* element requires only that the accused must have intended to cause serious bodily injury to an individual." *Walter v. State*, 581 S.W.3d 957, 970 (Tex. App.—Eastland 2019, pet. ref'd), citing *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012) and *Lugo-Lugo v. State*, 650 S.W.2d 72 (Tex. Crim. App. 1983). "With respect to the *mens rea* element, a conviction under Section 19.02(b) requires a showing that the defendant acted with the conscious objective or desire to create a substantial risk of death, serious permanent disfigurement, or protracted loss of impairment of any bodily member or organ." *Id*. at 971, citing *Lugo-Lugo*, 650 S.W.2d at 81; TEX. PEN. CODE § 1.07(a)(46) and TEX. PEN. CODE § 6.03(a). "Additionally, the State must show that the defendant committed an act clearly dangerous to human life that caused the death of the decedent." *Id*. "This element requires that the act intended to cause serious bodily injury must be 'objectively clearly dangerous to human life.'" *Id*.

As recounted above, there was evidence adduced at trial through the Appellant's testimony that the Complainant was attempting to commit murder. There was evidence that the Complainant began assaulting the Appellant in the bedroom and that this assaultive behavior continued in

various locations throughout the apartment. In addition, there was evidence that the Complainant choked the Appellant to the point of unconsciousness and that she briefly passed out as a result. Choking someone to the point of unconsciousness can constitute serious bodily injury and a jury can draw an inference that the act of choking could create a substantial risk of death. See *Walter*, 581 S.W.3d at 972, citing *Akbar v. State*, 660 S.W.2d 834, 835-36 (Tex. App.—Eastland 1983, pet. ref'd). As a result, the evidence would have allowed a reasonable jury to infer that the Complainant was attempting to murder the Appellant. See TEX. PEN. CODE §§ 9.32(b)(1)(C), 19.02(b)(2).

There was also no evidence that the Appellant provoked the Complainant. See TEX. PEN. CODE § 9.32(b)(2). Appellant testified that it was the Complainant who awakened her in an attempt to search for his marijuana. (5 R.R. at 43-44). From Appellant's testimony, a jury could reasonably infer that it was the Complainant who continued to escalate the violent nature of their interactions, as the Complainant's assaultive behavior became more aggressive, behavior that included choking and punching the Appellant. (5 R.R. at 47-71). In addition, a jury could reasonably infer based on the Appellant's testimony, that she repeatedly attempted to return to the bedroom to go back to sleep and tried to call her friend to help mediate the

situation. (5 R.R. at 58-59). As a result, the evidence would have allowed a reasonable jury to infer that the Appellant did not provoke the Complainant. See TEX. PEN. CODE § 9.32(b)(2). Finally, the evidence did not clearly establish beyond a reasonable doubt that the Appellant was engaged in any criminal activity at the time she killed the Complainant. See TEX. PEN. CODE §§ 2.05(b)(1), 9.32(b)(3). See also *Reyna v. State*, 597 S.W.3d 604, 606 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Although Appellant testified that the Complainant was looking for his weed, the established that no narcotics were found in the Appellant's apartment and Det. Sylvester noted did not observe any. (3 R.R. at 168; 4 R.R. at 33-34, 72-73). No narcotics were found in the vehicle Appellant was driving. There was also no testimony that Appellant herself was in possession of any illegal narcotics, including marijuana, at the time of the offense. As a result, the evidence presented would have allowed a reasonable jury to infer that the Appellant was not engaged in any criminal activity at the time she killed the Complainant. See TEX. PEN. CODE § 9.32(b)(3).

The presumption language under Section 9.32 was the law applicable to Appellant's case and should have been included in the jury charge. See *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008) ("where a

rule or statute requires an instruction under the particular circumstances, that instruction is 'the law applicable to the case.'") and *Reyna*, 597 S.W.3d at 606 n.1 (reproducing model jury instruction on presumption under Section 9.32(b)). However, the jury charge in this case did not include such an instruction even though Appellant was clearly entitled to one; therefore, the trial court erred.

2) Appellant suffered egregious harm

To determine whether a defendant has sustained egregious harm from a non-objected-to error in the jury charge, appellate courts consider (1) the entire charge; (2) the state of the evidence, including contested issues; (3) arguments of counsel; and (4) any other relevant information. *Perez-Mancha*, 589 S.W.3d at 911. Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." *Ngo,* 175 S.W.3d at 750.

(A) The Jury Charge

In *Villarreal*, the Court of Criminal Appeals considered a claim that a defendant suffered egregious harm from what it agreed was an erroneous failure to include a charge under Texas Penal Code § 9.32(b). *Villarreal v. State*, 453 S.W.3d 429 (Tex. Crim. App. 2015). The Court of Criminal

Appeals agreed with the court of appeals that this factor weighed in favor of finding that the defendant was egregiously harmed, though afforded "less weight to this factor" than did the court of appeals, given that the jury in *Villarreal* could have found that the presumption did not apply. *Id*. at 433-435.

The charge in this case, like *Villarreal*, "correctly informed the jury that a person 'is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.'" (C.R. at 414); *Id*. at 433. The instructions in this case, like *Villareal*, were correct in the context of deadly force. (C.R. at 414); *Id*. However, unlike in *Villarreal*, it would have been difficult for the jury to not give Appellant the presumption based on the evidence as discussed above. See *Supra* at 29-30. This, in combination with a charge that did not alert the jury that it must presume Appellant had a reasonable belief that the use of deadly force was necessary, weighs in favor of egregious harm.

(B) The state of the evidence

The Court of Criminal Appeals noted that "the mere existence of conflicting testimony surrounding a contested issue does not necessarily

trigger a finding of egregious harm." *Villarreal*, 453 S.W.3d at 436, citing *Olivas v. State*, 202 S.W.3d 137, 148 (Tex. Crim. App. 2006). The "plausibility of the evidence raising the defense" is also an appropriate consideration. *Id.*, citing *Allen v. State*, 253 S.W.3d 260, 267-68 (Tex. Crim. App. 2008).

"[T]he issue of self-defense was hotly contested" and Appellant's "entire defense rested on the theory of self-defense." *Elizondo v. State*, 487 S.W.3d 185, 209 (Tex. Crim. App. 2016). Although there was some evidence that was inconsistent with Appellant's theory of self-defense, mainly in the form of inconsistent statements apparently made by the Appellant to law enforcement that differed from her trial testimony and the nature of the injury that caused Appellant's death, Appellant contends that the evidence of guilt was not overwhelming enough to render the lack of the presumption of reasonableness instruction harmless. Initially, there were no eyewitness to the incident between the Appellant and the Complainant. (4 R.R. at 38). There were marks on the Complainant consistent with the Appellant's testimony that she was using her nails to fight off the Complainant. (4 R.R. at 176, 182, 187, 189-191, 214). Claw marks from the hammer were found at various points in the apartment and some of the

injuries to the Complainant were consistent with the claw of the hammer, an instrument that the Appellant admitted she used to fight off the Complainant. (3 R.R. at 137, 140-142; 4 R.R. at 18, 20, 190). Although Appellant testified she did not use a screwdriver to kill the Complainant, she still ultimately admitted to killing the Complainant. In addition, the evidence adduced at trial was sufficient for the presumption of reasonableness to be the law applicable to the case as detailed above. *Cf. Villarreal*, 453 S.W.3d at 439-40 (egregious harm not shown due in part to statutory presumption being unsupported by the evidence). In sum, the state of the evidence was very much in dispute at trial as compared to *Villarreal* and self-defense was the key dispute. As a result, the state of the evidence weighs in favor of a finding of egregious harm.

(C) Arguments of counsel

Appellant's trial counsel focused his arguments entirely on self-defense and no alternative theory as demonstrated by some of his initial remarks:

> Now, we have some evidence, some concrete evidence. Some defensive marks on the decedent that Ms. Marenah testified to on the stand. What she had to do in order to escape the grips of death.

> Now, we have a bunch of smoke and mirrors. These little bitty things, but they don't go directly to the case. We could have an argument about anything, anything to make an argument. A day later, hindsight 20/20, well, what about when you're going through it? What about what Ms. Marenah had to go through since December the 10th, 2020?
>
> Ms. Marenah is a survivor.

(5 R.R. at 176)

This contrasts with the Court of Criminal Appeals' decision in *Villarreal* where the defense counsel in that case relied upon multiple theories as to why the jury must acquit. *Villarreal*, 453 S.W.3d at 440 ("a close examination of appellant's trial counsel's arguments suggests that a justification defense was presented as one of two alternatives for the jury, only one of which was affected by the error. Because the omission of the instruction affected only appellant's secondary defensive theory, we do not find that the omitted instruction touched upon a 'vital aspect' of his case."). The theme of self-defense permeated throughout trial counsel's closing argument in this case. For example, trial counsel argued:

> So what I'm saying is you have to figure out whether Ms. Marenah's actions caused the death. If it did -- if you've made a decision, well, okay, Ms. Marenah, we figure that it was the hammer or whatever that caused the death. That means you've got to go through -- okay, if it was, was it self-defense?

> Now, like I said her story may not be a conclusive story or the best story, but that was her way of telling her story. Sometimes when you say choke, choke is just a whole -- it runs together. He choked me. You don't get into one, two, three, four times choking. If you look at the evidence and interviews they -- they probably go, okay, what happened next, what happened next?
>
> They didn't do that. They didn't do that.
>
> …
>
> They want to build a case from the back going to the front. No, self-defense say you got to evaluate her when and where she had been and when she needed to use it and how immediate it was and was her life in jeopardy, was her life in danger. She sit here and told you she was.

(5 R.R. at 183-184)

In their closing argument, the State told the jury that it "believe[d] that what we're going to be fighting about today is whether or not it was self-defense." (5 R.R. at 171). The State also discussed what it felt was a reasonable belief:

> Reasonably believes and it's immediately necessary. Let's talk about those. Reasonably believes means that you have to take the defendant out. And we talked about this. Put yourself in the defendant's shoes, right?
>
> A person that -- you're going to put an ordinary and prudent person in the defendant's shoes. So if that ordinary and prudent person in the defendant's shoe, what a reasonable person would have done at that time. Not what she was thinking, not what she felt, but what a reasonable person in her position would have done.

> That's what that means when it's asking you to consider what is reasonable. What a reasonable person would do not her.

(5 R.R. at 172)

The State then contended that there was "zero, absolutely no evidence of deadly force that was used or attempted deadly force that was used by [the Complainant]." (5 R.R. at 173-174). In addition, the State argued that they could find that Appellant had a duty to retreat if they believed she had provoked the Complainant or she was engaged in criminal activity, even though the jury charge explicitly instructed the jury to not consider whether the Appellant had a duty to retreat. (5 R.R. at 175; C.R. at 414). By inviting the jury to consider whether Appellant had a duty to retreat, the State implicitly asked the jury to consider similar factors as to what the presumption under Section 9.32(b) would have unless they found beyond a reasonable doubt otherwise (i.e. Appellant had not provoked the Complainant and had not engaged in criminal activity). Finally, the State's rebuttal arguments touched upon what a reasonable person would have done when it argued that some of Appellant's actions after the incident showed that she was not acting in self-defense:

> When it's a justified shooting, you stay there and you call the police. And in this situation, Melanie did an unjustified killing in

> her home. She can't just -- well, she could have just dragged the body out to the dumpster or something and tried to get rid of it. But she didn't know what to do cause it's in her home. She can't just run. So what did she have to do? She had to make up a story. She had to make up a story about what happened because she can't just get rid of this body.
>
> And so that's when she started doing her coverup when she calls 9-1-1. And that 9-1-1 call is in evidence and so you're going to be able to listen to it. But pay attention to that 9-1-1 call because that's where she starts crafting her story.

(5 R.R. at 191)

In sum, both parties addressed Appellant's self-defense claim in closing argument. Although the State attacked Appellant's credibility and contended that the physical evidence supported the Complainant being stabbed with a screwdriver in their closing arguments, the State still emphasized arguments concerning the reasonableness of Appellant's use of deadly force. Finally, Appellant's trial counsel's argument focused solely on self-defense and addressed the reasonableness of Appellant's use of force when he asked the jury to evaluate her when and where she had been and when she needed to use deadly force and how immediate it was and was her life in jeopardy, was her life in danger. As a result, the arguments of counsel weigh in favor of a finding of egregious harm.

(D) Additional Relevant Information

The State broached the topic of self-defense during jury selection. (2 R.R. at 80). In discussing reasonably believes, the State informed the venire panel:

> Reasonably believes. It is not what the defendant believes. It's not what the defendant herself believes, but it's someone who is reasonable, an ordinary prudent person in the defendant's shoes. So take her out of it, put a reasonable person in. What would a reasonable person in that position have believed? And that's going to be the question for you as the jury as to what is reasonable. Only you can explain what was reasonable. So that's regular force.

(2 R.R. at 81)

While discussing self-defense with the venire panel, the topic of reasonableness of use of deadly force was addressed with several venirepersons:

> [Juror #49]: So you -- you were saying -- you were saying that, so if it's a fist fight, it would be a fist on fist, but then what you're trying to tell me is that that person has to shoot first before I shoot him.
>
> [State]: No. So there's two different things that we're saying. If it's just a -- a fist fight, what we're saying is it must be proportional, right. In that fist fight, are you entitled to bring out your gun?
>
> [Juror #49]: No. It's according to how beat up I am.
>
> …

[State]: But is that what the law says?

[Juror #49]: No comment.

[State]: And so the question is -- and it's okay if you disagree with it. The question is, are you able to follow it, right. And so there may be circumstances that are presented that you as the jurors will be able to determine if this person reasonably believed that the type of force that you qualify as being needed was necessary. But the 6 question is, what was the force being used against you and how are you able to respond to that force being used against you? Are you going to be able to hear what we just said? Are you going to be able to follow it? Are you going to kind of do what you believe you would do in that scenario?

(2 R.R. at 83-84)

[Juror #62]: I have a question. When you say proportionate, like if you're in a fist fight and you have a tall man against a short woman, is that considered proportionate?

[State]: And so the question -- it would be reasonable -- what's 15 reasonable for you, right. In the circumstances that you're hearing about as a juror, there could be facts and circumstances that are brought up. *You have to decide what was reasonable based on the person in the defendant's shoes if their actions were reasonable. That's going to be a question for you all. Nobody's going to be able to tell you exactly what is reasonable, what isn't reasonable. That's going to be for you.* But the question is, what force -- was there any unlawful force being used and what lawful force would be able to be used back if it was being used? It has to be proportional.

(2 R.R. at 85) (emphasis added)

Appellant's trial counsel also extensively discussed self-defense during his voir dire. In discussing self-defense, trial counsel informed the panel of the presumption under Section 9.32(b) in general terms and not specifically as applicable to the facts of the case. (2 R.R. at 97-98). However, although trial counsel spoke of the presumption, it was not included within the jury charge and trial counsel did not request it. Appellant contends that this might have left the jury with the impression that this presumption did not apply even though trial counsel mentioned it in jury selection.

In sum, both parties addressed the reasonableness of use of deadly force and self-defense generally during their respective voir dires. Trial counsel noted the presumption under Section 9.32(b) in general terms, but then inexplicably did not request such an instruction, potentially leaving the jury with the impression that such a presumption did not apply to Appellant's case. As a result, this factor also weighs in favor of egregious harm.

3) *Conclusion*

The failure of the trial court to include the statutory presumption provided by Texas Penal Code § 9.32(b) was error which resulted in actual, rather than theoretical egregious harm, to the Appellant. Because of such

harmful error, the judgment of conviction must be reversed, and the cause remanded for a new trial.

PRAYER

Appellant, Melanie Marenah, prays that this Court abate her appeal and restart the timetable so that she may potentially further develop the record in a motion for new trial. Additionally, Appellant prays that this Court reverse the trial court's judgment and remand the case back to the trial court for a new trial. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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/s/ Nicholas Mensch
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