Cause No. 69,245

Tr.Ct.No. 83-CR-149-A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

**********

DE LUNA

CARLOS DE LUNA
APPELLANT

from

CCA

VS.

THE STATE OF TEXAS
APPELLEE

**********

APPEAL FROM THE 28TH JUDICIAL
DISTRICT COURT OF NUECES COUNTY, TEXAS

**********

# BRIEF OF APPELLANT

**********

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APPELLANT'S TRIAL BRIEF SPECIFYING ERRORS OF WHICH APPELLANT COMPLAINS ON APPEAL

APPEAL FROM THE 28TH JUDICIAL DISTRICT
COURT OF NUECES COUNTY, TEXAS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW Carlos De Luna, hereinafter referred to as the Appellant and respectfully submits this his trial brief specifying errors of which Appellant complains on appeal pursuant to Article 40.09 (9) of the Texas Code of Criminal Procedure and would show through his attorney the following grounds of error of which Appellant wishes to complain on appeal.

## STATEMENT OF THE GROUNDS OF ERROR PRESENTED

### Ground of Error One

The trial court erred in overruling Appellant's motion for new trial based on newly discovered evidence.

### Ground of Error Two

The trial court erred in failing to grant Appellant's motion for new trial based on newly discovered evidence as such evidence could have and should have resulted in a mistrial.

Ground of Error Three

The trial court erred in not accepting the jury's inability to reach a verdict on two occassions as being the verdict required under Art. 37.071 V.A.C.C.P. for the automatice assessment of a life sentence.

Ground of Error Four

The trial court erred in admitting SX-42 into evidence, for purposes of the record only, and not allowing the jury to read and examine same.

Ground of Error Five

The trial court erred in overruling Appellant's objection to the court's charge on punishment.

Ground of Error Six

The trial court erred in admitting into evidence state's exhibit 17, a picture of appellant, without first having the State lay the proper predicate.

Ground of Error Seven

The trial court erred in failing to respond to appellant's timely special requested charge and instruction to the jury on the law of circumstantial evidence.

## STATEMENT OF FACTS

Appellant was charged by indictment with the offense of capital murder alleged to have been committed on February 4, 1983 in Nueces County, Texas.

On July 5, 1983, appellant plead not guilty and the case proceeded in a jury trial. The jury on July 20, 1983, hearing all the evidence, found appellant guilty as charged in the indictment.

On July 21, 1983, the punishment phase of the trial began. After hearing testimony from the State, the jury answered yes to both special issues. On July 21, 1983, the trial court assessed appellant's punishment at death.

On August 9, 1983, appellant filed a motion for new trial. A first amended motion for new trial was filed on September 7, 1983. An amended motion for new trial was filed on September 9, 1983. On September 12, 1983, a hearing was held on appellant's amended motion for new trial. The court, after hearing evidence, overruled appellant's amended motion for new trial. On September 12, 1983, appellant gave oral, timely notice of appeal.

## ARGUMENT AND AUTHORITIES

### Ground of Error One

The trial court erred in overruling Appellant's motion for new trial based on newly discovered evidence.

At Appellant's hearing on motion for new trial, Appellant put on evidence that during the course of the trial, one

of the jurors, Estella Flores Jimenez, was robbed at knife point while working her job at a convenience store. (S.F. Vol. XIV, 27-31) While hints of this incident were discovered during trial and the trial court made aware of it (S.F. Vol. XII, 86-87), full documentation of the incident could not be obtained and the full details made known until after the trial due to the uncooperativeness of the police department. (S.F. Vol. XIV, 16-20). Had the trial court been aware of the occurrence during the course of the trial, the court could either have provided the Appellant an oppurtunity to proceed to final verdict with only eleven jurors under Article 36.29 V.A.C.C.P. since no alternates were selected or the court could have given the Appellant an option to have a mistrial declared. This ground of error will deal with why the option of proceeding with eleven jurors would have been an appropriate remedy. Ground of Error Two deals with mistrial as the only appropriate alternative to an eleven person jury under the circumstances.

Upon learning that juror Jimenez had been involved in a crime with exactly the same fact situation as that for which Appellant was being tried for Capital Murder, the trial court would have been entitled to, and should have, disqualified juror Jimenez as being mentally disabled to render a decision under the circumstances. Griffin v. State, 486 S.W.2nd 948, determined the situations under which a juror was disabled under Article 36.29 V.A.C.C.P. as being "...any condition that inhibits the juror from fully and fairly performing the function of a juror." (See also Marquez v. State, 620 S.W.2nd

131) In Carrillo v. State, 597 S.W.2nd 769, this Court further defined the disability in Article 36.29 V.A.C.C.P. as being limited to physical, emotional and mental disabilities and not encompassing bias or prejudice per se. However, the bias or prejudice present in Carrillo was that one of the jurors selected realized she had taught one of the defendant's sisters. Clearly being the victim of the exact same situation differs tremendously from a knowledge of the defendant's kin to a degree that it would create mental disability which would inhibit the juror from fully and fairly performing his duty rather than a bias or prejudice. See Griffin, supra; Carrillo, supra.

The instant case is distinguishable from this Court's decision in Bass v. State, 622 S.W.2nd 101, in the amazing similarity of the crime involved. In Bass, this Court held that the fact that someone had broken into a juror's home with a knife two days before the defendant's trial for capital murder, created only a bias or prejudice and thus did not come under an Article 36.29 V.A.C.C.P. disability following Carrillo. However, in Bass, the defendant was being tried for the capital murder of a peace officer. In the instant case, Appellant was tried for the capital murder of a convenience store clerk during a knife point robbery, the exact same situation which confronted juror Jimenez during Appellant's trial. It cannot reasonably be contended that the expierence did not render juror Jimenez mentally if not emotionally incapable of performing the functions of a juror fully and fairly. Appellant's motion for new

trial should therefore have been granted based upon the newly discovered evidence relating to juror Jimenez.

Ground of Error Two

The trial court erred in failing to grant Appellant's motion for new trial based on newly discovered evidence as such evidence could have and should have resulted in a mistrial.

For purposes of brevity, paragraph one of Ground of Error One is hereby incorporated by reference.

In the event that the trial court had known of the facts surrounding the robbery of juror Jimenez during the trial, the trial court should have given the option to the Appellant of proceeding to final verdict with eleven jurors or having a mistrial declared. See Carrillo, supra. Since the option should have been made to Appellant, a new trial should have been grant after the evidence was discovered.

Ground of Error Three

The trial court erred in not accepting the jury's inability to reach a verdict on two occassions as being the verdict required under Article 37.071 V.A.C.C.P. for the automatice assessment of a life sentence.

During the punishment phase of the case, the jury was unable to answer the second issue in any manner. (S.F. Vol. XII, 88-89) Upon inquiry by the Court, the foreman answered that the jury "(had) exhausted both avenues, sir, and I think that it would be rather difficult to go back in there and try to make a decision, sir." (S.F. Vol. XII, 88) Juror Kurtz answered

that she didn't think they could make any decision at all. (S. F. Vol. XII, 89) Following the return of the jury for further deliberations, the Appellant made the following objection:

MR. LAWRENCE: "Your Honor, we object to the jury further deliberating on this matter as a verdict has been reached under Article 37.071 V.A.C.C.P. when the jury indicated at 3:00 and just a moment ago that they could not answer the second question." (S.F. Vol. XII, 89-90; see also order entered in motion of objection to appellate record.)

Article 37.071 V.A.C.C.P. clearly states that a penalty of life in prison upon either a negative finding to either question or the jury's inability to answer either question. In the instant case, the jury indicated not once, but twice, that it was unable to reach a decision. In the course of their communication, the foreman of the jury, the person in the best position to make a determination, indicated that any resolution was extremely unlikely. While this is apparently an issue of first impression under Article 37.071 V.A.C.C.P., the dictates of the statute are clear and unequivocal and a punishment of life should have been assessed.

Alternatively, even if one follows an analogy in the case of mistrials for failing to reach a verdict, the trial court still should have found that the jury was unable to reach a decision and assessed punishment at life. In any case where the jury is deadlocked, the criteria the court is to look at is the nature of the case, the amount of evidence presented,

and the time of deliberation. Lindsy v. State, 393 S.W.2nd 906; Henderson v. State, 593 S.W.2nd 954. Given the nature of the questions to be asked and there effect coupled with the relative brevity of the punishment hearing, the trial court abused its discretion in failing to discharge the jury and sentence the Appellant to life in the Texas Department of Corrections as a matter of law. The continued deliberations did no more than coerce the remaining jurors to change their vote. Pullen v. State, 121 Tex.Cr.R. 619, 51 S.W.2nd 592, Harrell v. State, 120 Tex.C.R. 359, 47 S.W.2nd 311.

Ground of Error Four

The trial court erred in admitting SX-42 into evidence, for purposes of the record only, and not allowing the jury to read and examine same.

At the punishment phase of the trial, the trial court allowed testimony of an unadjudicated offense alleged to have been committed by the Appellant. (S.F. Vol. XII, 21-27) There was no evidence that appellant was ever charged or arrested for said offense.

Appellant recognizes the fact that Article 37.071 V.A.C.C.P. allows extraneous offenses to be admissable at the punishment phase of a capital offense whether said offenses have resulted in a final conviction or not. Garcia v. State, 581 S.W.2nd 168; Williams v. State, 622 S.W.2nd 116.

It is clear that evidence of this nature is allowed in order that the jury may take same under consideration in order to answer the special issues in a capital case. However, evidence

that is available which would tend to oontradict the alleged unadjudicated offense, should be allowed for the jury's consideration.

In the instant case, the State introduced SX-42 which were offense reports of the alleged unadjudicated offense. Appellant objected to the fact that said exhibit was being introduced only for the purposes of the record and not for the jury to see. (S. F. Vol. XII, 48 ln 4-13) The trial court overruled Appellant's objection. (S.F. Vol. XII, 48 ln 15-25)

A close examination of SX-42 shows that there was no rape or attempted rape. The only offense alleged was a class "C" misdemeanor assault. Appellant contends that the testimony of the elderly and nearly blind victim of the alleged unadjudicated offense was highly prejudicial. Such evidence made a tremendous impact on the jury and caused then answer the special issues affirmatively.

Appellant did not take the stand at the punishment phase of the trial. Therefore, it was necessary and proper to allow the offense reports making up SX-42 to be shown to the jury. The trial court's reasoning for not allowing SX-42 into evidence before the jury was because same was heresay. (S.F. Vol. XII, 48 ln 15-19) Assuming it was heresay, it would have been incumbent on Appellant to object as to its admissibility.

Ground of Error Five

The trial court erred in overruling Appellant's objection to the court's charge on punishment.

At the punishment phase of the trial, Appellant objected to the Court's proposed charge because same did not contain a definition of the words "deliberate" and "a probability." (S. F. Vol. I, 66; S.F. Vol. XII, 51 ln 3-18)

Article 37.071 V.A.C.C.P. states in part:

"...(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society..."

Appellant recognizes that in King v. State, 553 S.W.2nd 105, this Court held, "(W)e hold that the court need not provide special definitions for these terms in its charge to the jury during the punishment stage of a capital murder trial."

In the King case, supra, there was considerable evidence concerning the defendant's past record that was admitted into evidence at the punishment phase of the trial. In Barefoot v. State, 596 S.W.2nd 875, the question concerning definitions of the words deliberate and a probability was again discussed. The Court of Criminal Appeals held that King, supra, had decided the issue.

However, in Barefoot, supra, the Court of Criminal Appeals showed that psychiatric testimony was presented to the jury in

order to give the jury a chance to decide the issues especially the probability aspect.

Appellant would argue that in the instant case there was no psychiatric evidence presented nor was appellant's past record adequate enough for the jury to answer the special issues without definitions of the words "deliberate" and "a probability."

Ground of Error Six

The trial court erred in admitting into evidence states' exhibit 17, a picture of appellant, without first having the State lay the proper predicate.

During redirect examination of Officer Schauer, the following occurred:

"(By Mr. Botary) Officer Schauer, look at the Defendant for a minute, would you, please? Does he have that animal-like stare right now?

A No, sir.

Q Does he have that glassy-type stare that you have described?

A No, he doesn't have that smile either on his face.

Q Or the smile, is that correct?

Q Let me show you what's been marked for identification as State's Exhibit 17. Would you look at that to yourself, please. Do you recognize that?

A Yes, sir.

Q Who is that a photograph of?

A It's Carlos, the suspect.

Q Is that how he looked the night that you arrested him after

you took him to the booking desk?

A Yes.

Q Does he have that stare that you have described?

A I think so.

Q And is that the -- that's the stare that you called animal-like and glassy?

A Yes. This a front -- this is a straight-on photo, so -- but that's the way he looked.

Q This is how he looked when you took him to the booking desk that night? (S.F. Vol. X, 151)

A He has kind of a smirk on his face, too.

Q This was taken at the police department?

A It was up at the booking desk.

Q On the 4th day of February, 1983, is that correct?

A Yes, sir.

MR. BOTARY: We offer that into evidence, State's Exhibit 17.

MR. LAWRENCE: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

MR. LAWRENCE: We can make it off the record. (At this time an off-the-record discussion was held at the bench, after which the following proceedings were had:)

THE COURT: I have a matter to take up in your absence and I will ask you, if you would, to go with your bailiff for just one moment.

(At this time the Jury was withdrawn from the courtroom,

after which the following proceedings were had before the Court, with counsel for the State, counsel for the Defendant and the Defendant present:)

MR. LAWRENCE: Your Honor, at this time we would object to the admittance of State's Exhibit Number 17 on two points. Number one, the proper (S.F. Vol. X, 152) predicate hasn't been laid as to who actually took the picture, what time the picture was taken or anything of this nature, if, in fact, it was taken on February 4, 1983, and, secondly, we would also object to the fact that on State's Exhibit Number 17, if I am not mistaken, there is a tag on the front part of it that shows it as State's Exhibit Number 3, which was used at a pre-trial hearing and over on the back of that same photograph, State's Exhibit Number 17, there is a file mark by the district clerk showing that it was filed on June the 20th, and I think both of these writings on the picture itself would somehow or another cause the Jury to wonder that possibly this evidence has already been introduced before and we would ask that as far as the exhibit numbers, such as SX-3 and the file numbers on the back could be covered up in some for or fashion where the Jury is unaware that they do, in fact, exist. (S.F.Vol. X, 153 ln 1-19)

MR. LAWRENCE: Could we also have a ruling on the first part of the objection to State's Exhibit Number 17?

THE COURT: That portion of it is overruled.

MR. LAWRENCE: Okay, note our exception." (S.F. Vol. X, 156, ln 2-6)

In Trussell v. State, 354 S.W.2nd 584, the Court of Criminal Appeals held that the predicate for the introduction of a photograph requires proof of (1) its accuracy as a correct representation of the subject at a given time, and (2) its material relevance to a disputed issue.

In Laws v. State, 549 S.W.2nd 738, a photograph was admitted to show the defendant's appearance at the time of his arrest. The Court, in the Laws cause, supra, held that "(J)ust as a verbal description of appellant's appearance at the time of his arrest is admissible, so too is the photograph that accurately depicts such." See also, Reeves v. State, 491 S.W.2nd 157; Denny v. State, 473 S.W.2nd 503.

In the instant case, a picture of the Appellant was shown to the witness and asked it his is the way the Appellant looked the night he was arrested. No predicate was laid as to when the picture was taken or by whom it was taken. Appellant would argue that allowing the picture into evidence was error and further that it gave the Jury the impression that the picture was in fact taken the night of the arrest.

Ground of Error Seven

The trial court erred in failing to respond to Appellant's timely special requested charge and instructions to the jury on the law of circumstantial evidence.

After both sides closed, Appellant presented objections to the Court's charge and also requested a special charge. (S.F. Vol. I, 54-57; S.F. Vol. XI, 470 ln 9-19) The trial court overruled Appellant's objection to the charge and also overruled Appellant's requested special charge on circumstantial evidence. (S. F. Vol. XI, 470 ln 20-22)

Appellant requested the following charge:

"This is a case depending for conviction on circumstantial evidence. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole, to a satisfactory conclusion and producing, in effect, a reasonalbe and moral certainty that the accused, and no other person, committed the offense charge. But in such cases it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the defendant not guilty." (S.F. Vol. I, 54-55)

In Phillips v. State, 604 S.W.2nd 904, this Court held, "(W)hen the defendant admists committing the act charged and intent is the only question in issue, no charge on circumstantial evidence is required." Glover v. State, 566 S.W.2nd 636.

In the instant case, Appellant did not admit committing the act charged and also, both intent and identity were in issue. This Court has stated that a charge on circumstantial evidence is required only where evidence of main facts essential to guilt is purely and entirely circumstantial. Britton v. State, 611 S.W.2nd 421.

Appellant contends that the trial court erred in not submitting the charge of circumstantial evidence to the Jury.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the 28th District Court, Nueces County, Texas, or upon appellate review, that the Court of Criminal Appeals should reverse the judgment, set aside the conviction of Appellant and dismiss the case, or, in the alternative, grant Appellant a new trial.

James R. Lawrence
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 1984, a true and correct copy of the foregoing Brief of Appellant was delivered to the District Attorney's Office of Nueces County, Texas.

James R. Lawrence
Attorney for Appellant