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NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20220D01247

IN THE 409th DISTRICT COURT OF EL PASO COUNTY, TEXAS

THE STATE OF TEXAS	§	
	§	
VS.	§	CAUSE NO. 2022ODO1247
	§	
RICARDO MARQUEZ	§	

AMENDED MOTION FOR NEW TRIAL

RICARDO MARQUEZ, Defendant, by and through his Attorneys of Record, and pursuant to Tex. R. App. P. 23.1, moves this Honorable Court to grant him a new trial. In support of this Motion, Mr. Marquez offers the following:

PRELIMINARY MATTER

At the conclusion of the punishment phase of trial, the Court sentenced Mr. Marquez to a term of imprisonment for 75 years. While that sentence is within the statutory range for a conviction of 1st Degree Murder, it is not clear if the trial court considered the defense of sudden passion. Mr. Marquez respectfully requests this Honorable Court to make a specific finding for or against sudden passion. Doing so will enable the Defense to properly raise unlawful sentence if the Court did in fact find in favor of the Defense on sudden passion. To preserve

an issue for appeal, the record must reflect that a complaint was made to the trial court and that the trial court either ruled or refused to rule on the complaint. Tex.R.App. P. 33.1(a); *see also Briggs v. State,* 789 S.W.2d 918, 924 (Tex.Crim . App.1990) (en banc) (noting that "[e]ven constitutional errors may be waived by failing to object").

INSUFFICIENT EVIDENCE

Evidence adduced at trial was insufficient to support a verdict of guilt by a rational trier of fact. Tex. R. App. P. 23.1(h). *Jackson v. Virginia*, 443 U.S. 307 (1979). While the State was legally entitled to indict Mr. Marquez under a "manner and means unknown" theory, that does not absolve them of the requirement that they prove the *mens rea* element of the offense beyond a reasonable doubt. In this case there was no evidence of an intentional and knowing killing of Erica Gaytan. Thus, there is no way the jury could have eliminated any number of reasonable explanations for Ms. Gaytan's disappearance or conclude that Mr. Marquez intentionally and knowingly killed her without speculating. There is no possible way to link all the circumstantial facts adduced at trial and determine beyond a reasonable doubt that Mr.

Marquez intentionally murdered Erica Gaytan, or intentionally and knowingly caused serious bodily injury which resulted in her death.

Under the *Jackson v. Virginia* standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard when either: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 319 n.11, 320, 99 S.Ct. 2781; *Laster*, 275 S.W.3d at 518. In Mr. Marquez's case, there was NO EVIDENCE probative of the *mens rea* element in this case; intentionally and knowingly.

Beginning with the examination of its witnesses and through its closing argument, the State encouraged the jury to speculate as to how Mr. Marquez might have killed Ms. Gaytan. During the State's closing arguments, in direct response to Mr. Marquez's objections based upon speculation, the Court ordered the jury not to make guesses or speculate about facts not in evidence. Unfortunately, that is exactly what they did. Even if the circumstantial evidence

in this case pointed to Mr. Marquez somehow, it did not show that he possessed the requisite *mens rea* for the offense of murder. In a case that bears an uncanny resemblance to this case, the Fort Worth Court of Appeals in *Stobaugh v. State*, had this to say about a veritable mountain of circumstantial evidence which the State believed proved murder beyond a reasonable doubt:

> Finally, even if—based on the cumulative force of all of the circumstantial evidence presented by the State and detailed above of [defendant's] lies, inconsistent statements, and suspicious post-December 29 conduct—the jury could have logically deduced a conclusion that something happened to [alleged decedent] at the farm on the night of December 29, 2004, and also could have logically deduced that [defendant] was responsible for that something and that the something caused [alleged decedent's] death, no facts or evidence exist from which the jury could—based on these inferences and the surrounding circumstances—also logically have deduced that while that something was occurring, [defendant] possessed the requisite *mens rea* for the offense of murder. *Cf. Hooper,* 214 S.W.3d at 16 (utilizing a hypothetical to explain multiple reasonable inferences from the same set of facts). In other words, the circumstantial evidence, even if it supports an inference that [defendant] did something to [alleged decedent] and that [alleged decedent] died as a result of that something, nonetheless wholly fails to provide the jury with any facts from which the jury could also reasonably infer that the *mens rea* [defendant] possessed when he did that something to [alleged decedent] was the *mens rea* for murder, as opposed to some other *mens rea,* such as the *mens rea* for manslaughter. *See Cavazos,* 382 S.W.3d at 384 (explaining that causing death while consciously disregarding a risk that death will occur is the *mens rea* for manslaughter and that this is a less culpable *mens rea* than the *mens rea* for murder—either by intending to cause serious bodily injury resulting in a death or by intentionally or knowingly causing a death). The jury's finding in this case that [defendant], with the requisite *mens*

> *rea,* committed an act clearly dangerous to human life that resulted in [alleged decedent's] death or intentionally or knowingly caused [alleged decedent's] death is based on speculation and cannot support a finding of guilt beyond a reasonable doubt. *See Megan Winfrey,* 393 S.W.3d at 771.
>
> *Stobaugh v. State*, 421 S.W.3d 787, 867-868 (Tex. App. – Ft. Worth, 2014, no pet.)

While Mr. Marquez does not concede that the evidence showed that he did anything to Ms. Gaytan, the Fort Worth Court of Appeals correctly decided in a similar case that even if the State *had* proved the defendant harmed his wife, the fact is none of the circumstantial evidence in the case amounted to proof of the requisite *mens rea* element. The same situation presents itself here. At best, even if the circumstantial evidence in this case shows that Mr. Marquez did something to Ms. Gaytan, and that something somehow caused her death, the evidence still "wholly fails provide the jury with any facts from which the jury could also reasonably infer that the *mens rea* [Mr. Marquez] possessed when he did that something to [Ms. Gaytan] was the *mens rea* for murder, as opposed to some other *mens rea,* such as the *mens rea* for manslaughter."

IMPROPER JURY DELIBERATIONS

The jury engaged in improper deliberations which violated Mr. Marquez's right to a fair and impartial trial. A defendant is entitled to a new trial "when,

after retiring to deliberate, the jury has received other evidence" or "when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial." *See* Tex. R. App. P. 21.3(f)–(g). "As a general rule it is improper for a juror to perform experiments or demonstrations in the jury room," but such misconduct does not require the granting of a new trial unless "some new fact, hurtful to appellant, was discovered by the examination and experiment." *See McLane v. State*, 379 S.W.2d 339, 342 (Tex. Crim. App. 1964). Whether the jury received such new information is a question of fact for the trial court to decide. *See Tollett v. State*, 799 S.W.2d 256, 259 (Tex. Crim. App. 1990). *Melgar v. State,* 593 S.W.3d 913, 923 (Tex. App.—Houston [14th Dist.] 2020), review dismissed as improvidently granted, No. PD-0243-20, 2022 WL 2240263 (Tex. Crim. App. June 22, 2022).

Following the rendering of the verdict, defense counsel, State prosecutors, and the judge met with members of the jury in the deliberation room and discussed certain aspects of the case. During those discussions, certain facts regarding their deliberations were made known to all parties. The following facts were heard and ascertained by all parties present:

- One juror, a pharmacist, attempted to explain D.N.A. evidence to the other jurors in "layman's terms." In doing so he injected information into the deliberations which were not facts adduced at trial.
- Another juror explained to the other jurors that the neighborhood where the alleged murder occurred was safe enough that Ms. Gaytan could not possibly have been abducted. This fact went directly against one of the defense's alternative theories of the case, that Ms. Gaytan may have decided to walk to her aunt's home late at night that was located a mere fifteen minutes away, and at that time disappeared. Importantly, there was no evidence adduced at trial regarding the relative walking safety of Mr. Marquez's neighborhood.
- Other jurors play-acted an argument that was alleged to have occurred between Mr. Marquez and Ms. Gaytan. In interpreting the cell phone location data and comparing it to Mr. Marquez's description of the events, one juror was able to convince the other juror that it was implausible that Ms. Gaytan would have been in and around Mr. Marquez's location for as long as the cell phone data showed. This juror stated that arguments between him and his own wife never last longer than ten minutes, and at most twenty minutes. These jurors went on to then speculate that Mr.

Marquez must have done something harmful to Ms. Gaytan during the approximately 20-30 more minutes that Ms. Gaytan's cell phone was in and around Mr. Marquez's location.

- Additionally, subsequent discussions between jury members and defense counsel revealed that jurors ignored the official translation of Mr. Marquez's first interview. Instead, jurors who professed proficiency in the Spanish language, translated specific passages to non-Spanish speaking jurors, and used that translation in lieu of the official transcript and translation provided by the Court and agreed upon by the parties.

None of the deliberations discussed above were based upon evidence adduced at trial. None of the deliberations above are based upon reasonable inferences drawn from facts at trial. Indeed, all of them are speculative and based upon the purported expertise of a pharmacist, the domestic circumstances of one juror (and his wife, who was not a juror), and the conviction of one juror that his neighborhood is safe and, therefore, it is impossible that Ms. Gaytan might have been abducted by someone else.

Finally, it is important to note that at least two other jurors believed that Ms. Gaytan might have died from an accident, essentially that Mr. Marquez is as likely to have been guilty of manslaughter as he was murder. While this aspect of

the deliberations was not improper, it establishes that at least two jurors understood that murder had not been proved beyond a reasonable doubt. That they could find no evidence to support either manslaughter or murder only reinforces what we argued above under our insufficiency claim. Because of the improper deliberations, these two jurors gave in to pressure to vote guilty.

VOIR DIRE

A person who is physically unfit to properly discharge the duties of a juror is not qualified or unfit to sit on a jury. Tex. Code Crim. Pro. art. 35.16. The Texas Code of Criminal Procedure states in part that ether party may challenge for cause any potential "juror [that] has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case...". Tex. Code Crim. Pro. art. 35.16 (a) (5). In *Black v. Continental Casualty Co.*, the Texas appellate court overturned a jury verdict for the defendant after it was found that one of twelve jurors was unable to hear the testimony of witness. *Black v. Continental Casualty Co.*, 9 S.W.2d 743, 744 (Tex. Civ. App.--Austin 1928, no writ). In its reasoning the court stated, "[o]bviously a juror whose vision or

hearing is so defective that he cannot hear material testimony, *or see the conduct of the witness on the stand*, cannot as an impartial juror pass upon the credibility of the witness . . . ." *Id.* (emphasis added). Meaning, jurors must be able to observe the demeanor of witnesses on the stand and the expression on the witnesses' faces to properly evaluate the credibility of testimony and the weight to be given to it.

In this case, potential juror #61, Lee Vasquez, told the court on multiple occasions in response to multiple questions from the State, the defense, and even the court, that he had such a defect in his eyesight that he was incapable of properly evaluating the evidence. Upon Defendant's challenge for cause, the court called in Mr. Vasquez, where a demonstration was held in the courtroom to determine how debilitated his eyesight truly was. Mr. Vasquez was instructed to walk past the jury box and alert the court once he could clearly make out the expressions on an individual seated in the jury box. Mr. Vasquez walked more than 6 feet in front of the box before telling the court that he could make out such features. The defense thereupon re-urged its motion to strike Mr. Vasquez for cause, which the trial court denied. The defense was subsequently forced to use one of its preemptory strikes to remove Mr. Vasquez from the jury pool. The court later denied the defenses' motion for additional strikes and the defense

specifically noted that the objectionable juror that made the jury, preserving the issue for appeal. This objectionable juror was the one who later introduced the new evidence regarding the relative walking safety of Mr. Marquez's neighborhood.

If a trial judge errs in overruling a challenge for cause against a venire member, then the appellant must show that he was harmed because he was forced to use a peremptory strike to remove the venire person and that he suffered a detriment from the loss of that peremptory strike. *Chambers v. State,* 866 S.W.2d 9, 22 (Tex. Crim. App. 1993) (citing to *Demouchette v. State,* 731 S.W.2d 75, 83 (Tex. Crim. App. 1986)). Error is preserved for review by an appellate court only if appellant (1) used all of his peremptory strikes, (2) asked for and was refused additional peremptory strikes, and (3) was then forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause (or granted him additional peremptory strikes so that he might strike the juror). *Id.* at 23. To establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record that he used a peremptory strike to remove the venireperson and thereafter suffered a detriment from the loss of the strike. *Id.* at 22 (citing to *Demouchette,* 731 S.W.2d at 83; *Comeaux v. State,* 445 S.W.3d 745,

750 (Tex. Crim. App. 2014)) ("When the trial judge denies a valid challenge for cause, forcing the defendant to use a peremptory strike on a panel member who should have been removed, the defendant is harmed if he would have used that peremptory strike on another objectionable juror.")

CONCLUSION

For all the above stated reasons, Mr. Marquez is entitled to a new trial.

WHEREFORE, Defendant Ricardo Marquez prays this motion be set for hearing, and that his request for a new trial be granted.

Respectfully Submitted,

EL PASO COUNTY PUBLIC DEFENDER

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THE STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF EL PASO §

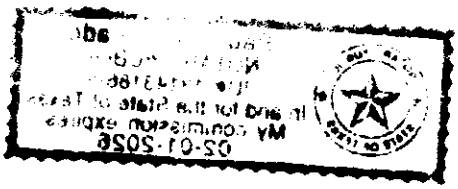
BEFORE ME, the undersigned authority, on this day personally appeared Todd Morton, who after being duly sworn, stated:

"I am the attorney in the above entitled and numbered cause and swear that all of the allegations of fact contained therein are true and correct."

SUBSCRIBED AND SWORN TO BEFORE ME on the 29th day of July, 2022.

Notary Public in and for
El Paso County, TX

Paul E Coronado
NOTARY PUBLIC
ID# 13143186-9
In and for the State of Texas
My commission expires
02-01-2026



CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was delivered to opposing counsel via E-File.Texas.Gov on the date this document was accepted for filing by the Clerk's Office.

Todd D. Morten

Automated Certificate of eService

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Status as of 7/28/2022 1:54 PM MST
Associated Case Party: RICARDO MARQUEZ

Name	BarNumber	Email	TimestampSubmitted	Status
DISTRICT ATTORNEY		DACRIMINAL@EPCOUNTY.COM	7/28/2022 1:45:13 PM	SENT

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