

No. 14-24-00908-CR

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS

IN THE COURT OF APPEALS 4/24/2025 2:41:02 PM
FOR THE FOURTEENTH DISTRICT OF DEBORAH M. YOUNG
HOUSTON, TEXAS Clerk of The Court

Richard Leodre Silmon

Appellant,

v.

The State of Texas

Appellee.

On Appeal from the 155th District Court
Austin County, Texas, No. 2023R-0230
The Honorable Jeff R. Steinhauer, Presiding

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE AND JURISDICTION

Nature of the case:

On November 15, 2023, a Grand Jury indicted Richard Leodre Silmon in Austin County, Texas, with a third-degree felony for unlawful possession of a firearm by a felon on or about September 16, 2021, enhanced by a prior felony conviction on May 4, 2011. C.R. at 4, 82.

Course of Proceedings:

Silmon pleaded not guilty, and the case was tried to a jury. C.R. at 82.

Disposition of the case:

On November 20, 2024, a jury found Silmon guilty and sentenced him to 12 years in TDCJ. C.R. at 73, 80, 82.

Court of Appeals
Jurisdiction:

The district court certified Silmon's right to appeal on November 20, 2024. C.R. at 86. On November 22, 2024, Silmon filed a Notice of Appeal. C.R. at 88. Therefore, this case is properly before the Court of Appeals.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the Texas Rules of Appellate Procedure 38.1, 39.1 and 39.2, Appellant, Richard Leodre Silmon, requests oral argument before this Court of Appeals. Although Appellant represents that the facts and legal arguments are thoroughly presented in this brief and in the record, Appellant also believes that the decisional process of the Court of Appeals will be significantly aided by oral argument.

This case involves several important issues—all of which turn on the unique, specific facts of this case, and involve complex areas of Texas constitutional and procedural law. The primary issue before this Court is whether police conducted a pretextual search by impounding and inventorying a vehicle when the driver was not under arrest and when the officer was not acting pursuant to department policy. As this Court is aware, Fourth Amendment issues often involve in-depth analysis of the specific facts of the case and Silmon believes oral argument will afford the Court a better opportunity to discuss the specific facts of this case in light of applicable law.

Further, this brief addresses other trial court errors, namely the exclusion of a 38.23 jury instruction when the evidence clearly warranted

such an instruction and other constitutional issues, including double jeopardy and a violation of the Equal Protection Clause. Appellant believes that due to the breadth and depth of the issues presented, oral argument will aid in the analysis and afford greater clarity to the issues on appeal.

ISSUES PRESENTED

1. Whether the trial court erred in denying Silmon's Motion to Suppress when the officer illegally impounded Silmon's vehicle and then conducted a pretextual inventory search.
2. Whether the trial court erred in denying Silmon's request for a 38.23 Jury Instruction when the evidence raised an issue of fact as to the legality of the vehicle search.
3. Whether the State's use of two prior felony convictions from the same trial to establish an element of the crime and then to enhance punishment subjected Silmon to double jeopardy.
4. Disregarding the illegally seized evidence, whether the evidence is legally sufficient to support the jury's verdict.
5. Whether the trial court erred in denying Silmon's motion for mistrial when the State raised issues outside of the jury charge in closing argument.
6. Whether the State violated the Equal Protection Clause when it struck all black jurors without a race-neutral explanation.

7. Whether the improper admission of evidence caused Silmon harm at sentencing.

STATEMENT OF FACTS

The Motion to Suppress

On October 29, 2024, the trial court held a hearing on Silmon's Motion to Suppress the firearm police seized after impounding and then searching Silmon's vehicle. 2 RR. According to the State, after midnight on September 16, 2021, Officer Eric Bryant stopped Silmon for speeding. 2 RR at 5. Silmon pulled his car all the way over onto an improved shoulder completely out of the roadway; Bryant conceded that Silmon's vehicle was not obstructing the flow of traffic. 2 RR 5, 7-9. Silmon, his girlfriend, and two children were in the car, and Silmon did not have a driver's license or proof of insurance. 2 RR at 5-6; 3 RR at 238. Silmon told the officer that the car was a rental he borrowed from a friend but there was no rental agreement in the car. 2 RR at 6. But there was no evidence that the car was stolen either. 2 RR at 13-14. Officer Bryant then impounded the vehicle and did a warrantless inventory search. 2 RR at 6, 15-16.

Although the State argues that Silmon lacked standing to challenge

the search because Silmon allegedly did not have “lawful possession” of the vehicle absent a car rental agreement, the court found Silmon had standing for purposes of the hearing based on actual possession and the lack of evidence that the car was stolen. 2 RR at 15. The State then asserted that it was lawful to impound the vehicle solely based on the lack of a driver’s license and proof of insurance. 2 RR at 25-26. But Bryant did not arrest Silmon for these issues, and the State provided no other reason to support impounding and then searching the vehicle. 2 RR at 22, 25. During the inventory search, officers discovered a “firearm and contraband,” namely Promethazine; later officers learned that it was not Promethazine. 2 RR at 7, 26. Although Silmon was arrested at the scene for possession of a controlled substance, these charges were later dismissed after testing revealed the alleged contraband was not a controlled substance. 3 RR at 16, 292.

Silmon moved to suppress the firearm discovered during the inventory search, arguing that Silmon was not under arrest at the time of the search, that the vehicle was unlawfully impounded, and that any inventory search of the vehicle was illegal. Supp. C.R. at 3-4. The trial court denied the motion and, although Silmon re-urged the motion

several times during trial, the court maintained its stance. 3 RR 243, 250; Supp. C.R. at 6.

Voir Dire

At the close of voir dire, counsel for Silmon made a *Batson* challenge after the State struck all black jurors. 3 RR 196. As to juror number six, the State defended its strike by stating that the potential juror affirmatively nodded in response to several questions adverse to the State's position. 3 RR at 196-97. The State never elicited any verbal response from juror number six but rather said the potential juror "rolled his head back and rolled his eyes" at one of the State's questions. 3 RR at 196-97. Defense counsel pointed out that none of these nonverbal cues appear in the record. 3 RR at 198.

As to juror ninety-six, the State originally made a challenge for cause against her but then withdrew that challenge and used a peremptory strike instead. 3 RR at 198. The State justified the strike by stating that it did not believe the answer the juror gave when she was questioned during the challenge and further stated that the juror would be more likely to give exceptions to the defense. 3 RR at 198. The court overruled the *Batson* challenge as to both jurors, acknowledging that "the

optics don't look good, but I think there's a rational basis for each challenge or peremptory strike made by the State." 3 RR at 199. The State later pointed out that there were two other African American jurors, but they were too far down the panel to be chosen. 3 RR at 202.

The Prior Felony Convictions

During pre-trial, Silmon objected to the State's use of his two prior felony convictions both from a single trial, to establish an element of the crime and also to enhance punishment. 3 RR at 207-09. The court overruled the objection, finding the two prior convictions from one trial can be split, one being used to establish the "felon" element in the indictment and one being used to enhance the sentence. 3 RR at 208.

Trial Testimony

On September 16, 2021, Officer Eric Bryant pulled Silmon over for speeding and an expired registration. 3 RR 234-5. Bryant approached the vehicle and identified the occupants as Silmon, his girlfriend, and two children. 3 RR at 238. Bryant spoke with Silmon and believed there were "indicators" of criminal activity. 3 RR at 238. For example, the car was a rental, but it was apparently rented in someone else's name, and the occupants did not produce a rental policy; Silmon and his girlfriend said

they did not work, and they said they were going on vacation but had no luggage. 3 RR at 238-39. Bryant conceded that these indicators alone were insufficient probable cause to search the vehicle. 3 RR at 239, 281. Yet Bryant impounded the vehicle because Silmon lacked a driver's license and could not show proof of financial responsibility (insurance). 3 RR at 243, 263. Bryant called a wrecker to retrieve the vehicle and placed Silmon in the backseat of his patrol car while Bryant inventoried the car. 3 RR at 249-50; Ex. 1. During the search, Bryant discovered a loaded gun, cash and other "contraband" believed to be a controlled substance, but testing later determined the substance was not illegal. 3 RR at 16, 255-57. Bryant arrested Silmon for possession of the controlled substance. 4 RR at 17-19. Silmon objected to the admission of the gun, seized during the inventory search, based on the arguments previously made in his Motion to Suppress; the objection was overruled. *See* State's Exhibits 9A, 9B, and 9C; 3 RR at 277.

On cross-examination, Bryant conceded he had no probable cause to search Silmon's car and admitted that the purpose of an inventory search, such as the search Bryant conducted here, is to protect the items in the vehicle from theft. 3 RR at 281. Bryant also admitted that the

occupants of the vehicle were not under arrest at the time he conducted his inventory search and that he returned some of the items in the vehicle to Silmon's girlfriend. 3 RR at 249-50, 273-74. Bryant testified that the reason for the impound was Silmon's lack of driver's license and inability to show proof of financial responsibility. 4 RR at 29-30. Bryant testified that the inventory was completed pursuant to police department policy. 3 RR at 254-55.

Officer Brett Cook testified regarding an incident in 2021 when someone broke into his unmarked police car and took his firearm from the front compartment. 4 RR at 64. The defense stipulated that the stolen firearm had the same serial number as State's Exhibit 9A—the weapon retrieved during Bryant's search of Silmon's car. 4 RR at 66-67. Cook, however, admits that he has no reason to believe that Silmon was the one who stole the firearm from Cook's vehicle. 4 RR at 68.

Silmon's girlfriend, Ms. Barrientos, took the stand and testified that the car was insured and was legal but had no documentation with her to establish that the vehicle was insured. 4 RR at 80, 84. She also testified that the impound was done merely as a means to search the vehicle for drugs. 4 RR at 80-81.

The Jury Charge

At the charge conference, defense counsel cited Texas Code of Criminal Procedure article 38.23, arguing that “in any case where the legal evidence raises an issue of whether it was legally obtained, the jury shall be instructed that if it believes or has a reasonable doubt that the evidence was obtained in violation of the provisions of this article, the laws of the State of Texas, or the laws of the United States, then and in such event, the jury shall disregard any such evidence so obtained.” 4 RR at 87. Specifically, Silmon requested the following 38.23 instruction to be included in the charge:

Now, you have heard evidence that the Defendant, Richard Silmon, was stopped for speeding and it was determined that no license to drive had been issued to Richard Silmon. Upon learning that fact, as well as the fact that financial responsibility for the car was not provided, Officer Bryant lawfully decided to impound [sic], or -- I guess I should say, decided to impound the car the Defendant was driving, and pursuant to that decision, took an inventory of the contents of the vehicle pursuant to policy.

Further, you have heard that the Defendant, based on his conduct, was subject to arrest for the offenses of not having a driver’s license and failing to produce proof of financial responsibility. You are instructed that upon arrest, a vehicle may be lawfully impounded, and that it may -- its contents may be inventoried pursuant to impounding. The warrantless search of a vehicle has to be proven by the State, and the validity of the search has to be established in order that any

evidence derived as a result of that search be introduced at the trial of the Defendant.

Application here, if you believe beyond a reasonable doubt that Officer Bryant was, in good faith, inventorying the contents of the vehicle pursuant to department policy, then you will find the Defendant guilty and say so by your verdict. However, if you do not believe that Officer Bryant was performing an inventory of the contents of the vehicle lawfully and pursuant to policy, or if you have a reasonable doubt thereof, you will not consider any of the evidence seized as a fruit of the inventory pursuant to impound and consider whether legal probable cause to arrest existed. You are instructed, that in the State of Texas, officers have a limited right to investigate pursuant to an arrest. Any evidence that is seized pursuant to arrest must be based on the offense for which the Defendant was arrested. You are further instructed that in the event that a vehicle is impounded, pursuant to arrest, that officers have a legal right to inventory the contents of that vehicle for officer safety.

(the “38.23 Jury Instruction”) 4 RR at 87-89. The court overruled Silmon’s objections to the charge and did not include the 38.23 Jury Instruction. 4 RR at 96-97.

Closing Argument

During closing, the State argued that Silmon “chose to drive over 90 miles an hour down the interstate in the middle of the night, with a loaded fully automatic stolen gun in the glove box and stacks of cash in the front of the car, and a load of fake drugs in the back of the car.” 4 RR

at 128. Defense counsel promptly objected to this argument, asserting that the State was attempting to legally justify impounding the vehicle by backdooring evidence that the defense had been prohibiting from arguing in closing. 4 RR at 129. Outside the presence of the jury, defense counsel reminded the court that since there was no 38.23 Jury Instruction, the only thing the State should be arguing is what is in charge, not reasons to justify the search. 4 RR at 131. Defense counsel then moved for a mistrial, arguing that “it is becoming clear that it is difficult for the parties to litigate their position, given the way that we have approached the moving target of is there a question about a legal inventory, is there a question about any issues presented to the jury beyond is this a firearm, is he a felon.” 4 RR 133-34. The court denied the motion for mistrial but conceded that “there does seem to be some amount of unfairness, at least in the closing argument portion right now.” 4 RR at 134-35.

Sentencing

Silmon’s counsel renewed his motion for mistrial because he was unable to present a defense to the jury once the court denied his 38.23 Jury Instruction. 4 RR at 4-5. The motion was denied. 5 RR at 5.

At sentencing, Officer Grillet testified that he pulled over a vehicle driven by Isaiah Esquivel and Silmon was the passenger. Esquivel gave consent to search the vehicle and under Silmon's seat, Grillet found a handgun. 5 RR at 24-38. Silmon denied that the gun belonged to him, but Grillet arrested Silmon. 5 RR at 31. Grillet testified that he consulted the NCIC database and discovered that Silmon was a criminal gang member. 5 RR at 31. Defense counsel objected and moved to strike this testimony, arguing that the database records were hearsay and there was no foundation for establishing Grillet as an expert on gangs; the objection was overruled. 5 RR at 31-33. Defense counsel also objected to State's Exhibits 41 and 42 (images of an alleged gang tattoo on Silmon) on the same grounds. 5 RR at 33-34.

Outside the presence of the jury, defense counsel again argued that it was double jeopardy to use one indictment with multiple counts, tried in one trial, to both establish that Silmon was a felon in possession—an element of the crime—and for enhancing punishment. 5 RR at 40-41. The court determined that this issue was not proper before the jury as it was a question of law for the court to decide, prohibiting the defense from raising this issue in front of the jury. 5 RR at 42.

SUMMARY OF THE ARGUMENT

I.

A search without a warrant is presumed unreasonable. If an officer conducts a warrantless search, as he did here, the State bears the burden of proving a valid exception to the warrant requirement existed at the time of the search. But here there is no legal justification for the search of Silmon’s vehicle. Officer Bryant did not inventory the vehicle pursuant to a lawful arrest, a lawful impoundment, or as a matter of regular Sealy Police Department policy. Rather, he saw “suspicious indicators” of criminal activity and wanted the opportunity to rummage around and see what would turn up. None of the six factors outlined by this Court support the claim that impoundment in this case was reasonable.

In fact, there was an obvious, less intrusive means of removing the vehicle from the premises—Bryant could have allowed Silmon and/or his girlfriend to phone a friend. Silmon was not under arrest. There was no probable cause. There was no police department policy requiring an inventory under these facts. And there were no safety concerns with the vehicle’s location. Bryant’s inventory search after an unlawful impoundment was merely a pretext for satisfying his curiosity regarding

what he believed to be suspicious indicators of criminal activity. This Court should reverse and acquit Silmon based on this point of error.

II.

Silmon requested a 38.23 jury instruction which outlined his entire defense—that the search was illegal—to the jury. Silmon raised the issue of the legality of the search at trial when Officer Bryant testified and when Ms. Barrientos testified. When there is an issue of fact regarding the legality of a search, a 38.23 instruction is required. Undoubtedly, the legality of the search was contested and was, in fact, a central issue to Silmon’s defense. Yet the court, after timely objection from the defense, did not give the instruction. Upon reviewing the 38.23 charge, the jury could have determined the search was merely a pretext or that it did not fall under the Sealy Police Department policy as described in State’s Exhibit 12. These were contested factual issues raised by the evidence at trial. Silmon need only show some harm for reversal as a result of the timely objected to missing, required jury instruction.

III.

The trial court used two convictions from the same trial proceeding to both prove an element of the charged offense and to enhance

punishment, violating the Double Jeopardy Clause. The legislature could not have intended for convictions tried in the same proceeding, arising from the same transaction or occurrence, to be used both to establish an element of the crime and then additionally to enhance the sentence. Silmon's sentence for these convictions ran concurrently—as one, but the State split those same-trial convictions and subjected Silmon to multiple punishments by splitting those convictions for dual use here, violating double jeopardy.

IV.

Without the illegally seized firearm, the remaining evidence is legally insufficient to support Silmon's conviction. In fact, there is no evidence to support the jury's verdict absent the illegally seized evidence and, therefore, this Court should reverse and acquit Silmon.

V.

The trial court acknowledged the unfairness of allowing the State to make closing arguments justifying the impound search of Silmon's vehicle while simultaneously denying the defense the opportunity to argue the other side of the coin—that the search was unjustified. Because of the inherent injustice of the State's closing argument which wandered

outside the bounds of the jury charge and because Silmon was unable to assert any defense related to the legality of the search, the trial court should have granted a mistrial when motioned by Silmon.

VI.

The State violated the Equal Protection Clause when it struck the black jurors without credible, race-neutral explanations supported by the record. Further, the trial court made no findings as to the State's purported race-neutral explanations on the record in response to Silmon's *Batson* challenge. As such, the court should have cancelled the venire or reseated the improperly stricken jurors.

VII.

The trial court abused its discretion by admitting unverified and prejudicial gang affiliation evidence at sentencing. Officer Grillet, who was not qualified as a gang expert, offered improper opinion testimony and hearsay evidence to support his notion that Silmon was involved in a criminal gang. This issue warrants, at a minimum, a new punishment hearing.

ARGUMENT AND AUTHORITIES

I. The trial court erred in denying Silmon’s Motion to Suppress.

A. Standard of Review

In determining whether the trial court’s ruling on a motion to suppress is supported by the record, appellate courts generally consider only the evidence adduced at the hearing on the motion unless the suppression issues have been consensually relitigated by the parties during trial on the merits. *Rachel v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996); *Dang v. State*, 99 S.W.3d 172, 179 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Appellate courts apply a bifurcated standard of review to a trial court’s ruling on a motion to suppress. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). At a suppression hearing, the trial court is the exclusive trier of fact and judge of the credibility of the witnesses. *Id.* An appellate court affords almost total deference to a trial court’s determination of the historical facts supported by the record, especially when the trial court’s findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (en banc). Appellate courts afford the same level of deference to a trial court’s ruling on “application of law

to fact questions,” or “mixed questions of law and fact,” if the answer to those questions turns on an evaluation of credibility and demeanor. *Amador*, at 673. However, the court reviews de novo those questions not turning on credibility and demeanor. *Id.*

B. Officer Bryant violated Silmon’s Fourth Amendment rights when he unlawfully impounded and then searched Silmon’s vehicle.

The Fourth Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.” US CONST. AMEND. IV. Generally, seizure of an individual’s property is per se unreasonable unless the seizure is pursuant to a warrant issued upon probable cause describing the items to be seized. *United States v. Place*, 29 462 U.S. 696, 701 (1983). Warrantless searches and seizures are presumed unreasonable. *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004). The warrant requirement is not “lightly set aside.” *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Exigent circumstances is one exception to the warrant requirement, but the interest of law enforcement must be so compelling that a warrantless search would be objectively unreasonable. *Igboji v. State*, 666 S.W.3d 607,613-14 (Tex.

Crim. App. 2023). Another exception to the warrant requirement is an inventory search after lawfully impounding a vehicle. *South Dakota v. Opperman*, 428 U.S. 364 (1976). Once it is clear that a search or seizure occurred absent a warrant, the burden shifts to the State to prove that the search or seizure was reasonable. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

“The word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.” *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). “Thus, in order for an impoundment of an automobile to be lawful, the seizure of the automobile must be reasonable under the Fourth Amendment.” *Benavides v. State*, 600 S.W.2d 809, 811 (Tex. Crim. App. 1980).

1. The impound was unlawful.

Courts have found that the impoundment of a vehicle is proper in the following circumstances:¹

- removal from an accident scene or impoundment for parking violations;
- if the owner or driver requests or consents to the impoundment;

¹ This list is in *Benavides*, 600 S.W.2d at 811.

- if the automobile is stolen or the police have a reasonable belief that it is stolen;
- if the vehicle is abandoned, a hazard, or so mechanically defective that it creates a danger to others using public streets or highways;
- if the driver is arrested for being intoxicated while in the vehicle and no other person is available to drive the vehicle or otherwise safeguard the vehicle; and
- if police are authorized to do so under a specific statute.²

This Court has outlined some factors that may be considered in determining the reasonableness of impoundment:

(1) whether someone was available at the scene of the arrest to whom the police could have given possession of the vehicle; (2) whether the vehicle was impeding the flow of traffic or was a danger to public safety; (3) whether the vehicle was locked; (4) whether the detention of the arrestee would likely be of such duration as to require police to take protective measures; (5) whether there was some reasonable connection between the arrest and the vehicle; and (6) whether the vehicle was used in the commission of another crime.

Josey v. State, 981 S.W.2d 831, 842 (Tex. App.–Houston [14th Dist.]

1998, pet. ref'd). None of these factors weigh in favor of impounding Silmon's vehicle and, in fact, all of the evidence weighs against the

² This list is not exhaustive but is “indicative of the grounds that most jurisdictions would agree upon to allow impoundments.” *Id.*

reasonableness of the impoundment here.

- Silmon was not under arrest. 2 RR at 22, 25.
- Ms. Barrientos was on the scene to manage the vehicle, take their belongings out, and wait until a friend arrived to assist. 3 RR 281-86.
- The vehicle was not a danger to the public or impeding traffic. 3 RR 289 (vehicle was in a safety area).
- There was no connection between lacking a driver's license and insurance and inventorying the vehicle.
- There was no evidence of any other crime prior to impounding the vehicle. 2 RR at 13-14; 3 RR at 281.

In *Opperman*, a vehicle owner left his car illegally parked for an extended period and the vehicle was impounded for multiple parking violations. *Opperman*, 428 U.S. at 364. Police then inventoried that vehicle as standard procedure under department policy. *Id.* at 376. The Supreme Court upheld that search because it was “standard procedure”, and it was not “a pretext concealing an investigatory police motive.” *Id.* The court also noted that the inventory was prompted by “the presence of plain view” valuables inside the car.” *Id.* at 375-76.

In *Phillips*, this Court upheld an inventory search when the appellant was arrested in the same place his car was located, the car was parked on a public street with the keys in the ignition, and no one else was at the scene to take control of the car for appellant. *Phillips v. State*, No. A14-92-00430-CR, 1992 WL 173585 (Tex. App.—Houston [14th] Dist. 1992, no writ) (mem. op.). But here, Silmon was not under arrest and his girlfriend was at the scene and could have taken control of the vehicle by calling for help and waiting with the car until help arrived. 3 RR at 249-50, 273-74.

In *Benavides*, the Court of Criminal Appeals found an inventory search illegal when the vehicle owner was arrested two blocks away and the vehicle was not impeding the flow of traffic, it was not a danger to public safety, and it was legally parked in a residential area. *Benavides*, 600 S.W.2d at 812. Specifically, the court reasoned that there was not yet a violation of any ordinance, there was no testimony that it was standard procedure to impound a car under these facts, and while the Appellant may not have been able to attend to the vehicle, he may have been able to phone a friend to take care of the car for him. *Id.*

None of the above factual scenarios and none of the factors this

Court uses to determine whether impounding a vehicle was reasonable even come close to the facts here. Unlike *Opperman*, Silmon's car was not illegally parked or violating any ordinances. It was, in fact, in a "safety area." 3 RR 289. There were no valuables in plain view in Silmon's car. And, as discussed below, there was no standard police procedure that applied to the impounding of Silmon's car here. This case is more like *Benavides*—the car was not a hazard, and Silmon or Ms. Barrientos either one could have called for someone to assist them with the car and their valuables. There was no justification for impounding and searching the vehicle.

2. The impound violated the Sealy Police Department's own towing policy.

Unlike *Opperman*, the Sealy Police Department ("SPD") did not have a standard policy allowing an inventory search under the facts of this case, and, even if it did, that search would violate the Fourth Amendment here. State's Exhibit 12 provides the procedures for the "appropriate and legal" towing and storage of a vehicle. Officers "shall know under which provisions . . . the vehicle shall be towed. State's Ex. 12. If the vehicle is lawfully towed, then police can conduct the inventory search. State's Ex. 12. Subparagraphs A-K provide an exhaustive list of

when a vehicle can be towed by the SPD.

But the facts here do not fall within any subparagraph in the SPD towing policy. For example, Silmon was not involved in an accident, there was no emergency, Bryant admitted Silmon was not impeding traffic or blocking a parking area, the car was not abandoned or unattended, and the car was not on private property and was not a hazard. *See* State's Ex. 12. Moreover, the vehicle was not of evidentiary value or involved in the commission of a crime. State's Ex. 12. At the time of the search the only "crime" alleged was that Silmon had no driver's license or proof of insurance. There was nothing of evidentiary value in the vehicle that could possibly be related to these allegations, nor is there any allegation that the vehicle was involved in a crime. In fact, Bryant concedes there was no evidence the vehicle was stolen, and that he had no probable cause to search. 2 RR at 13-14; 3 RR at 281.

Per SPD's own policy, Bryant had no right to impound the vehicle. The State bears the burden to establish that the police conducted a lawful inventory search. *Jackson v. State*, 468 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Gauldin v. State*, 683 S.W.2d 411, 415 (Tex. Crim. App. 1984), overruled on other grounds by *Heitman*

v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991)). The State satisfies this burden “by demonstrating an inventory policy exists and the officers followed the policy.” *Id.* (citing *Moberg v. State*, 810 S.W.2d 190, 195 (Tex. Crim. App. 1991)). No such policy existed here applicable to these facts.

3. Because the impound was unlawful, the inventory search was illegal.

“[B]efore any need arises to inventory the contents of an automobile, there must be a lawful impoundment.” *Benavides*, 600 S.W.2d at 810. An inventory search cannot be upheld until there is an inquiry into the lawfulness of the impoundment. *Id.* “[T]he inventory search must be conducted in good faith and pursuant to a reasonable standard police procedure.” *Jackson*, 468 S.W.3d at 195. The search may not be used as a ““ruse for a general rummaging in order to discover incriminating evidence.”” *Id.* (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

In this case, the inventory search was not to protect the owner’s property while the vehicle was in police custody; it was not to protect police against claims over lost or stolen property; and it was not to protect police against potential danger. None of the justifications for an inventory search fit the facts here and none of the facts here fit the SPD’s

impound and inventory policy.

The search here was undoubtedly focused on finding a reason to arrest Silmon because Officer Bryant believed there were some “indicators” of criminal activity, and he wanted to investigate. 3 RR at 238. Bryant conceded he had no probable cause to search Silmon’s vehicle and further conceded that the purpose of an inventory search is to protect whoever owns what is in the car from having it stolen. 3 RR at 281. Yet Silmon’s girlfriend was standing right there next to the car and Bryant never asked her to remove their personal belongings before the wrecker came to pick up the car. 3 RR 281-82. There was no need to worry about the items being stolen; Ms. Barrientos could have taken possession of those items before the car was towed. 3 RR at 284-86. If the justification is to protect the owner’s property and protect police from claims regarding theft of an owner’s property, why not let the owner who was not driving and who was not placed in the back of a police car gather their belongings and be on the way? Unfortunately, logic did not prevail here.

Bryant’s inventory was based solely on the lack of a driver’s license and insurance. 3 RR at 290. Bryant, however, admitted that if Silmon had been involved in a wreck and was standing next to the car, Bryant

would not have impounded the vehicle. 3 RR at 289. He also conceded that the vehicle was in the “safety area” of the roadway and could have remained there for forty-eight hours without issue. 3 RR 289. The reality is there were lesser restrictive alternatives, but Bryant wanted to search Silmon’s car because Bryant had “some suspicions” and wanted to generally rummage the vehicle to discover incriminating evidence. 3 RR at 288.

Unlike *Opperman*, no standard police procedure dictated the impoundment and search here and, in this case, the search was merely “a pretext concealing an investigatory police motive.” See *Opperman*, 428 U.S. at 376. Bryant’s search was unreasonable under the Fourth Amendment and, therefore, the firearm seized pursuant to the unreasonable search should have been suppressed at trial. As such, this Court should reverse the trial court’s decision and acquit Silmon based on the illegal search.

C. Denying Silmon’s Motion to Suppress caused harmful, constitutional error.

The harm analysis for evidence admitted in violation of the Fourth Amendment is Rule 44.2(a)’s constitutional standard. *Hernandez v.*

State, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001); Tex. R. App. P. 44.2(a) “[T]he court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.” TEX. R. APP. P. 44.2(a). Undoubtedly the admission of the illegally seized firearm—the sole evidence to support a primary element of the crime charged in the underlying indictment—constitutionally harmed Silmon. But for the illegal search, there would have been no evidence to support his indictment and ultimately his conviction. Silmon was deprived of his rights under the Fourth Amendment and that deprivation led directly to a conviction. There is no greater harm to constitutional rights than that.

II. The trial court erred in denying Silmon’s requested 38.23 Jury Instruction.

If a defendant timely objects to jury instructions, reversal is required upon a showing of *some* harm to the defendant. *Marshall v. State*, 479 S.W.3d 840, 842 (Tex. Crim. App. 2016).

Texas Code of Criminal Procedure article 38.23 provides as follows:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against

the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

The “jury *shall* be instructed” . . . the law provides no option but to give the 38.23 Jury Instruction when, as here, a defendant raises an issue as to the legality of a search. A 38.23 jury instruction is required when: (1) The evidence heard by the jury raises an issue of fact; (2) The evidence on that fact is affirmatively contested; and (3) That contested factual issue is material to the lawfulness of the challenged conduct in obtaining the evidence. *Madden v. State*, 242 S.W.3d 504, 509–11 (Tex. Crim. App. 2007). In other words, there must be a factual dispute about how the evidence was obtained. *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004). The evidence raising a fact issue may be “strong, weak, contradicted, unimpeached, or unbelievable,” but it “must still actively conflict with the State’s assertion of material fact in order to raise an affirmatively contested fact issue for an Article 38.23 instruction.” *Chambers v. State*, 663 S.W.3d 1, 11-12 (Tex. Crim. App. 2022), (op. on reh’g).

A. The evidence raised an issue of fact.

The following is an excerpt from Silmon's requested 38.23 Jury Instruction:

Application here, if you believe beyond a reasonable doubt that Officer Bryant was, in good faith, inventorying the contents of the vehicle pursuant to department policy, then you will find the Defendant guilty and say so by your verdict. However, if you do not believe that Officer Bryant was performing an inventory of the contents of the vehicle lawfully and pursuant to policy, or if you have a reasonable doubt thereof, you will not consider any of the evidence seized as a fruit of the inventory pursuant to impound and consider whether legal probable cause to arrest existed.

4 RR at 87-89. The facts related to this instruction are directly in dispute. There is no doubt an issue of fact exists as to whether Officer Bryant was conducting the inventory search “pursuant to department policy.” If that fact was not in dispute, the State would have never introduced the SPD policy on towing and inventorying vehicles. *See* State’s Ex. 12. The State presented extensive argument and testimony regarding State’s Exhibit 12 and regarding whether Officer Bryant’s search fell within the SPD towing policy. *See* 3 RR at 223, 253-54, 265-66, and 270-71 (asking whether Bryant was abiding by the policy when he inventoried the car and discussing other issues related to whether the inventory here fell within the SPD’s policy). On cross examination, Silmon’s counsel

challenged this policy and raised an issue regarding whether the inventory search here fell within the confines of the SPD towing policy. 4 RR 25-26. Testimony from Ms. Barrientos also challenged Bryant's inventory search because she testified that the search was merely a pretext to search the vehicle. 4 RR at 80-81.

Whether the impound and inventory search fell within the limits of the SPD towing and inventory policy was the crux of the State's case at trial and that issue was directly contradicted by evidence and argument from the defense. 4 RR 25-26, 35-36, 80-81, 87-88. Further, even just reviewing State's Ex. 12 itself raises a fact issue as to whether Bryant's actions complied with the policy.

The primary justification the State asserts in support of Officer Bryant's inventory search is that the search was pursuant to SPD policy. Because the defense directly contradicted whether the search fell within the confines of the SPD towing and inventory policy, Silmon was entitled to the 38.23 Jury Instruction.

B. The Missing 38.23 Jury Instruction undoubtedly caused *some* harm.

Without the 38.23 Jury Instruction, Silmon was deprived of the

opportunity to have the jury assess his primary defense in the case. In this case, the charge prevented the jury from deciding a central fact issue in the case—whether Bryant’s inventory search was lawful pursuant to a written SPD policy. If the jury decided that the inventory did not fall within the express limitations of the SPD policy, they would have had to find Silmon not guilty. The lack of instruction, required by law under Article 38.23 on the facts of this case, deprived Silmon of his substantial rights to have the jury decide all the relevant factual issues disputed in the case. The jury must be able to perform its function as a fact-finder and a jury charge that deprives the jury of that role causes harmful, reversible error. *See Abdnor v. State*, 871 S.W.2d 726, 741 (Tex. Crim. App. 1994) (en banc).

Actual harm occurs when the erroneous jury instruction affected “the very basis of the case,” “deprive[d] the defendant of a valuable right,” or “vitally affect[ed] a defensive theory.” *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). Here, the missing 38.23 Jury Instruction wiped out the entire defensive theory of the case and impacted the very basis of the facts at issue in the case. As such, the trial court erred in excluding the instruction from the charge and this Court should reverse

and acquit Silmon, or, at a minimum, remand the case for a new trial.

III. The State’s use of two prior felony convictions from the same trial to establish an element of the crime and to enhance punishment subjects Silmon to double jeopardy.

The application of legal principles, as those at issue here, to a specific set of facts is an issue of law and is reviewed *de novo*. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013).

Silmon was indicted for being a felon in possession of a firearm, and the State used a May 4, 2011, felony conviction from Cause No. 10CR243, 349th District Court of Houston County, Texas, to establish the “felon” element of the charged crime. C.R. at 4. Then the State used another felony conviction from the same trial, same court, with the same conviction date to enhance Silmon’s punishment. C.R. at 4; State’s Exhibit 25. Defense counsel argued that this subjected Silmon to double jeopardy in violation of his constitutional rights because the same proceeding was used for two separate purposes here—as both an element of the crime and again to enhance punishment. 5 RR at 15-16, 40-42.

But the State cannot use the same prior conviction more than once in the same prosecution. In *McWilliams*, the Court of Criminal Appeals held that the State was precluded from using a prior conviction to

enhance the punishment, when that same prior conviction was also used to create the charged offense. *McWilliams v. State*, 782 S.W.2d 871, 874-75 (Tex. Crim. App. 1990). Similarly, in *Ramirez*, the court held that punishment could not be enhanced by the same prior conviction used to create the charged offense of unlawful possession of a firearm by a felon. *Ramirez v. State*, 527 S.W.2d 542, 544 (Tex. Crim. App. 1975). *See also* *Wisdom v. State*, 708 S.W.2d 840, 845 (Tex. Crim. App. 1986) (stating the use of a prior conviction to prove an essential element of the offense bars the use of that prior conviction in the same indictment for enhancement).

When multiple offenses are prosecuted at a single trial, the Double Jeopardy Clause “prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). An accused is subject to multiple punishments in violation of the Double Jeopardy Clause when he is “convicted of more offenses than the legislature intended” under a given set of facts. *Ervin v. State*, 991 S.W.2d 804, 807 (Tex. Crim. App. 1999).

Here, Silmon received a concurrent sentence for two felonies on May 4, 2011, one being assault on a public servant and one being for harassment of a public servant. State’s Ex. 21, 24. But then the court

allowed that conviction from the same May 4, 2011 trial and that concurrent sentence to be used both to enhance his punishment and as an element of the charged crime. This effectively subjected Silmon to multiple punishments for the same trial and there is no evidence the legislature intended such a result.

When an accused is found guilty of multiple offenses arising from the same criminal episode and tried in a single trial, the sentences shall run concurrently, but for some limited circumstances not applicable to this case. *See* TEX. PEN. CODE §3.03(a). There is no indication that the legislature intended for multiple offenses tried in the same trial, receiving the same sentence to be used for separate purposes to both convict and enhance the punishment of an accused in a subsequent proceeding. This double use constituted double jeopardy and subjected Silmon to greater punishment than the legislature intended. As such, this Court should reverse the trial court's ruling and find that the use of the May 4, 2011 conviction for two separate purposes was unconstitutional. At a minimum, Silmon requests that this Court find that the enhancement in this case was unconstitutional.

IV. Disregarding the illegally seized evidence, the evidence is legally insufficient to support the jury's verdict.

If this Court agrees Silmon's motion to suppress should have been granted, remand is not necessary, because without the illegally obtained evidence, the remaining evidence is legally insufficient to support the conviction, and Silmon should be acquitted.

A. This Court should exclude the illegally obtained evidence in conducting its legal sufficiency analysis.

An appellate court must always address challenges to the sufficiency of the evidence even if the conviction should be reversed on other grounds. *McFarland v. State*, 930 S.W.2d 99, 100 (Tex. Crim. App. 1996); *Garza v. State*, 715 S.W.2d 642 (Tex. Crim. App. 1986); *Foster v. State*, 635 S.W.2d 710, 717 (Tex. Crim. App. 1982). If the appellate court finds the evidence legally insufficient, it must reverse the judgment and render an acquittal, otherwise a retrial with insufficient evidence is double jeopardy. *Owens v. State*, 576 S.W.2d 859, 861 (Tex. Crim. App. 1979), citing *Greene v. Massey*, 437 U.S. 19 (1978). When an appellate court considers the sufficiency of the evidence, it considers only the admissible evidence. In *Adams v. State*, the court found a search illegal and ruled that the evidence seized from that search should have been

suppressed. *Adams v. State*, 643 S.W.2d 423, 426 (Tex. App. –Houston [14th Dist.] 1982, no pet.), remanded by *Adams v. State*, 639 S.W.2d 942, 943 (Tex. Crim. App. 1982). The court set aside the appellant’s conviction based upon the insufficiency of the admissible evidence and stated, “[w]here a conviction is set aside because the admissible evidence is insufficient to support a finding of guilt, the judgment is remanded to the trial court for entry of a judgment of acquittal.” *Id.* (citing *Greene*, 437 U.S. at 24-25). This court should, like the court in Adams, conduct a legal sufficiency analysis based upon the remaining “admissible” evidence. *Adams*, 643 S.W.2d at 426.

B. There is no remaining evidence to support the conviction.

The only evidence supporting an essential element of the State’s case—the possession of a firearm—is the firearm illegally seized from Silmon’s vehicle. Once that evidence is properly suppressed, nothing remains to support his conviction. This Court should find the remaining evidence legally insufficient to support Silmon’s conviction and render an acquittal.

V. The trial court erred when it denied Silmon's motion for mistrial.

After excluding Silmon's 38.23 Jury Instruction and then preventing Silmon's counsel from arguing anything related to the legality of the search, the State then put forth during closing argument reasons to justify the search. The State argued that Silmon "chose to drive over 90 miles an hour down the interstate in the middle of the night, with a loaded fully automatic stolen gun in the glove box and stacks of cash in the front of the car, and a load of fake drugs in the back of the car." 4 RR at 128. Defense counsel objected, asserting that the State was attempting to legally justify impounding the vehicle by backdooring evidence that the defense had been prohibited from arguing in closing. 4 RR at 129.

Outside the presence of the jury, defense counsel reminded the court that since there was no 38.23 Jury Instruction, the only thing the State should be arguing is what is in charge, not reasons to justify the search. 4 RR at 131. Defense counsel then moved for a mistrial, arguing that "it is becoming clear that it is difficult for the parties to litigate their position, given the way that we have approached the moving target of is there a question about a legal inventory, is there a question about any

issues presented to the jury beyond is this a firearm, is he a felon.” 4 RR 133-34. The court denied the motion for mistrial but conceded that “there does seem to be some amount of unfairness, at least in the closing argument portion right now.” 4 RR at 134-35.

Mistrial is an appropriate remedy for a “narrow class of highly prejudicial and incurable errors.” *Wood v. State*, 18 S.W.3d 642, 648 Tex. Crim. App. 2000). “The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case. *Hernandez v. State*, 805 S.W.2d 409, 413–414 (Tex. Crim. App. 1990), *cert. denied*, 500 U.S. 960 (1991). A mistrial is required where the improper argument is “so prejudicial that expenditure of further time and expense would be wasteful and futile.” *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). *cert. denied*, 542 U.S. 905 (2004). A court’s denial of a motion for mistrial is reviewed under an abuse of discretion standard. See, e.g., *Browne v. State*, 483 S.W.3d 183, 203 (Tex. App.—Austin 2015, no pet.).

Here, the State’s jury argument, attempting to justify its search of Silmon’s vehicle, goes to the very heart of the issue in this case: was the search proper under the Fourth Amendment? But the court did not allow

Silmon to assert this defense. The court denied the 38.23 Jury Instruction and prohibited defense counsel from arguing that the search was illegal. In fact, the court reiterated that the “law that’s in the charge is what [the parties are] going to talk about. No opinions on anything that’s not in the charge.” 4 RR at 98.

So, the court prohibited Silmon from challenging the legality of the search but then allowed the State to throw out a laundry list of reasons regarding why the search was legal. This is fundamentally unfair, as even the court noted. *See* 4 RR at 134-35. The court should have granted a mistrial the moment the jury heard argument from the State that was outside the jury charge and that related to the primary defense that Silmon was prevented from asserting. This was highly prejudicial to Silmon’s defense and caused the jury to incorrectly presume that the search was justified and legal under the Fourth Amendment. This Court should, therefore, reverse the lower court’s decision and find that a mistrial should have been granted in this case.

VI. The State violated the Equal Protection Clause by using its peremptory challenges to strike the black jurors absent a race-neutral explanation.

A. Standard of Review

Appellate courts apply a “clearly erroneous” standard of appellate review to a trial court’s ruling on a *Batson* claim. *Gibson v. State*, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004). This is a “highly deferential standard” because the trial court is in the best position to determine whether a facially race-neutral explanation for a peremptory strike is genuinely race-neutral. See *Jasper v. State*, 61 S.W.3d 413, 421–22 (Tex. Crim. App. 2001). But here, there is nothing in the record indicating that the State’s race-neutral explanation is genuinely race-neutral.

B. The State’s peremptory strikes were unjustifiably race-based.

A party violates the Equal Protection Clause if it uses peremptory challenges based on race. *Batson v. Kentucky*, 476 U.S. 79, 93–98 (1986). Texas courts apply the three-step framework established in *Batson* which outlines the burden-shifting framework for evaluating racial discrimination in jury selection (reaffirmed in *Guzman v. State*, 85 S.W.3d 242 (Tex. Crim. App. 2002) (en banc)). The framework is:

1. The party challenging the strike must make a *prima facie* showing that the strike was based on race, gender, or ethnicity.
2. The burden then shifts to the striking party to offer a race or gender-neutral explanation for the strike.
3. The court must determine whether the stated reason is genuine or merely a cover for discrimination. *Guzman*, 85 S.W.3d at 246.

In *Guzman v. State*, the Court of Criminal Appeals adopted the “mixed motives” doctrine. The court explained that when both a race neutral reason and a potentially improper reason are given for a strike, the strike may still be valid if the race-neutral justification, on its own, would have led to the same result. This means a strike is not automatically invalid just because bias may have played a role in the decision. It can still stand if the court finds that the neutral reason was enough by itself and makes an explicit finding to that effect. *Id.* at 255.

On the other hand, in *Snyder*, the Supreme Court rejected the State’s explanation for striking a black juror based on “nervousness” and job-related concerns. *Snyder v. Louisiana*, 552 U.S. 472 (2008). The trial court made no finding that the juror was actually nervous, and white jurors with similar conflicts were not struck. *Id.* at 485-86. The Court

found the justification lacked support and reversed the conviction. *Id.* at 486. *Snyder* underscores that vague or unsupported reasons, especially when applied inconsistently, do not meet *Batson*'s standard.

Courts have accepted strikes based on a juror's demeanor, but only when the behavior is clearly described in the record. Courts expect more than vague impressions. If there's no support in the record, the explanation may not hold up. *See Snyder*, 552 U.S. 472 (rejecting a strike based on "nervousness" that was not confirmed by the trial judge or supported by the record).

Courts require more than vague or subjective reasons to justify a strike. When a party claims they did not believe a juror's answers, the explanation must be supported by the record, including any follow-up questions or concerns raised during voir dire. Without that, the justification may not be enough to satisfy step three of *Batson*. *See Guzman*, 85 S.W.3d at 255 (remanding after the trial court failed to determine whether the race-neutral reason was enough on its own and whether the challenger met burden). *Snyder* also emphasizes that unsupported explanations, particularly those involving credibility or demeanor, are not enough. *See Snyder*, 552 U.S. at 485–86.

Here, the State's justifications for striking the only two black jurors are insufficient to satisfy the *Batson* standard. At the outset, Silmon is the same race as the two black jurors challenged by the State. *See* State's Exhibit 38 (identifying Silmon as an African American man). At the close of voir dire, counsel for Silmon asserted a *Batson* challenge after the State struck both black jurors. 3 RR 196. Striking all black jurors satisfies the prima facie requirement of the first *Batson* element by raising an inference of discrimination. *See Keeton v. State*, 749 S.W.2d 861, 867 (Tex. Crim. App. 1988) (en banc). The burden then shifted to the State to show a race-neutral explanation for the strike that is genuine and not a cover for racial discrimination. *Guzman*, 85 S.W.3d at 246.

As to juror number six, the State defended its strike by arguing that the juror affirmatively nodded in response to several questions adverse to the State's position. 3 RR at 196-97. The State never elicited any verbal response from juror number six but rather said the potential juror "rolled his head back and rolled his eyes" at one of the State's questions. 3 RR at 196-97. None of these nonverbal cues appear in the record. 3 RR at 198.

As to juror ninety-six, the State originally made a challenge for cause against her but then withdrew that challenge and used a strike

instead. 3 RR at 198. The State justified the strike by stating that it did not believe the answer the juror gave when she was questioned during the challenge and further stated that the juror would be more likely to give exceptions to the defense. 3 RR at 198. The court overruled the *Batson* challenge, acknowledging that “the optics don’t look good, but I think there’s a rational basis for each challenge or peremptory strike made by the State.” 3 RR at 199.

This case is like *Snyder*, discussed above. When the race-neutral explanation for the strike relies upon a potential juror’s demeanor, the trial judge should make a specific finding about that demeanor and should make a finding that an attorney credibly relied on demeanor in exercising a strike. *Snyder*, 552 U.S. at 479. There are no such findings here. Not only are eye rolls and head nods not on record, but there are no judicial findings that these nonverbal cues existed. Further, as to juror ninety-six, the State said it just did not believe her and that she would be more likely to favor the defense. 3 RR at 198. The State did not make any specific allegations regarding what it did not like about her answers, nor did the court make any specific findings regarding juror ninety-six’s answers.

Because the State failed to offer a race-neutral explanation that was more than mere cover for discrimination, Silmon's *Batson* challenge should have been granted. This Court should reverse Silmon's conviction and acquit him on the ground that the State violated the Equal Protection Clause.

VII. This Court should reverse and remand this case for a new trial, or at a minimum a new sentencing hearing, because the improper admission of evidence at sentencing constituted harmful error.

A. Standard of Review

Appellate courts review a decision to admit or exclude evidence for an abuse of discretion. *Bowley v. State*, 310 S.W.3d 431, 434 (Tex. Crim. App. 2010). A trial court abuses its discretion only when the court's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *Barrientos v. State*, 539 S.W. 3d 482, 492 (Tex. App.—Houston [1st Dist.] 2017, no pet.). To be relevant, evidence must tend to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. CRIM. EVID. 401. Motive is not an essential element of a criminal offense, but the prosecution is entitled

to offer evidence of motive to commit the charged offense because it is relevant when it fairly tends to raise an inference that the accused had a 34 motive to commit the crime alleged. *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991), cert. denied, 509 U.S. 922 (1993); *Rodriguez v. State*, 486 S.W.2d 355, 358 (Tex. Crim. App. 1972).

B. The trial court erred in admitting evidence of gang affiliation.

At sentencing, Officer Grillet testified that he consulted the NCIC database and discovered that Silmon was a criminal gang member. 5 RR at 31. Defense counsel objected and moved to strike this testimony, arguing that the database records were hearsay and there was no foundation for establishing Grillet as an expert on gangs; the objection was overruled. 5 RR at 31-33. Defense counsel also objected to State's Exhibits 41 and 42 (images of an alleged gang tattoo on Silmon) on the same grounds. 5 RR at 33-34.

Evidence tending to show Silmon as a member of a criminal gang was more prejudicial than probative and was further improperly admitted over objection. First, the NCIC database records referenced by Grillet were hearsay records, not subject to any exception. They were not

admitted at trial and did not satisfy the business records exception, the public records exception, nor was Grillet the proper custodian of those records. Grillet, therefore, should not have been allowed to testify as to written, hearsay records not admitted at trial.

Second, Grillet was not an expert on gangs, yet he testified, over objection, regarding tattoos and other indicators of gang activity. A lay person may only offer opinion testimony when that testimony is rationally based on the witness's perception, and it is helpful to clearly understanding the testimony or to determining a fact issue. TEX. R. CRIM. EVID. 701. But there was no fact issue regarding whether Silmon was in a gang—that issue was never raised at trial. Further, Grillet was not testifying as to his own perceptions of Silmon, Grillet was making generalizations regarding Silmon's tattoos and linking those tattoos to a gang without demonstrating credentials as an expert on gang affiliations. Grillet was drawing impermissible assumptions rather than testifying regarding his own perceptions and, as such, the testimony should have been excluded.

C. The erroneously admitted evidence caused harmful error.

The improperly admitted gang evidence caused harmful error by creating the illusion that Silmon was potentially in a gang and was chronically involved in criminal gang activity. This could have only harmed his image in front of the jury and encouraged the jury to enhance his sentence beyond what they would have determined but for this evidence. Silmon requests that this Court grant him a new sentencing hearing on this point of error.

CONCLUSION AND PRAYER

For the foregoing reasons, Appellant, Richard Loedre Silmon, respectfully requests this Court to vacate his conviction and render an acquittal. In the alternative, Appellant asks for this Court to reverse his conviction and remand the case for a new trial. Appellant further requests all relief, whether in law or equity, to which he is justly entitled.

April 24, 2025

Respectfully submitted,

BARLETTA LAW, PLLC

By: /s/Natalie K. Barletta
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Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This Appellant's Brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(D) because this Brief contains 7,573 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1). This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because this brief has been prepared in a conventional typeface using Microsoft Word 365 in Century Schoolbook font size 14.

By: /s/ Natalie Barletta
Natalie Barletta

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 6.3 and 9.5(b), (d), (e), I hereby certify that a true and correct copy of the foregoing was electronically served on the State of Texas as follows:

Via E-filing

By: /s/ Natalie Barletta
Natalie Barletta

APPENDIX

Judgment of Conviction	1
Trial Court's Certification of Defendant's Right to Appeal.....	4
Indictment	5
Motion to Suppress.....	6



CAUSE No. 2023R-0230 COUNT No. 1

INCIDENT NO. /TRN: 9282930424 - D001

THE STATE OF TEXAS

v.

RICHARD LEODRE SILMON
DOB: 01/04/1993
STATE ID No.: TX-04859806

IN THE 155TH DISTRICT

COURT

AUSTIN COUNTY, TEXAS

JUDGMENT OF CONVICTION BY JURY

JUDGE PRESIDING:	HON. JEFF STEINHAUSER	DATE SENTENCE IMPOSED:	11/20/2024
ATTORNEY FOR STATE:	BRANDY ROBINSON	ATTORNEY FOR DEFENDANT:	ADAM REPOSA
<u>OFFENSE FOR WHICH DEFENDANT CONVICTED:</u>			
UNL POSS FIREARM BY FELON			
CHARGING INSTRUMENT:	STATUTE FOR OFFENSE: <u>46.04(e) PENAL CODE</u>		
INDICTMENT			
DATE OF OFFENSE:	PLEA TO OFFENSE: <u>09/16/2021</u> <u>NOT GUILTY</u>		
DEGREE OF OFFENSE:			
THIRD DEGREE FELONY			
VERDICT OF JURY:	FINDINGS ON DEADLY WEAPON: <u>N/A</u>		
GUILTY			
PLEA TO: 1 ST	FINDING ON 1 ST		
ENHANCEMENT PARAGRAPH:	NOT TRUE	ENHANCEMENT PARAGRAPH:	TRUE
2 ND ENHANCEMENT PARAGRAPH:	N/A	FINDING ON 2 ND ENHANCEMENT PARAGRAPH:	N/A
PUNISHMENT ASSESSED BY:	DATE SENTENCE COMMENCES: (DATE DOES NOT APPLY TO CONFINEMENT SERVED AS A CONDITION OF COMMUNITY SUPERVISION.) <u>JURY</u> <u>11/20/2024</u>		
PUNISHMENT AND PLACE OF CONFINEMENT:	12	YEARS TDCJ	

THIS SENTENCE SHALL RUN: CONCURRENTLY.

SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR
(THE DOCUMENT SETTING FORTH THE CONDITIONS OF COMMUNITY SUPERVISION IS INCORPORATED HEREIN BY THIS REFERENCE.)

DEFENDANT IS REQUIRED TO REGISTER AS SEX OFFENDER IN ACCORDANCE WITH CHAPTER 62, TEX. CODE CRIM. PROC.
(FOR SEX OFFENDER REGISTRATION PURPOSES ONLY) THE AGE OF THE VICTIM AT THE TIME OF THE OFFENSE WAS N/A.

FINES:	<u>RESTITUTION:</u>	RESTITUTION PAYABLE TO: VICTIM (SEE SPECIAL FINDING OR ORDER OF RESTITUTION WHICH IS INCORPORATED HEREIN BY THIS REFERENCE.)
\$ 0.00	\$ N/A	
COURT COSTS:	REIMBURSEMENT FEES:	
\$ 508.54	\$ N/A	

WAS THE VICTIM IMPACT STATEMENT RETURNED TO THE ATTORNEY REPRESENTING THE STATE? N/A

(FOR STATE JAIL FELONY OFFENSES ONLY) IS DEFENDANT PRESUMPTIVELY ENTITLED TO DILIGENT PARTICIPATION CREDIT IN ACCORDANCE WITH ARTICLE 42A.559, TEX. CODE CRIM. PROC.? N/A

TOTAL JAIL	IF DEFENDANT IS TO SERVE SENTENCE IN COUNTY JAIL OR IS GIVEN CREDIT TOWARD THE FINE AND COSTS, ENTER DAYS <u>CREDITED BELOW.</u>
TIME CREDIT: 19 DAYS	N/A DAYS NOTES: N/A

THIS CAUSE WAS CALLED FOR TRIAL BY JURY AND THE PARTIES APPEARED. THE STATE APPEARED BY HER DISTRICT ATTORNEY AS NAMED ABOVE.

COUNSEL / WAIVER OF COUNSEL (SELECT ONE)

- DEFENDANT APPEARED WITH COUNSEL.
- DEFENDANT APPEARED WITHOUT COUNSEL AND KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THE RIGHT TO REPRESENTATION BY COUNSEL IN WRITING IN OPEN COURT.
- DEFENDANT WAS TRIED IN ABSENTIA.

BOTH PARTIES ANNOUNCED READY FOR TRIAL. IT APPEARED TO THE COURT THAT DEFENDANT WAS MENTALLY COMPETENT TO STAND TRIAL. A JURY WAS SELECTED, IMPANELED, AND SWORN, AND DEFENDANT ENTERED A PLEA TO THE CHARGED OFFENSE. THE COURT RECEIVED THE PLEA AND ENTERED IT OF RECORD.

THE JURY HEARD THE EVIDENCE SUBMITTED AND ARGUMENT OF COUNSEL. THE COURT CHARGED THE JURY AS TO ITS DUTY TO DETERMINE THE GUILT OR INNOCENCE OF DEFENDANT, AND THE JURY RETIRED TO CONSIDER THE EVIDENCE. UPON RETURNING TO OPEN COURT, THE JURY DELIVERED ITS VERDICT IN THE PRESENCE OF DEFENDANT AND DEFENSE COUNSEL, IF ANY.

THE COURT RECEIVED THE VERDICT AND ORDERED IT ENTERED UPON THE MINUTES OF THE COURT.

PUNISHMENT ASSESSED BY JURY / COURT / NO ELECTION (SELECT ONE)

- JURY. DEFENDANT ENTERED A PLEA AND FILED A WRITTEN ELECTION TO HAVE THE JURY ASSESS PUNISHMENT. THE JURY HEARD EVIDENCE RELATIVE TO THE QUESTION OF PUNISHMENT. THE COURT CHARGED THE JURY AND IT RETIRED TO CONSIDER THE QUESTION OF PUNISHMENT. AFTER DUE DELIBERATION, THE JURY WAS BROUGHT INTO COURT, AND, IN OPEN COURT, IT RETURNED ITS VERDICT AS INDICATED ABOVE.
- COURT. DEFENDANT ELECTED TO HAVE THE COURT ASSESS PUNISHMENT. AFTER HEARING EVIDENCE RELATIVE TO THE QUESTION OF PUNISHMENT, THE COURT ASSESSED DEFENDANT'S PUNISHMENT AS INDICATED ABOVE.
- NO ELECTION. DEFENDANT DID NOT FILE A WRITTEN ELECTION AS TO WHETHER THE JUDGE OR JURY SHOULD ASSESS PUNISHMENT. AFTER HEARING EVIDENCE RELATIVE TO THE QUESTION OF PUNISHMENT, THE COURT ASSESSED DEFENDANT'S PUNISHMENT AS INDICATED ABOVE.

IN ACCORDANCE WITH THE JURY'S VERDICT, THE COURT ADJUDGES DEFENDANT GUILTY OF THE ABOVE OFFENSE. THE COURT FINDS THAT THE PRESENTENCE INVESTIGATION, IF SO ORDERED, WAS DONE ACCORDING TO THE APPLICABLE PROVISIONS OF SUBCHAPTER F, CHAPTER 42A, TEX. CODE CRIM. PROC.

THE COURT ORDERS DEFENDANT PUNISHED IN ACCORDANCE WITH THE JURY'S VERDICT OR COURT'S FINDINGS AS TO THE PROPER PUNISHMENT AS INDICATED ABOVE. THE COURT ORDERS DEFENDANT TO PAY THE FINES, COURT COSTS, REIMBURSEMENT FEES, AND RESTITUTION AS INDICATED ABOVE AND FURTHER DETAILED BELOW.

PUNISHMENT OPTIONS (SELECT ONE)

- CONFINEMENT IN STATE JAIL OR INSTITUTIONAL DIVISION. THE COURT ORDERS THE AUTHORIZED AGENT OF THE STATE OF TEXAS OR THE COUNTY SHERIFF TO TAKE AND DELIVER DEFENDANT TO THE DIRECTOR OF THE CORRECTIONAL INSTITUTIONS DIVISION, TDCJ, FOR PLACEMENT IN CONFINEMENT IN ACCORDANCE WITH THIS JUDGMENT. THE COURT ORDERS DEFENDANT REMANDED TO THE CUSTODY OF THE COUNTY SHERIFF UNTIL THE SHERIFF CAN OBEY THE DIRECTIONS IN THIS PARAGRAPH. UPON RELEASE FROM CONFINEMENT, THE COURT ORDERS DEFENDANT TO PROCEED WITHOUT UNNECESSARY DELAY TO THE DISTRICT CLERK'S OFFICE, OR ANY OTHER OFFICE DESIGNATED BY THE COURT OR THE COURT'S DESIGNEE, TO PAY OR ARRANGE TO PAY ANY FINES, COURT COSTS, REIMBURSEMENT FEES, AND RESTITUTION DUE.
- COUNTY JAIL—CONFINEMENT / CONFINEMENT IN LIEU OF PAYMENT. THE COURT ORDERS DEFENDANT COMMITTED TO THE CUSTODY OF THE COUNTY SHERIFF IMMEDIATELY OR ON THE DATE THE SENTENCE COMMENCES. DEFENDANT SHALL BE CONFINED IN THE COUNTY JAIL FOR THE PERIOD INDICATED ABOVE. UPON RELEASE FROM CONFINEMENT, THE COURT ORDERS DEFENDANT TO PROCEED WITHOUT UNNECESSARY DELAY TO THE DISTRICT CLERK'S OFFICE, OR ANY OTHER OFFICE DESIGNATED BY THE COURT OR THE COURT'S DESIGNEE, TO PAY OR ARRANGE TO PAY ANY FINES, COURT COSTS, REIMBURSEMENT FEES, AND RESTITUTION DUE.
- FINE ONLY PAYMENT. THE PUNISHMENT ASSESSED AGAINST DEFENDANT IS FOR A FINE ONLY. THE COURT ORDERS DEFENDANT TO PROCEED IMMEDIATELY TO THE DISTRICT CLERK'S OFFICE, OR ANY OTHER OFFICE DESIGNATED BY THE COURT OR THE COURT'S DESIGNEE, TO PAY OR ARRANGE TO PAY THE FINE, COURT COSTS, REIMBURSEMENT FEES, AND RESTITUTION ORDERED BY THE COURT IN THIS CAUSE.
- CONFINEMENT AS A CONDITION OF COMMUNITY SUPERVISION. THE COURT ORDERS DEFENDANT CONFINED DAYS IN AS A CONDITION OF COMMUNITY SUPERVISION. THE PERIOD OF CONFINEMENT AS A CONDITION OF COMMUNITY SUPERVISION STARTS WHEN DEFENDANT ARRIVES AT THE DESIGNATED FACILITY, ABSENT A SPECIAL ORDER TO THE CONTRARY.

FINES IMPOSED INCLUDE (CHECK EACH FINE AND ENTER EACH AMOUNT AS PRONOUNCED BY THE COURT):

- GENERAL FINE (§12.32, 12.33, 12.34, OR 12.35, PENAL CODE, OR ANY OTHER CODE) \$ (NOT TO EXCEED \$10,000)
- ADD'L MONTHLY FINE FOR SEX OFFENDERS (ART. 42A.653, CODE CRIM. PROC.) \$ (\$5.00/PER MONTH OF COMMUNITY SUPERVISION)
- CHILD ABUSE PREVENTION FINE (ART. 102.0186, CODE CRIM. PROC.) \$ (\$100)
- EMS, TRAUMA FINE (ART. 102.0185, CODE CRIM. PROC.) \$ (\$100)
- FAMILY VIOLENCE FINE (ART. 42A.504 (B), CODE CRIM. PROC.) \$ (\$100)
- JUVENILE DELINQUENCY PREVENTION FINE (ART. 102.0171(A), CODE CRIM. PROC.) \$ (\$50)
- STATE TRAFFIC FINE (\$542.4031, TRANSP. CODE) \$ (\$50)
- CHILDREN'S ADVOCACY CENTER FINE - AS COND OF CS (ART. 42A.455, CODE CRIM. PROC.) \$ (NOT TO EXCEED \$50)
- REPAYMENT OF REWARD FINE (ART. 37.073/42.152, CODE CRIM. PROC.) \$ (TO BE DETERMINED BY THE COURT)
- PAYMENT OF FINE TO CRIME STOPPERS ORGANIZATION - AS COND OF CS (ART. 42A.301 (B) (19), CODE CRIM. PROC.) \$ 50.00 (NOT TO EXCEED \$50)
- DWI TRAFFIC FINE (A/K/A MISC. TRAFFIC FINES) (\$709.001, TRANSP. CODE) \$ (NOT TO EXCEED \$6,000)

EXECUTION OF SENTENCE

THE COURT ORDERS DEFENDANT'S SENTENCE EXECUTED. THE COURT FINDS THAT DEFENDANT IS ENTITLED TO THE JAIL TIME CREDIT INDICATED ABOVE. THE ATTORNEY FOR THE STATE, ATTORNEY FOR THE DEFENDANT, THE COUNTY SHERIFF, AND ANY OTHER PERSON HAVING OR WHO HAD CUSTODY OF DEFENDANT SHALL ASSIST THE CLERK, OR PERSON RESPONSIBLE FOR COMPLETING THIS JUDGMENT, IN CALCULATING DEFENDANT'S CREDIT FOR TIME SERVED. ALL SUPPORTING DOCUMENTATION, IF ANY, CONCERNING DEFENDANT'S CREDIT FOR TIME SERVED IS INCORPORATED HEREIN BY THIS REFERENCE.

FURTHERMORE, THE FOLLOWING SPECIAL FINDINGS OR ORDERS APPLY:

THE COURT ENTERS AN AFFIRMATIVE FINDING THAT DEFENDANT HAS BEEN FOUND GUILTY OF A FELONY.

TO PAY:

\$508.54 COURT COSTS;

\$40.00 JURY FEE;

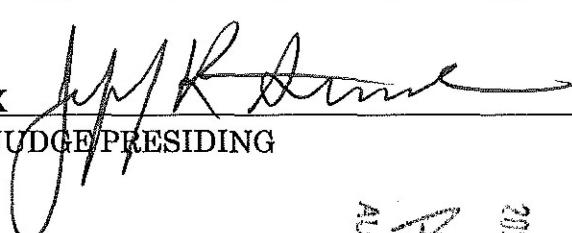
\$50.00 CRIME STOPPER FEE;

DEFENDANT'S \$4,000.00 COURT DEPOSIT IN CAUSE NUMBER 2021R-0169 TO BE TRANSFERRED TO CAUSE NUMBER 2023R-0230 AND APPLIED TO ABOVE FEES AND COSTS, REMAINING BALANCE TO BE DISPERSED TO RICHARD SILMON

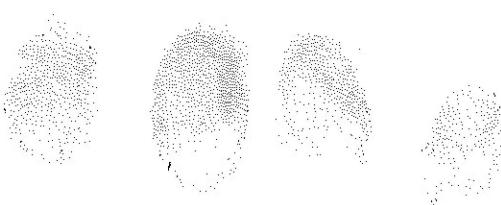
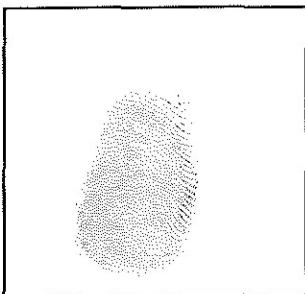
PAY \$60.00 PER MONTH BEGINNING 30 DAYS AFTER TDCJ RELEASE TO THE AUSTIN COUNTY DISTRICT CLERK'S OFFICE;

ANY CASH BOND AND/OR COURT DEPOSIT LESS ANY ADMINISTRATIVE FEES REQUIRED BY LOCAL GOVERNMENT CODE SEC. 117.054 AND SEC. 117.055 SHALL BE APPLIED TO THE ABOVE FEES – THE REMAINING BALANCE SHALL BE PAYABLE PER THE DIRECTION OF THE DISTRICT CLERK.

DATE JUDGMENT ENTERED: 11/20/2024

X 
JUDGE PRESIDING

RIGHT THUMBPRINT




AUSTIN COUNTY CLERK
TEXAS

2024 NOV 20 PM 1:43

FILED

CAUSE NO. 2023R-0230

THE STATE OF TEXAS

IN THE DISTRICT COURT OF

VS.

AUSTIN COUNTY, TEXAS

RICHARD LEODRE SILMON

155TH JUDICIAL DISTRICT

**TRIAL COURT'S CERTIFICATION OF DEFENDANT'S RIGHT OF APPEAL
[pursuant to 25.2(d) T.R.A.P]***

I, Judge Presiding, certify this criminal case:

- Is not a plea-bargain case, and the defendant has the right of appeal.
 - Is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal.
 - Is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal.
 - Is a plea bargain case, and the defendant has NO right of appeal.
 - The defendant has waived the right of appeal.

November 20, 2024

Date Signed

JMR
Judge Presiding
concerning any appeal of this criminal case, including
the Texas Rules of Appellate Procedure. I have been

I have received a copy of this Certification. I have also been informed of my rights concerning any appeal of this criminal case, including any right to file *pro se* petition for discretionary review pursuant to Rule 68 of the Texas Rules of Appellate Procedure. I have been admonished that my attorney must mail a copy of the court of appeal's judgment and opinion to my last known address and that I have only 30 days in which to file a *pro se* petition for discretionary review in the court of appeals. TEX.R.APP.P 68.2. I acknowledge that, if I wish to appeal this case and if I am entitled to do so, it is my duty to inform my appellate attorney, by written communication, of any change in the address at which I am currently living or any change in my current prison unit. I understand that, because of appellate deadlines, if I fail to timely inform my appellate attorney of any change in my address, I may lose the opportunity to file a *pro se* petition for discretionary review.

I have received a copy of this certification (boxes below checked if delivered in person or X'ed if mailed):

- Defendant's Counsel

Defendant

State Bar of Texas Identification Number

P. O. Box or Street Mailing Address

P. O. Box or Street Mailing Address

City, State Zip

City, State Zip

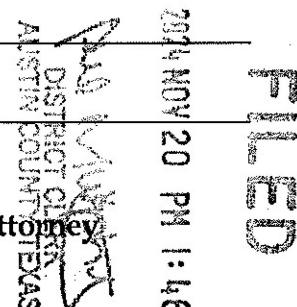
Telephone Number 407-248-1234

Telephone Number

Fax number (if any) **20**

Fax number (if any)

Criminal District Attorney



SID: 04859806
 TRN: 9282930424-D001
 ARREST DATE: 09/16/2021
 AGENCY: SEALY POLICE DEPARTMENT/21003018
 DA CASE NO.: DA21-00520

NO. 2023R-0230 BOND: _____

THE STATE OF TEXAS VS. RICHARD LEODRE SILMON, Black/Male, DOB: 01/04/1993

CHARGE: UNL POSS FIREARM BY FELON
 SECTION: 46.04(e)
 DEGREE: Third Degree Felony Enhanced
 OFFENSE CODE: POSS CS PG 4 >= 400G
 COURT: 155TH JUDICIAL DISTRICT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, Austin County, Texas, duly selected, empaneled, sworn, charged, and organized as such at the July 2023 Term of the 155th Judicial District Court for said County, upon their oaths present in and to said court at said term that

RICHARD SILMON

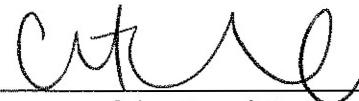
on or about September 16, 2021, and before the presentment of this indictment, in Austin County, Texas, did then and there, having been convicted of the felony offense of Assault Public Servant on May 4, 2011, in cause number 10CR243 in the 349th District Court of Houston County, Texas, intentionally, knowingly, and recklessly possess a firearm after the fifth anniversary of the defendant's release from confinement following conviction of the felony, and the defendant's possession of the firearm occurred at a location other than the premises at which the defendant lived,

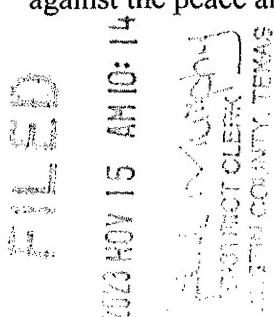
ENHANCEMENT

And it is further presented that before the commission of the charged offense, the defendant had been convicted on May 4, 2011, in the 349th District Court of Houston County, Texas, in cause number 10CR-244, for Harassment by Person in Correctional/Detention,

~~And it is further presented that before the commission of the charged offense, the defendant had been convicted on May 4, 2011, in the 349th District Court of Houston County, Texas, in cause number 10CR-243, for Assault Public Servant,~~ JPJ.

against the peace and dignity of the State.


 Foreman of the Grand Jury



20024r-0085

THE STATE OF TEXAS

§ IN THE DISTRICT COURT

vs.

§ TH JUDICIAL DISTRICT

RICHARD SILMON

§ AUSTIN COUNTY, TEXAS

MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A WARRANT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, Richard Silmon, by and through his attorney of record, Adam T, Reposa, in the above styled and numbered cause, and files this Motion to Suppress and shows the following:

1. Defendant was stopped by Sealy Police Department for speeding. Defendant was driving a rental car rented by a friend who was not present during the stop.
2. Defendant has never received a driver's license.
3. Defendant was detained and informed that he was "lucky" that he was not arrested for the driving violation and placed in the back of a patrol car.
4. Defendant was informed that a search prior to impounding was going to be conducted, notwithstanding the fact that Defendant and a passenger were both on scene, and if no contraband were discovered then he would be released from his detention
5. Unfortunately, a firearm was located during the "inventory" and Defendant was arrested

ANALYSIS

The search of the vehicle was not lawful because the Defendant was not lawfully under arrest, the impoundment was not legally authorized, and the search was not the least restrictive means to ensuring the citizens, who were in fact there on scene, were protected.

Benavides v. State, 600 S.W.2d 809, (Tex. Crim. App. 1980) makes clear that if a vehicle is not lawfully impounded then the search of the vehicle is subject to suppression. Furthermore, even if the impoundment was legal, the people who were being protected by this inventory search were on the scene and completely capable of protecting their own interest.

WHEREFORE, Defendant prays that the evidence seized during the search of the vehicle be suppressed as in violation of the law.

Respectfully submitted,

/s/ Adam Reposa
Law Office of Adam Reposa

Attorney for Defendant
2012 Peoples St.
Austin, Texas 78702
(512) 476.7376 Tel.
(512) 478-1114 Fax
State Bar No. 24040163
lawofficeofadamreposa@gmail.com

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been delivered to the District Attorney's Office on this the _____ day of _____, 2024.

Adam Reposa

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 100054803

Filing Code Description: Brief Requesting Oral Argument

Filing Description:

Status as of 4/24/2025 2:58 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brandy Robinson		brandy.robinson@austincounty.com	4/24/2025 2:41:02 PM	SENT