NO. 14-24-00737-CR

IN THE COURT OF APPEALS

FOR THE

FOURHTEEN SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

MITCHELL WHITLEY

APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

ON APPEAL CAUSE NO 84448-CR

FROM THE 412TH JUDICIAL DISTRICT COURT

BRAZORIA COUNTY, TEXAS

HONORABLE JUSTIN R. GILBERT, JUDGE PRESIDING

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

This is a direct appeal from a conviction for Burglary of Habitation and Aggravated Assault. Appellant was charged by an indictment for Burglary of Habitation, count one, and Aggravated Assault, Count two, under TEX. PEN. CODE Sec. 30.02 and 22.02 (a) (2) on June 7, 2018. The State alleged the two offenses constituted a criminal episode and further alleged an enhancement with two prior felonies. (C.R. at 6). Appellant entered a plea of not guilty on September 9, 2024. (III R.R. at 5). The jury returned a verdict of guilty on September 16, 2024. (IIX R.R. at 8).

Burglary of Habitation, under TEX. PEN. CODE Sec. 30.02 is a 2nd degree felony offense with a range of punishment of not more than 20 years or less than 2 years within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00. Aggravated Assault, under TEX. PEN. CODE Sec. 22.02 is a 2nd degree felony offense with a range of punishment of not more than 20 years or less than 2 years within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00. The State further alleged Appellant was convicted of two prior felonies with the second offense being committed subsequent to the first becoming final. The range of punishment increasing to that of a 1st degree felony offense with a range of punishment of not more than 99 years

or life and not less than 25 years within the Texas Department of Criminal Justice – Institutional Division. TEX. PEN. CODE Sec. 12.42 (d).

Following evidence and arguments on the issue of punishment, the jury, having found Appellant had previously been found guilty of the felonies as alleged in the indictment, accessed punishment at 26 years in the Texas Department of Criminal Justice-Institutional Division. (IX R.R. at 87).

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BRIEF FOR APPELLANT

TO THE COURT OF APPEALS:

COMES NOW, Mitchell Whitley, appellant herein, and files this, his brief in this cause. This is an appeal from the 412th Judicial District Court, Brazoria County, Texas.

STATEMENT OF THE FACTS

The State indicted Appellant on June 7, 2018. (C.R. at 6). The State Alleged in count one Appellant committed an offense under the TEX. PEN. CODE Sec. 30.02 (1), Burglary of Habitation and in count two Appellant committed an offense under the TEX. PEN. CODE Sec. 22.02 (a) (2), Aggravated Assault. (C.R. at 6). Count one alleged Appellant did then and there intentionally or knowingly entered a habitation, owned by Curtis Arvik without the effective consent of said owner, with intent to commit theft. Count two alleged Appellant did then and there intentionally or knowingly threatened Curtis Arvik with imminent bodily injury and did use or exhibit a deadly weapon, namely, a firearm. The indictment alleged the two offenses constituted a "criminal episode" as that term is defined in Section 3.01 of the Texas Penal Code. The indictment further alleged an enhancement of the allegations with two prior felonies, each being committed before the commission of the primary offense and second enhancement being committed after the conviction of the first noted enhancement. (C.R. at 6). To the indictment, Appellant pleaded not guilty on February 13, 2024. (IV R.R. at 21).

The State asserted in the opening statement that Appellant was a member of a three-man burglary team. On April 6th of 2016, while the complaining witness, Curtis Arvik, was away from his home, using two vehicles, one with Appellant and

another member of the burglary team, Quentin Lewis and the second vehicle with the third member, Gmarkous Wilson. While Wilson acted as a lookout, Appellant and Lewis entered Arvik's home. (IV R.R. at 8). Arvik arrived home as Appellant and Lewis ran from the residence using a vehicle to escape the area. Arvik begins a pursuit in his vehicle. As Appellant and Lewis flee a shot is fired from a .45 caliber pistol through the windshield of the complaining witness vehicle. During the vehicle chase the vehicle driven by Wilson collides with the vehicle used by Appellant and Lewis. Appellant and Lewis flee on foot. Wilson and Arvik are in an altercation resulting in Wilson shooting and killing Arvik. Wilson then flees in Arvik's vehicle, a red Titan V8, (IV R.R. at 29), and following a brief chase is apprehended by police. During the pursuit Wilson abandons a weapon which is later recovered. Appellant is able to make his way to a Shell gas station where he calls for someone to pick him up. (IV R.R. at 9).

The State presented testimony from Kathryn Watson, Sean Slover, John Johnston, Jon McDonald, Reyna Villa, Stephen Buchanan, Teresa Harris, Nicholas Black, Brandi Hargrave, Emma Henrie, Royland Tubbs, Kent Nielsen, Shane Windsor, Trina Blunt, James Wolfe, Amanda Domer, and Kathleen McKinney.

Kathryn Watson testified in 2016 she was living in a trailer park off of County Road 58 in Rosharon, Texas. (IV R.R. at 15). This is the same community Curtis Arvik

lived in. (IV R.R. at 21). Ms. Watson testified prior to the incident she witnessed what looked like a white Crown Victoria parked next to her home in a vacant lot. (IV R.R. at 18). Testifying she was familiar with the vehicles of the neighborhood, this vehicle was not one of them. Ms. Watson was in her home on April 6, 2016, when she heard gunshots. (IV R.R. at 19). While attempting to stop her disabled father, she witnessed two wrecked vehicles one black and another she could not identify. (IV R.R. at 20). The vacant lot Ms. Watson testified of previously is between her home and Curtis Arvik's home. (IV R.R. at 21).

Sean Slover testified he was good friends with Curtis Arvik. The two were attempting to start a business together in early 2016. (IV R.R. at 25). Slover testified to the business venture, buying inventory which was kept at and sold from Arvik's trailer. (IV R.R. at 28). The inventory was typically sold to individuals the two knew but Slover could not say Arvik was not selling to other individuals. (IV R.R. at 28). Arvik arrived at Slover's home the morning of April 6, 2016, to prepare their quarterly tax returns. After a brief time, the decision was made to return and continue the tax returns at Arvik's home. (IV R.R. at 29-30). Arvik left approximately 15 minutes prior to Slover. (IV R.R. at 31). The time to travel between the two residences would take 10-12 minutes. (IV R.R. at 32). After leaving his residence Slover received a phone call which he can only remember being told of gunshots

and something dealing with Arvik. (IV R.R. at 33). This phone call came from one of the neighbors. (IV R.R. at 35). Upon arrival at Arvik's trailer park Slover witnessed the ambulance leaving. (IV R.R. at 33). Slover testified from the State's exhibits, photographs of Arvik's residence and the condition the photo's displayed of Arvik's residence was not the condition typical of the residence. (IV R.R. at 40-44). Slover testified he did not know of Arvik having any enemies. (IV R.R. at 45). Additionally, Slover testified Arvik had two Pomeranians. (IV R.R. at 26).

John Johnston a plumber leaving a job testified while traveling on County Road 58 going towards Highway 288 he slammed on his brakes to avoid the vehicle in front of him. He witnessed a debris field developing in front of the vehicle he was following. (IV R.R. at 48). He described witnessing two vehicles in a ditch, (IV R.R. at 50), and a red truck with damage on the roadway. (IV R.R. at 53). Johnston testified the Malibu, the vehicle earlier described as being driven by Wilson was attempting to get out of the ditch. The driver of the red truck, Arvik, got out and approached the Malibu and he was yelling at the driver of the Malibu. (IV R.R. at 53). Wilson exited the Malibu and began going towards the red truck. Arvik approached Wilson and an altercation began in the street. Arvik began backing away from Wilson when Wilson shot Arvik. Arvik stumbled and fell into the ditch. (IV R.R. at 54). Wilson fled in Arvik's truck. (IV R.R. at 55). Johnston testified he called 9-1-1. (IV R.R. at 56).

Johnston did not see anyone running from the scene and only witnessed Wilson and Arvik. (IV R.R. at 58). He continued to testify to the details of his 9-1-1 call and the actions of other bystanders attempting to help.

Jon McDonald in 2016 was a deputy constable with Brazoria County Precinct 4. (IV R.R. at 63). McDonald testified while at the precinct office and speaking with Deputy Ashburn, Ashburn received a dispatch for a disturbance in progress. McDonald advised dispatch he would backup Ashburn. (IV R.R. at 64). While on route dispatched advised shots had been fired with a description of a damaged red truck. McDonald testified they recognized the described red truck and began a pursuit. The red truck then turned into a subdivision. (IV R.R. at 66). McDonald testified prior to stopping, the driver threw out a handgun as he turned a corner. McDonald approached the vehicle and ordered the driver to exit the vehicle. (IV R.R. at 67). After taking the driver into custody, a Pomeranian was discovered in the back seat of the truck. (IV R.R. at 70). McDonald additionally located a handgun magazine he believed to be for the handgun thrown from the truck. (IV R.R. at 73). McDonald had no additional involvement in the investigation of the case. (IV R.R. at 71).

Reyna Villa in 2016 worked at the Handi Stop in Pearland, Texas. (IV R.R. at 75). While working an individual walked in. This individual Ms. Villa described as

dark skinned, bloody, and muddy. (IV R.R. at 77). After obtaining a fountain drink the individual asked to use the store phone. Ms. Villa agreed, and he made a call. (IV R.R. at 78-79). After he made the phone call he walked out of the store. Ms. Villa did not see where he went after leaving. (IV R.R. at 80). Ms. Villa did not identify Appellant during trial.

Stephen Buchanan testified in 2016 he was employed with the Brazoria County Sheriff's Office as a criminal investigator. (IV R.R. at 86). On April 6, 2016, Buchanan was in neighborhood near the offense with another investigator, Clint Lobpries, working on a missing person case. (IV R.R. at 87-88). After hearing Brazoria County dispatched advised of shots fired the two investigators went to the location of the offense. Upon arrival he witnessed EMS working on Arvik and met with John Johnston. (IV R.R. at 88). After speaking with Johnston, Buchanan spoke with Charles Terry who pointed out shell casings. (IV R.R. at 89). Investigator Buchanan then spoke with William Watson who did not provide any useful information. (IV R.R. at 91). Buchanan then spoke with Mr. Watson's daughter Kathleen learning the maintenance person for the trailer park. After speaking with the maintenance person, Buchanan followed the tow vehicle taking the Crown Victoria the Sheriff's department for processing. (IV R.R. at 92). While at the Sheriff's department, Buchanan learns of a black male, bloody and muddy walking

into the Handi Stop. This is important due to the location and the knowledge two Black males had fled the accident location, a muddy ditch. (IV R.R. at 93-94). Buchanan obtained video surveillance footage from the Handi Stop on April 7, 2016, that provided support of the individual described by Ms. Villa. (IV R.R. at 95). After collecting the video Buchanan turned it over to the lead investigator, James Wolfe. (IV R.R. at 96). Buchanan was able to retrieve two numbers dialed on the phone. (IV R.R. at 98).

Teresa Harris testified she discovered a jacket on her property located on the corner of Angelina and Central which is adjacent to County Road 58. The jacket was discovered after a day she understood a shooting took place. (IV R.R. at 111). The jacket was located in her chicken coop. (IV R.R. at 112). First, believing the jacket may belong to one of the children she took the jacket to the house. After learning the jacket did not belong to a member of the family and remembering the offense that had occurred the day before she contacted the police. (IV R.R. at 114).

Nicholas Black, a patrol deputy with the Brazoria County Sheriff's Office on April 6, 2016. (IV R.R. at 121). Deputy Black was dispatched to a residence in Rosharon, Texas and in the proximity of Manvel, Texas with regards to a handgun being found on the property. (IV R.R. at 122-123). At the residence he meets with the owner who guided him to a location behind her shed. She then pointed out a

black Springfield XD 45 caliber handgun in the grass. (IV R.R. at 125). Deputy Black collected the firearm and while clearing the weapon, discovered a spent casing in the chamber. (IV R.R. at 128). Black then secured the weapon in the evidence lockers located at the Sheriff's Office. (IV R.R. at 128). Deputy Black could not testify who placed the weapon at the found location or when it was disposed. (IV R.R. at 132).

Brandi Hargrave a crime scene investigator with the Brazoria County Sheriff's Office testified she was contacted to photograph and collect evidence located at the Cold River Ranch subdivision. (IV R.R. at 137). Hargrave took photographs of the vehicle and weapon found in the road and collected the firearm for evidence. (IV R.R. at 138). Additionally, upon returning to the jail she photographed Wilson. (IV R.R. at 139). These photographs and the weapon collected were introduced through Hargrave's testimony.

Emma Henrie, assistant medical examiner at the Harris County Institute of Forensic Sciences. (V R.R. at 8). Dr. Henrie performed an autopsy on a 43-year-old gentleman by the name of Curtis Richard Arvik. (V R.R. at 11). The autopsy found Arvik suffered from two gunshot wounds. (V R.R. at 11). One wound of the abdomen and one over the right hip. (V R.R. at 12). The first wound to the abdomen is a very close type of entrance gunshot wound. Following its path, Dr. Henrie

testified it injured the small intestine and the large intestine as well as one of the major arteries in the pelvis. The other gunshot wound over the right hip was noted to skim underneath the skin. (V R.R. at 12). The bullet collected from the pelvis of Arvik was provided to the Brazoria County Sheriff's Office. (V R.R. at 13). Dr. Henrie testified the cause of death was a gunshot wound of the abdomen and right lower extremity. (V R.R. at 13). Mr. Arvik also had a few nonspecific scrapes or abrasions over his knees and left arm. (V R.R. at 13).

Royland Tubbs on April 6, 2016, was an I.D. Officer with the Brazoria County Sheriff's Office. (V R.R. at 30). Royland Tubbs was dispatched to the scene involving the vehicles involved in the accident and the shooting of Arvik. Upon arrival he started processing the scene. (V R.R. at 31). Following this, Tubbs went to the residence and photographed items outside of the home of Arvik. (V R.R. at 34). The following day Tubbs was to process inside the residence of Arvik. (V R.R. at 36). During the investigation of Arvik's residence Tubbs retrieved a DVR system from the home. (V R.R. at 37). Tubbs additionally collected ammunition, a green leafy substance, the identification of a female, and DNA swabs. (V R.R. at 38). Tubbs testified the jacket collected from the chicken coop was tested for DNA. (V R.R. at 43). A surveillance video and receipt were obtained from a Home Depot in Houston. (V R.R. at 45). Tubbs collected State's exhibit #22, a Samsung Galaxy cell phone and

State's exhibit #25, a cell phone, from the initial scene, the area of the shooting. (V R.R. at 47-48). Tubbs collected State's exhibit #54, a LG cell phone, from the Malibu involved in the crash and driven by Wilson. (V R.R. at 50). Cartridge casings located at the initial scene, State's exhibits #16, #17, and #20, were additionally collected. (V R.R. at 51-54). The bullet collected from Avrik's body, State's exhibit #27 and the blood stain card of Avrik, was obtained from the Medical Examiner. (V R.R. at 59 and 67). Tubbs testified State's exhibit #22, the Samsung cell phone was collected from Arvik's boot. (V R.R. at 173). Additionally, State's exhibit #15, a cell phone was provided by a neighbor, Arron Jones. (V R.R. at 176). Tubbs testified State's exhibit #37, a crowbar, and the driver's license of Quentin Lewis, State's exhibit #90, was collected from the Crown Victoria. (VI R.R. at 17 and 20). Tubbs collected State's exhibit #67, a buccal swab of Lewis and State's exhibit #68 of Wilson. (VI R.R. at 34). A swab, State's exhibit #91, was collected from the trigger area of State's exhibit #12, (VI R.R. at 38), and State's exhibit #69 from the leather jacket recovered from the chicken coop. (VI R.R. at 39).

The defense provided the jury with the lack of investigation performed by Brazoria County. Tubbs failed to process the chicken coop or make any attempts to recover evidence from the chicken coop. (VI R.R. at 46). Tubbs failed to process or search the area the Springfield handgun was discovered including any attempt to

discover when the handgun was placed in the area. (VI R.R. at 48-49). Tubbs failed to obtain prints from within Arvik's residence. (VI R.R. at 50-51). Tubbs failed to perform a comparison analysis of the crowbar, State's exhibit #37, with the back door of Arvik's residence. (VI R.R. at 52). Tubbs cannot testify if the cell phones were dusted for prints. (VI R.R. at 53). Tubbs testified no items recovered tie Appellant to the Crown Victoria, Malibu, or Arvik's residence. (VI R.R. at 78).

Kent Nielsen, a digital forensic examiner with the Brazoria County Sheriff's Office, (V R.R. at 68), testified he was responsible for processing cell phones and the DVR equipment. (V R.R. at 69). Nielsen obtained and/or created extraction reports for each cell phone collected from the site of the initial shooting and videos from the DVR system. (V R.R. 78-81). Finding the time setting of the DVR system to be incorrect by approximately 23 hours, Nielsen was able to calculate one recording, State's exhibit #87, was made on April 6, 2016, at 10:30. (V R.R. at 81-82). Nielsen's testimony focused on the process and creation of the extraction reports created from State's exhibits #22, #25, and #54.

Shane Windsor, a forensic scientist with the Texas Department of Public Safety Crime Laboratory Division in Jersey Village in the firearm and tool mark section of that laboratory, (V R.R. at 102), testified to is comparison of firearms and associated evidence recovered during the investigation of the offense. (V R.R. at

106). Windsor testified State's exhibit #27, the bullet recovered from Arvik's body was not fired from State's exhibit #10, (V R.R. at 123), the Springfield firearm, and could not be confirmed or eliminated has being fired from State's exhibit #12, the Heckler & Koch firearm. (V R.R. at 124). State's exhibit #20, a cartridge, and State's exhibit #55, the protractile recovered from Arvik's vehicle, was fired from State's exhibit #10. (V R.R. at 121 and 123). State's exhibits #16 and #17 were fired from State's exhibit #12. (V R.R. at 122).

Trina Blunt employed with U.S. Postal Service dated Appellant in 2015 to the first of 2016. (V R.R. at 133). Ms. Blunt testified Appellant used a cell phone which was established in her name. She testified her account was for two cell phones. Her telephone number was (713) 899-9075. (V R.R. at 134). Ms. Blunt testified she was called by Appellant to provide him rides but could not recall if she was called on April 6, 2016. (V R.R. at 135). Ms. Blunt did not testify to picking up Appellant at the Handi Stop convenience store or in the area on April 6, 2016.

James Wolfe was a criminal investigator with the Brazoria County Sheriff's Office in 2016 acting as the lead investigator for offense. (V R.R. at 137). Wolfe first went to the location Gmarkous Wilson was taken into custody. (VI R.R. at 140). Following this Wolfe went to the location of the Crown Victoria and Malibu. (VI R.R. at 140-141). Investigator Wolfe was able to determine the owner of the Crown

Victoria was Quentin Lewis and the operator of the Malibu was Gmarkous Wilson. (VI R.R. at 141). Wolfe was responsible for drafting the search warrants for the residence of Arvik and the three vehicles involved in the investigation. (VI R.R. at 142). Testifying he ordered extractions of each of the cell phones and was able to identify one cell phone as that of Arvik and another located in the Malibu to be that of Wilson. (VI R.R. at 143). The third cell phone, located along the north ditch line of County Road 58, was determined to be the phone of Appellant. (VI R.R. at 144). During the search of Arvik's residence, the digital recording system was discovered with the camera above the front entrance facing out towards the driveway and main entrance of the trailer park. (VI R.R. at 145). Wolfe's investigation revealed recordings made on April 5th and 6th of 2016. Viewing the video footage Wolfe viewed the Crown Victoria at the location the previous day. Additionally, the day of the offense the footage shows a Black male getting into the driver's seat and driving off. (VI R.R. at 145). This footage shows the red Titian pickup arriving at the same time as the individuals were running back to the Crown Victoria. (VI R.R. at 145). The video footage is published to the jury showing the Malibu being driven by Wilson and the Crown Victoria owned by Lewis. (VI R.R. at 145). Forty-two minutes later the video displays the return of Arvik's vehicle providing evidence the windshield had not previously been damaged with a bullet hole as discovered during the

investigation. (VI R.R. at 148). Wolfe testifies the video shows somebody, singular, is running from the residence to the Crown Victoria and getting into the driver's seat. This individual is identified as Quentin Lewis. (VI R.R. at 149). Wilson was identified when arrested. Quentin Lewis was identified through evidence discovered in the Crown Victoria. (VI R.R. at 151). The investigation determined the LG cell phone was that of Gmarkous Wilson. (VI R.R. at 152). The extraction report identified a call from Wilson to a phone owned by Trina Blunt on April 6th during the time recorded by the digital recording system of Arvik's residence and lasting over three hours in that the cell phones were dropped during the incident and never disconnected. (VI R.R. at 153-155). The number of the cell phone of Trina Blunt was a saved contact on Wilson's phone identified as "Big Mitch". (VI R.R. at 157). Additional information was located on the cell phone of Trina Blunt which provided support the cell phone was used by Appellant. (VI R.R. at 157-159). The investigation determined the telephone call made by Appellant from the Handi-Stop was to Trina Blunt. (VI R.R. at 160-161). Investigator Wolfe illuminated the connection of Appellant, and the incident was the location the jacket was discovered, and the location of the .45 caliber pistol was found with a directional reference to the Handi-Stop could be established. (VI R.R. at 163). Wolfe describes a likely reason for a semi-automatic pistol to fail to eject a spent casing was improper

use of the weapon. By improperly holding the weapon while firing the slide of the handgun can be stopped by the webbing of the hand. This can result in an injury similar to that of Appellant. (VI R.R. at 166). Testifying the contents of the security video obtained from Home Depot, Investigator Wolfe identified Quentin Lewis purchasing zip ties and wearing the same clothes as in the security video of Arvik's residence. (VII R.R. at 5). The defense established there is no evidence linking Appellant with the Home Depot purchase, the Crown Victoria, the residence of Arvik, and the .45 caliber handgun found two weeks after the incident. (VII R.R. at 9-10). No blood was discovered on this handgun and no testing revealed DNA connecting Appellant to it. (VII R.R. at 12). Wolfe testified the cell phone associated with Appellant was not discovered by the police investigating the area but was provided by a neighbor approximately six hours after the incident. (VII R.R. at 15).

Wolfe testified he was present when Investigator Goolsby collected DNA buccal swabs from Appellant. (V R.R. at 139). Defense additionally established no .45 caliber casing was found near the residence of Arvik and Wolfe could not definitively establish when the pickup driving by Arvik received the bullet whole. (VII R.R. at 18). Defense established the investigative team failed to swab areas of the jacket that could contain DNA samples. (VII R.R. at 26). Investigator Wolfe testified there is no evidence Appellant had possession of the .45 caliber handgun and that

no witness observed Appellant with the .45 caliber handgun. (VII R.R. at 38). Defense alluded to the possibility Appellant was not in possession of the cell phone owned by Trina Blunt the day of the incident. (VII R.R. at 58). In response, the State provided evidence a text message was sent to Trina Blunt shortly before the incident stating "Trina, if all else fails just know I truly love you, regardless of the situation." (VII R.R. at 61). The State through Wolfe testified a blood stain located on the jacket located near the crime scene did have Appellant's DNA. (VII R.R. at 64).

Amanda Domer testified she is a section supervisor in the biology and DNA section of the Texas Department of Public Safety Crime Lab in Houston. Her main duties are to manage a team of four analysts, oversee their casework, their workflow tasks, to help aid in their professional and personal development, oversee their time sheets, and perform other everyday supervisor tasks. (VI R.R. at 84). Ms. Domer was responsible for collecting DNA samples of the nineteen items submitted by Brazoria County but did not perform the testing. This was performed by another individual. (VI R.R. at 101 and 102).

Kathleen McKinney, who works for the Texas Department of Public Safety Crime Laboratory in Houston, Texas as a supervisor in the DNA section and a forensic scientist, (VI R.R. at 105), testified to the results of the DNA analysis of the nineteen items submitted for testing by Brazoria County. The swab of the north fence did not

reveal an interpretable DNA profile. (VI R.R. at 114). Testing of the swab of the kitchen cabinets excluded Appellant as a contributor. (VI R.R. at 116). Testing of the swab of the steering wheel, item 02-03-AA, excluded Appellant as a contributor. (VI R.R. at 117). Testing of the swab of the crowbar excluded Appellant as a contributor. (VI R.R. at 119). The testing of the swab of the jacket concluded a strong probability Appellant as the contributor. (VI R.R. at 121). No interpretable DNA profiles were previously obtained to match the tested swab from the trigger area of the Springfield handgun. (VI R.R. at 122). Testing of the swab of the steering wheel, item #02-15-AA, excluded Appellant as a contributor. (VI R.R. at 123). No interpretable DNA profiles were previously obtained to match the tested swab from the Springfield handgun. (VI R.R. at 123).

POINT OF ERROR ONE

THE RECORD IS LEGALLY INSUFFICIENT TO ESTABLISH APPELLANT WAS ONE OF THE THREE INDIVIDUALS WHO COMMITTED THE OFFENSE ALLEDGED IN COUNTS ONE AND TWO.

The evidence is insufficient to support Appellant's conviction for burglary of a habitation and Aggravated Assault in that the State failed to prove, beyond a reasonable doubt, that Appellant was identified as one of three individuals involved with the offense. The jury in this case was instructed that it must determine whether

the State proved beyond a reasonable doubt that Appellant did then and there intentionally or knowingly enter a habitation, owned by Curtis Arvik, without the effective consent of Curtis Arvik, with the intent to commit theft, either individually or as a party and did then and there intentionally or knowingly threaten Curtis Arvik with imminent bodily injury and did then and there use or exhibit a deadly weapon, to wit: a firearm, either individually or as a party. (VII R.R. 84). Due process requires that the State prove, beyond a reasonable doubt, all elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In a sufficiency review, the Court reviews all the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893 (Tex.Crim.App. 2010); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex.Crim.App. 2005). It is not the duty of the reviewing Court to engage in a second evaluation of the weight and credibility of the evidence. It is only the duty of the reviewing Court to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App. 1993); *Harris v. State*, 164 S.W. 3d 775, 784 (Tex.App. – Houston [14th Dist.] 2005, pet. ref'd). Evidence is legally insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41-42, 102

S. Ct. 2211, 72 L. Ed. 2d 652 (1982). The appellate court's role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Deference is given to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. The appellate court must "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The evidence fails to establish the Appellant was an individual involved in the offenses charged. The testimony indicates one individual was recorded by a surveillance camera exiting a vehicle and going to the rear of Curtis Arvik's residence, a habitation that was discovered to have been vandalized. (VI R.R. 147). However, only one individual is identified, Quentin Lewis, the owner of the white Crown Victoria. (VI R.R. 147). Appellant is not identified. No witness identified Appellant as one of the three individuals involved. No DNA ties Appellant to any weapon retrieved. No DNA ties Appellant to the inside of the habitation. No DNA ties Appellant to the vehicles used in the offense. And no individual identifies Appellant with the individual calling from the convenience store following the offense.

Appellant's girlfriend at time, Trina Blunt, a postal worker does not recall receiving a request to pick Appellant up on the day of the offense and did not testify she did pick him up at or near the convenience store. (V R.R. at 135). No witness testifies to seeing Appellant flee the scene, the Clerk of the convenience store fails to identify Appellant, and I.D. Officer Royland Tubbs testified no items recovered tie Appellant to the Crown Victoria, Malibu, or Arvik's residence. (VI R.R. at 78). Investigator Wolfe testified to speculation how the individual in the store, presumably Appellant injured his hand causing the bleeding witnessed by the store clerk and the reasoning of the location of the weapon and leather jacket subsequently discovered. However, no blood was found on the weapon discovered. This, the weapon shown by forensic testing to be the weapon that fired the projectile into Arvik's vehicle.

The State bases its entire theory Appellant was involved on the discovery of the cell phone he was provided by his girlfriend, the person located at a local convenience store calls Appellants girlfriend, a leather jacket found in the area contains DNA that Appellant could not be excluded from, and the individual observed in the convenience store appeared to have an injury to his hand in that it appeared there was blood on his hand. (IV R.R. at 81).

The State depends on Appellant's cell phone which was discovered abandoned along a ditch six hours after the investigation began by an someone

other than a Police Officer and an individual's request to use a local business phone to call Appellant's girlfriend. This the State's ask the jury to speculate this individual did not have possession of a cell phone and the rational conclusion is it is Appellant was using the store's phone because he lost his cell phone when fleeing. With this the State is asking the jury to tie Appellant to the location of the offense. However, there is no evidence Appellant was the user of the phone during the offense or that he was the individual using the cell phone to act as a party to the offense.

The discovery of the leather jacket being discarded by Appellant additionally requires speculation. No witness testified observed an individual wearing a leather jacket. No witness could testify when the DNA of Appellant could have been transferred to the jacket or that Appellant was wearing the jacket before it was discarded.

Appellant's girlfriend at the time of the offense testified she did provide Appellant with rides but could not remember providing him with a ride on the day of the offense. It should be noted the State did not inquire if she had at any time picked Appellant up at the convenience store in question or in the area. Thus, failing to provide more than speculation it was Appellant in the convenience store.

Wolfe speculates a plausible reason for a semi-automatic pistol to fail to eject a spent casing was improper use of the weapon. By improperly holding the weapon

while firing the slide of the handgun can be stopped by the webbing of the hand. This can result in an injury similar to that of the individual at the convenience store. (VI R.R. at 166). The testimony is that the individual at the convenience store had blood on his hands. There is no evidence where the blood has come from or the individual suffered a cut to his hand or the webbing of the hand. Additionally, no blood is found on the weapon Wolfe is speaking of. The evidence to fails to identify Appellant beyond speculation.

Tying Appellant to the offense requires the jury to speculate. "Although the jury is free to make inferences from the evidence presented, the conviction here was based on pure speculation." *Gross v.* State, 380 SW 3d 181, 188 (Tex. Crim. App. 2012): Martin *v. State*, 753 SW 2d 384, 387 (Tex. Crim. App. 1988): *Valdez v. State*, 623 SW 2d 317, 321 (Tex. Crim. App. 1988). "…juries are permitted to draw multiple reasonable inferences from the evidence (direct or circumstantial), but they are not permitted to draw conclusions based on speculation." *Hooper v. State,* 214 S.W.3d 9, 16 (Tex.Crim.App. 2007).

The evidence is insufficient to support the judgment of the jury that Appellant committed Burglary of a Habitation with the intent to commit theft and an Aggravated Assault as charged within the indictment. The State's evidence fails to show Appellant was an individual who committed the offenses alleged beyond a

reasonable doubt. To conclude, otherwise, would be based on mere speculation. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

POINT OF ERROR TWO

THE RECORD IS LEGALLY INSUFFICIENT TO ESTABLISH APPELLANT COMMITTED THE OFFENSE AS ALLEDGED IN COUNT ONE

If the Court finds there is sufficient evidence to establish Appellant was present at the time an offense occurred, mere presence is not sufficient to sustain a conviction. *Gross v. State,* 352 S.W.3d 238, 241 (Tex.App.-Houston [14th Dist.] 2011, pet. granted). "[M]ere presence of a person at the scene of the crime, either before, during, or after the commission of the offense, or even flight from the scene, without more, is insufficient to sustain a conviction of one as a party to the offense." *Thompson v. State,* 697 S.W.2d 413, 417 (Tex.Crim.App.1985). "Although the jury is free to make inferences from the evidence presented, the conviction here was based on pure speculation." *Gross v.* State, 380 SW 3d 181, 188 (Tex. Crim. App. 2012): Martin *v. State*, 753 SW 2d 384, 387 (Tex. Crim. App. 1988): *Valdez v. State*, 623 SW 2d 317, 321 (Tex. Crim. App. 1988). There is no evidence Appellant entered the habitation or was a party to another entering the habitation.

The evidence is insufficient to support Appellant's conviction for burglary of a habitation in that the State failed to prove, beyond a reasonable doubt, that Appellant entered the habitation with an intent to commit theft. The jury in this case was instructed that it must determine whether the State proved beyond a reasonable doubt that Appellant did then and there intentionally or knowingly enter a habitation, owned by Curtis Arvik, without the effective consent of Curtis Arvik, with the intent to commit theft, either individually or as a party. (VII R.R. 84). Due process requires that the State prove, beyond a reasonable doubt, all elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In a sufficiency review, the Court reviews all the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893 (Tex.Crim.App. 2010); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex.Crim.App. 2005). It is not the duty of the reviewing Court to engage in a second evaluation of the weight and credibility of the evidence. It is only the duty of the reviewing Court to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App. 1993); *Harris v. State*, 164 S.W. 3d 775, 784 (Tex.App. – Houston [14th Dist.] 2005, pet. ref'd). Evidence is legally insufficient

when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41-42, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). The appellate court's role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Deference is given to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. The appellate court must "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The evidence fails to establish the Appellant entered the habitation with an intent to commit theft, either individually or as a party. The evidence indicates Quentin Lewis was recorded by a surveillance camera exiting a vehicle and going to the rear of Curtis Arvik's residence, a habitation that was discovered to have been vandalized. (VI R.R. 147).

The State bases its entire theory that entry was made into the habitation on the fact that the home had been vandalized. (IV R.R. at 40). However, this fails to establish those leaving the premises are responsible for unlawful entry. The fact a witness testified the condition of the home after the death of Arvik was

uncharacteristic of Curtis Arvik, this does not establish the condition of the residence was the responsibility of Appellant beyond a reasonable doubt. (IV R.R. at 44). Processing the residence provided no evidence of Appellant's DNA. (VI R.R. at 116).

The State may rely on Appellant's fleeing as support of his guilt of Burglary of a Habitation. The State fails to make this argument to the jury and thus the jury did not have the benefit of considering the act of fleeing. Additionally, this argument would be misplaced in that any act of fleeing fails to show Appellant aided or encouraged the entry into a habitation. "Acts done after the [offense] was completed [do] not make [the accused] a party to the offense." *Morrison v. State,* 608 S.W.2d 233, 235 (Tex. Crim. App. 1980). "[T]he evidence must show that at the time of the commission of the offense the parties were acting together, each doing some part of the execution of the common purpose." *Brooks v. State,* 580 S.W.2d 825, 831 (Tex. Crim. App. 1979). Thus, post-offense conduct alone cannot form the basis for an accused to be considered a party to the offense.

> "For a defendant to be considered a party to an offense, he must commit some culpable act before or during the commission of the offense. *Morrison,* 608 S.W.2d at 235; *see also Cordova,* 698 S.W.2d at 111 (explaining that any agreement to accomplish a common purpose must have been made before or contemporaneously with the criminal event)."

Gross, 352 S.W.3d at 243-244.

Indulging in the inference Appellant was at the scene of the offense, this inference does not support a prior or contemporaneous plan to burglarize the habitation owned by Curtis Arvik. The State's evidence fails to show Appellant was seen entering or had an intent to enter the habitation. The State's evidence fails to show Appellant planned, prior to the offense, to assist another individual to burglarize a habitation. To conclude otherwise would be based on mere speculation. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

The evidence is insufficient to show Appellant entered the habitation or acted as a party to the offense.

POINT OF ERROR THREE

THE RECORD IS LEGALLY INSUFFICIENT TO ESTABLISH APPELLANT COMMITTED THE OFFENSE AS ALLEDGED IN COUNT TWO

The evidence is insufficient to support Appellant's conviction for Aggravated Assault under TEX. PEN. CODE Sec. 22.02 (a) (2). The jury in this case was instructed that it must determine whether the State proved beyond a reasonable doubt that Appellant did then and there intentionally or knowingly threaten Curtis Arvik with imminent bodily injury and did then and there use or exhibit a deadly weapon, to wit: a firearm, either individually or as a party. (VII R.R. at 84). Due process requires that the State prove, beyond a reasonable doubt, all elements of the crime charged.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In a sufficiency review, the Court reviews all the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893 (Tex.Crim.App. 2010); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex.Crim.App. 2005). It is not the duty of the reviewing Court to engage in a second evaluation of the weight and credibility of the evidence. It is only the duty of the reviewing Court to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App. 1993); *Harris v. State*, 164 S.W. 3d 775, 784 (Tex.App. – Houston [14th Dist.] 2005, pet. ref'd). Evidence is legally insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41-42, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). The appellate court's role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Deference is given to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. The appellate court must "ensure that the evidence presented actually supports a conclusion that the defendant committed"

the criminal offense of which he is accused. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

With respect to the above argument put forward in point of error two, Appellant asserts that a finding by the Court the evidence is insufficient to find Appellant committed the act of burglary of a habitation, then the evidence is further insufficient to find Appellant was a party to aggravated assault committed in furtherance of a crime. Recognizing TEX. PENAL CODE § 7.02(b) establishes if in the attempt to carry out a conspiracy to commit one felony another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy. Therefore, if the evidence is insufficient to show Appellant committed the offense of burglary of a habitation either individually or has a party, the evidence is insufficient to find Appellant committed aggravated assault as a party under TEX. PENAL CODE § 7.02(b).

The issue that remains, is the evidence insufficient to find Appellant committed aggravated assault individually or as a party. Appellant in recognizing count two can be considered a separated and individual charge by the jury without a finding of an attempt to carry out a conspiracy to commit burglary of a habitation,

Appellant asserts the evidence is insufficient to sustain the judgment of the trial court finding Appellant guilty of aggravated assault individually or as a party.

If the Court finds there is sufficient evidence to establish Appellant was present at the time an offense occurred, again Appellant asserts mere presence is not sufficient to sustain a conviction. *Gross v. State,* 352 S.W.3d 238, 241 (Tex.App.-Houston [14th Dist.] 2011, pet. granted). "[M]ere presence of a person at the scene of the crime, either before, during, or after the commission of the offense, or even flight from the scene, without more, is insufficient to sustain a conviction of one as a party to the offense." *Thompson v. State,* 697 S.W.2d 413, 417 (Tex.Crim.App.1985). The evidence fails to establish Appellant threatened Curtis Arvik with imminent bodily injury and did then and there use or exhibit a deadly weapon, to wit: a firearm, either individually or as a party. The evidence indicates Quentin Lewis was captured on a video surveillance camera exiting a vehicle and going to the rear of Curtis Arvik's residence, a habitation that was discovered to have been vandalized. Quentin Lewis is then again recorded running from the home and getting into a vehicle as the owner of the residence is arriving home. (VI R.R. at 145).

There is no evidence Appellant was with Quentin Lewis as he speeds away and responsible for firing a weapon that resulted in damage to Curtis Arvik's vehicle by a projectile from a firearm or was a party to another firing a weapon that resulted

in damage to Curtis Arvik's vehicle. The State presents no witness to testify who fired the weapon. Investigator Wolfe speculates it was Appellant at the convenience store and was responsible for firing the weapon at Arvik's vehicle by alluding that the location of the convenience store Appellant is presumed to be witnessed, the location the leather jacket was discovered, and the location State's exhibit #10, the Springfield firearm was discovered, had a directional correlation to the location of the offense. (VI R.R. at 166). Wolfe continues with his speculation by describing a possible reason for a semi-automatic pistol to fail to eject a spent casing was improper use of the weapon. By improperly holding the weapon while firing the slide of the handgun can be stopped by the webbing of the hand. This can result in an injury. (VI R.R. at 166). However, as previously argued above the testimony is that the individual at the convenience store had blood on his hands. There is no evidence where the blood has come from, or the individual suffered a cut to his hand or the webbing of the hand. Additionally, no blood is found on the weapon Wolfe is speaking of. The evidence fails to identify Appellant beyond speculation. Verdicts cannot be based on speculation.

> "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented..... juries are permitted to draw multiple reasonable inferences from the evidence (direct or circumstantial), but they are not permitted to draw conclusions based on speculation."

Hooper v. State, 214 S.W.3d 9, 16 (Tex.Crim.App. 2007). The evidence shows the projectile removed from Arvik's vehicle was fired from State's Exhibit #10. No DNA connects Appellant to State's Exhibit #10. (VI R.R. at 122 and 123). No evidence supports a finding of Appellant's blood, that which would have been deposited on the weapon had Appellant suffered the injury Wolfe speculates resulted from the poor handling of the firearm when the shot was fired. It is important to note no casing was discovered in the area the presumed firing at Arvik's vehicle occurred and Investigator Wolfe cannot establish when the projectile was fired at Arvik's vehicle. (VII R.R. at 19). The evidence of the State fails to discount Wilson was not in possession of the firearm when it was disposed. The evidence fails to establish Wilson's possible direction and location when fleeing. The State has no evidence Appellant handled the weapon introduced and shown to be the weapon firing the projectile into Arvik's vehicle. (VI R.R. at 163). "Although the jury is free to make inferences from the evidence presented, the conviction here was based on pure speculation." *Gross v.* State, 380 SW 3d 181, 188 (Tex. Crim. App. 2012): Martin *v. State*, 753 SW 2d 384, 387 (Tex. Crim. App. 1988): *Valdez v. State*, 623 SW 2d 317, 321 (Tex. Crim. App. 1988).

Again, Appellant argues the State may rely on Appellant's fleeing as support of his guilt of an Aggravated Assault either by his own actions or that of another. To this Appellant asserts the State fails to make this argument to the jury and thus the jury did not have the benefit of considering the act of fleeing. Additionally, this argument would be misplaced in that any act of fleeing fails to show Appellant aided or encouraged an aggravated assault of Curtis Arvik being committed during the criminal episode. "Acts done after the [offense] was completed [do] not make [the accused] a party to the offense." *Morrison v. State,* 608 S.W.2d 233, 235 (Tex. Crim. App. 1980). "[T]he evidence must show that at the time of the commission of the offense the parties were acting together, each doing some part of the execution of the common purpose." *Brooks v. State,* 580 S.W.2d 825, 831 (Tex. Crim. App. 1979). Thus, post-offense conduct alone cannot form the basis for an accused to be considered a party to the offense.

> "For a defendant to be considered a party to an offense, he must commit some culpable act before or during the commission of the offense. *Morrison,* 608 S.W.2d at 235; *see also Cordova,* 698 S.W.2d at 111 (explaining that any agreement to accomplish a common purpose must have been made before or contemporaneously with the criminal event)."

Gross, 352 S.W.3d at 243-244.

Indulging in the inference Appellant was at the scene of the offense, this inference does not support a prior or contemporaneous plan to commit an Aggravated Assault. There is no evidence Appellant committed an aggravated assault individually or as a party to the Aggravated Assault. No evidence supports Appellant was aware another individual had the propensity to threaten another individual with a firearm. The State's evidence fails to show Appellant himself committed the act of Aggravated Assault as charged within the indictment or as a party to Aggravated Assault as charged within the indictment. To conclude, otherwise, would be based on mere speculation. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

The evidence is insufficient to show Appellant committed the offense of Aggravated Assault or acted as a party to the offense.

POINT OF ERROR FOUR

THE TRIAL COURT ERRED IN ORDERRING FEES TO BE REPAID BY THE APPELLANT

Per *Wiley v. State*, 410 S.W.3d 313 (Tex. Crim. App. 2013) if a defendant has been found indigent, this indigence is presumed to remain unless the record can show the defendant's financial status has changed. Appellant was found indigent and appointed trial counsel on November 28, 2018. (C.R. at 10). Following trial, the

trial court found Appellant indigent and appointed counsel for appeal on September 17, 2024. (C.R. at 96). Additionally, on September 17, 2024, the trial court signed an "Order to Withhold Funds." (C.R. at 95). This order directs the Texas Department of Criminal Justice to withhold funds from Appellants inmate trust account to repay unpaid court cost, fees and/or fines and/or restitution. The record does not contain evidence appellant financial status changed prior to the judgement and order to withhold funds signed by the trial court. The findings of indigency and order to withhold funds are in conflict in that the trial court may not order an indigent Appellant to repay cost. The record is insufficient to support Appellant's financial status has changed and the trial court erred in ordering Appellant to pay reimbursement fees and cost.

Appellant request this Honorable Court to reform the judgement to reflect Appellant is not ordered to repay said fees unsupported by the record.

PRAYER

WHEREFORE, PREMISE CONSIDERED, Appellant respectfully prays this Honorable Court sustain Appellants points of Error one, two, and three, reverse the trial courts judgement, and enter an acquittal. In the alternative Appellant

respectfully prays this Honorable Court sustain Appellants point of Error four and modify the judgment.

Respectfully Submitted,
By: /S/ Perry Stevens
Perry Stevens
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to Tom Selleck, 111 East Locust, Suite 408A, Angleton, Texas 77515, on March 3, 2025.

/S/ Perry Stevens
Perry Stevens
Attorney for Appellant
State Bar #00797496

CERTIFICATE OF COMPLIANCE

I hereby certify, per Texas Rules of Appellate Procedure 9.4i (1), 9.4i (2) (B), and 9.4i (3), this brief is a computer-generated document, and the computer program used to prepare the document calculates the word count to be 8766 words.

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