NO. 83-CR-194-A

THE STATE OF TEXAS

VS.

CARLOS DE LUNA

IN THE 28TH DISTRICT COURT

OF

NUECES COUNTY, TEXAS

NOTICE OF APPEAL

On this the 12th day of September, 1983, the defendant in the above styled and numbered cause:

(A. Written notice, by defendant or attorney):

Hereby excepts to the judgment of the Court in said cause and gives Notice of Appeal.

State of Texas

Address:

Defendant

or

James C. Lawrence

Attorney for Defendant

State Bar No. 12047000

Address: P. O. Bx. 8365

Corpus Christi, Tx. 78412

(B. Oral notice, by clerk):

Excepted to the judgment of the Court in said cause and gave oral Notice of Appeal in open court.

OSCAR SOLIZ

Clerk

By Mattie N. Degner

Deputy Clerk

Complete the following:

MICROFILMED

Date of Judgment: July 22nd., A. D., 1983

Name of Trial Court Judge: Wallace C. Moore - 13114 Boehme-Houston, Tx. 77079

Name of Court Reporter: Rhonda Jernigan

Defendant Incarcerated?: [*] Yes [ ] No

Appeal Bond: $ -0- Date

Offense: CAPITAL MURDER

Punishment Assessed: Death.

NO. 83-CR-194-A

THE STATE OF TEXAS

VS.

Carlos De Luna

IN THE 28th DISTRICT COURT

OF

NUECES COUNTY, TEXAS

PAUPER'S AFFIDAVIT

I, Carlos De Luna, Defendant in the above styled and numbered cause, hereby solemnly swear that I am wholly destitute; that I do not have funds or means of employing an attorney to represent me in this case on appeal.

Carlos De Luna

Defendant

Before me, the undersigned District Clerk, on this the 12th day of September A.D., 1983, personally appeared Carlos De Luna who subscribed the foregoing instrument and after having been by me duly sworn, stated on his oath that the foregoing statement are true and correct.

OSCAR SOLIZ, DISTRICT CLERK

BY Mattie M. Wagner

DEPUTY

ORDER APPOINTING ATTORNEY

On this the 12th day of September, 1983 came on to be heard the above sworn Pauper's Affidavit, and the Court hereby appoints James Lawrence, a practicing attorney of Nueces County, Texas, to represent the Defendant.

JUDGE PRESIDING

MICROFILMED

No. 83-CR-194-A

STATE OF TEXAS
VS.
CARLOS DELUNA

IN THE DISTRICT COURT
28TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

MOTION TO DISQUALIFY COUNSELS
AND FOR APPELLANT TO PROCEED
BY HIMSELF AS COUNSEL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CARLOS DELUNA, by AND THROUGH HIMSELF, in the above entitled and numbered cause and files this his Motion to Disqualify Counsel and to proceed by himself as counsel and would show unto the court the following:

MICROFILMED

I

It is axiomatic, at least since the decision of the United States Supreme Court in Faretta v. California, 422 U.S. 806, 95 Sect. 2525, 45 L. Ed 2d 562 (1975), that an accused may dispense with the right to be represented by counsel all together and proceed pro se. On the issue of waiver of counsel the Court of Criminal Appeals, stated Lisney v. State, 574 S.W. 2d 114 (1978); and Renfro v. State, 574 S.W. 2d ~~###~~ 1196 (1979), the applicable rules regarding waiver of counsel. In Jordan v. State, 571 S.W. 2d 883 (1978) it was said there that when the issue of waiver of counsel was approached, an accuse may waive his right to counsel if such waiver is made voluntarily with knowledge of the consequences there of. Barbour v. State, 551 S.W. 2d 371 (1977); Thomas v. State 550 S.W. 2d 64 (1977). Privett v. State 635 S.W. 2d 746 (1982). It is true that when an accused chooses to have an attorney manage and present his case law and tradition may allocate to the attorney the power to make binding decisions of trial

MICROFILMED

strategy as well as in the appellate stages. Henry v. Mississippi, 379 U.S. 443, 85 Sect. 564 Brookhart v. Janis, 384 U.S. 186 Sect. 1245: Fay v. Noia, 372 U.S. 391, 83 Sect. 822. This allegation can only be justified however, by the appellants land or accused consent at the outset and any time the accuse decides to dispense with the right to be represented by counsel altogether and decides to represent himself the states courts are obligated to honor that exercise out of the respect for the individual which is the lifeblood of the law. Hawkins v. State, 613 S.W. 2d 720 (1981): Illinois v. Allen, 397 U.S. 337, 90 Sect. 1057, 25 L. Ed. 2d 353.

In Gueslin v. State, 600 S.W. 2d 309 (1980) and Pruett v. State, 635 S.W. 2d 746 (1982), it was observed that prior to a state court making a decision on a motion to proceed pro se said courts are required to hold an evidentiary hearing during which the trial court must make the accuse aware of the dangers and disadvantages of self-representation, and the trial court must develop evidence as to wether the accuses decision to waive Counsel on appeal or trial and desires to proceed pro se is knowingly and intelligently made, Webb v. State, 533 S.W. 2d 780 (1976). In this connection the Record must clearly *~~State~~ and reflect that the accuse knows what he is doing and his choice is made with eyes open Faretta v. California, 422 U.S. at 835, 95 Sect. at 2541; Goodman v. State 591 S.W. 2d 498 (1980); Burks v. State, 588 S.W 2d 496 (1979); Maynard v. Meachum, 545 F. 2d 273 (1976); Irvine v. State, 555 & S.W. 2d 760 (1977).

*show

MICROFILMED

It is therefore submitted that in light of the ongoing malicious conduct of counsel and his total court. set Forth above, this court in the interest of justice should disqualify counsel and permit the appellant to represent himself. This court will be committing plain error and a travesty of Justice if this court refuses to accord the appellant the relief he is seeking. Accordingly, it has been irrevocably made clear that the appellant does not want ~~that~~ the court appointed lawyer to represent him, that there is friction between the counsel and appellant, due to the counsel misconduct that the appellant would rather now represent himself, this court has the supervisory power and the Code of ~~Criminal~~ Judicial Conduct Canon 3 (B) (3) to initiate appropriate disciplinary measures against any attorney for unprofessional conduct of which the trial judge may become aware. that the various Bar Associations and their Grievance committees do not constitute the only proper forum for investigation of a claim of professional misconduct. On the contrary, the courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his client.
General Motors Corp. v. City of New York, 501 F.2d 639; Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 496 F.2d 800 (1978); Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541, 69 Sect. 1221, 93 L. Ed. 1528 (1949). the disqualification of attorney Mr. Ponder is required under Canons 4, 7, 8 and 9 of the State Bar Act. Art. 320 a-1 Vernons Ann Civil St. because said counsel is not representing his client competently, nor zealously within the bounds of the law

MICROFILMED

is not improving the legal system and the appearance of impropriety is therefore present in his representation. Further disqualification is required under Canon 5 because Mr. Hector DePena Jr. and James R. Lawrence ought to be called as a witness to defend these accusations of misconduct against him.

In Woods v. Cuvinatou County Bank, 537 F.2d 804 (5th Cir 1976), it was established a two part standard for determining wether an attorney should be disqualified under Canon 9, supra.

(1.) there must be "at least a reasonable posibility that some specifically identifiable impropriety did in fact occur". 537 F. 2d at 813. In the chief case in point this has already been shown.

(2) The second step was that the court "must also find that the likelihood of public suspicion or oblogue outweigh the social interest which will be served by a lawyer's continued participation in a particular case". 537 F 2d at 813. Arguably this requirement is present in this particular case.

This court cannot and should not cast aside ethical responsibilities without firm support from the Judicial Branch, if so, the canons of ethics would be only reverberating generalities. This court has a public interest and owes the appellant said duty. these interest requires this court to exercise its supervisory power and leadership, to insure that nothing, not even the appearance of impropriety, is is permitted to tarnish the judicial process.

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Thus, disqualification in this particular case is in order. The court cannot act contrary to the public and the appellants interest and permit counsel to remain simply under the allegation that this court appointed counsel, to justify the continuance of ~~this~~ a breach of the Code of Professional Responsibility. The courts power ~~to~~ and duty to regulate the conduct of attorney's practicing before it, in accordance with the canons, cannot be defeated by the supervisor himself.

Wherefore, Premises Considered, Appellant prays this Honorable Court disqualify ~~Mr. Bruce~~ Mr. Hector D. Pena, James Lawrence Ponder as the attorney of Record and permit Jimmy Hernandez to proceed by himself as counsel, and for such other and further relief, both special and general at law or in equity, to wich the appellant may show himself justly entitled.

Respectfully submitted

Carlos De Luna

CARLOS DE LUNA

SUBSCRIBED AND SWORN TO BEFORE ME this the 12th day of September, 1983.

Notary Public, State of Texas

My commission expires:
11-30-84

MICROFILMED

Judge Dunham, Sir.

Nov - 17, 1983

I would like to Request If possible That you could Appoint Another Attorney In my Defense At This moment my Attorney Is Mr. James Lawrence I had two Attorneys But The other Attorney Mr. De Pena Jr. was not Doing Nothing to help me so I Filed A motion to ~~Disqualif~~ have Mr De Pena Remove From handling my Appeal. I would Like to keep Mr Lawrence but Also I would like For you to Appoint Another Attorney on my behalf. I wouldn't be Asking you For This If my case wasn't This bad At This moment I am At Ellis Unit ON Death Row And I Feel I should have At-East. Two Attorneys handling my Appeal. I Also Filed A motion to have The Transcipts & statements of Fact's to me. I would like to know If They ARE Ready. I hope you take This matter into Consideration. I would like For you to Inform me About These matters.

Thank you For your Time.

FILED
DEC 2 1983
SCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By Mattie Wagner Deputy

MICROFILMED

Sincerly
X Carlos Delana

CARLOS DELANA
Ellis Unit - G-15-11-1
Route 11
Huntsville, Texas 77343

Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
AREA CODE 512 888-0450

P 492 249 892

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November 14, 1983

Hector De Pena Jr. Atty

2933 Norton Suite 207

Corpus Christi, Texas 78415

FILED

NOV 14 1983

OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

Dear Sir:

Your are hereby notified of the completion of the record in cause no.

83-CR-194-A THE STATE OF TEXAS VS. **CARLOS DE LUNA**

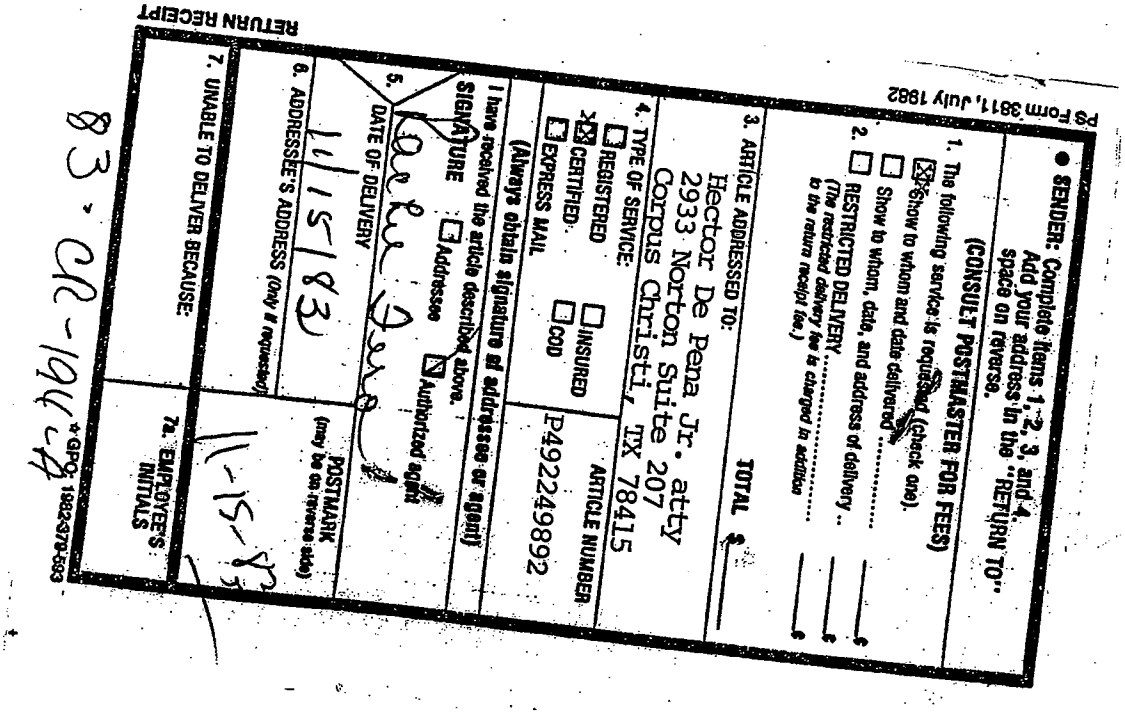
as required by Art. 40.09 of the Code of Criminal Procedure.

Yours very truly,

OSCAR SOLIZ, DISTRICT CLERK
NUECES COUNTY, TEXAS

By ..... Deputy

MICROFILMED



Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
AREA CODE 512 888-0450

November 14, 1983

FILED
NOV 14 1983
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

Mr. Grant Jones
District Attorneys Office
Nueces County Courthouse
Corpus Christi, Texas 78403

Dear Sir:

You are hereby notified of the completion of the record in Cause No. 83-CR-194-A THE STATE OF TEXAS VS. CARLOS DE LUNA as required by Art. 40.09 of the Code of Criminal Procedure.

Yours very truly,
OSCAR SOLIZ, DISTRICT CLERK
NUECES COUNTY, TEXAS
By ..... Deputy

Receipt of the original of the above notice acknowledged this the 14 day of November 1983.

GRANT JONES DISTRICT ATTORNEY

BY Dom White by LC
Assistant District Attorney

MICROFILMED

Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
AREA CODE 512 888-0450

November 29, 1983

Mr. James Lawrence Atty
P.O. Box 8365
Corpus Christi, Texas 78412

FILED
NOV 29 1983
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

Dear Sir:

Your are hereby notified of the completion of the record in cause no.

83-CR-194-A THE STATE OF TEXAS VS. Carlos De Luna

as required by Art. 40.09 of the Code of Criminal Procedure.

Yours very truly,

OSCAR SOLIZ, DISTRICT CLERK
NUECES COUNTY, TEXAS

BY ..... Deputy

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PS Form 3800, Feb. 1982

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(CONSULT POSTMASTER FOR FEES)

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   (The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL ¢

3. ARTICLE ADDRESSED TO:
James R. Lawrence Atty
P.O. Box 8365
Corpus Christi, Texas 78412

4. TYPE OF SERVICE: ARTICLE NUMBER
   - ☐ REGISTERED ☐ INSURED
   - ☒ CERTIFIED ☐ COD
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P492249899

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SIGNATURE ☐ Addressee ☐ Authorized agent

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7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

DEC 2 1983

FILED
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

83-CR-194-A

RETURN RECEIPT

Form 3811, July 1982 * GPO: 1982-379-863

Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
AREA CODE 512 888-0450

November 29, 1983

FILED
NOV 29 1983
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

Mr. Grant Jones
District Attorneys Office
Nueces County Courthouse
Corpus Christi, Texas 78403

Dear Sir:

You are hereby notified of the completion of the record in

Cause No. 83-CR-194-A THE STATE OF TEXAS VS. Carlos De Luna

as required by Art. 40.09 of the Code of Criminal Procedure.

Yours very truly,
OSCAR SOLIZ, DISTRICT CLERK
NUECES COUNTY, TEXAS
By ..... Deputy

Receipt of the original of the above notice acknowledged this the

29 day of November 1983.

GRANT JONES DISTRICT ATTORNEY
BY Tom White by DC
Assistant District Attorney

MICROFILMED

NO. 83-CR-194A

STATE OF TEXAS	X	28TH DISTRICT COURT
VS.	X	NUECES COUNTY
CARLOS DELUNA	X	TEXAS

BENCH WARRANT

TO: SHERIFF NUECES COUNTY, TEXAS

It is the Order of this Court that the Sheriff of Nueces County, Texas obtain custody of CARLOS DELUNA, now a prisoner in the Texas Department of Corrections, and bring him before this Court by 9 A.M. December 22, 1983 for proceedings in connection with the above numbered cause.

Signed and ordered entered December 21, 1983.

Walt Durham Jr.
JUDGE PRESIDING

Attest:
Oscar Soliz
District Court Clerk

By: Martha M. Salazar
Deputy

MICROFILMED

NO. 83-CR-194A

STATE OF TEXAS	X	28TH DISTRICT COURT
VS.	X	NUECES COUNTY
CARLOS DELUNA	X	TEXAS

BENCH WARRANT

TO: SHERIFF NUECES COUNTY, TEXAS

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Signed and ordered entered December 21, 1983.

S/Walter Dunham, Jr.
JUDGE PRESIDING

Attest:
Oscar Soliz
District Court Clerk

By: Mattie M. Wagner
Deputy

MICROFILMED

No. 83-CR-194-A

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	28TH JUDICIAL DISTRICT
CARLOS DE LUNA	) (	NUECES COUNTY, TEXAS

OBJECTION TO APPELLATE RECORD

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Carlos De Luna, Defendant, in the above-entitled and numbered cause, and files this objection to the appellate record. Defendnat shows the court in support of this objection that the record fails to speak the truth in the following manner: at the punishment phase of the trial, appellant objected to the jury being sent back to deliberate after they had advised the court that they could not answer the second question; and appellant further objects in that the record is silent to the above and also silent to an objection by appellant when the jury furthr informed the court that they could not still answer the second question on punishment after which the court brought the jury back into the courtroom and polled the jury. The record does not contain any of the second conversation with the jury by the court.

WHEREFORE, the defendant prays the court grant the objection to the record and enter an order causing the record to speak the truth. Defendant further requests that the record of such hearing be incorporated in the appellate record.

Respectfully submitted,

James R. Lawrence
Attorney for Defendant
Bar No. 12047000
P.O. Box 8365
Corpus Christi, Tx 78412
(512) 884-5549

FILED
15 1983
DISTRICT COURT, NUECES COUNTY, TEXAS
Martin M. Delagnes
MICROFILMED

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of December, 1983, a true and correct copy of the above and foregoing Motion of Objection to Appellate Record was personally served on the Assistant District Attorney of Nueces County, Texas.

James R. Lawrence
Attorney for Defendant

ORDER

Be it remembered that on the 14th day of December, 1983, the foregoing motion was presented to the Court with a request for the Court to conduct a hearing thereon and it therefore ordered that on the 22nd day of December, 1983, at 10:00 o'clock, A.M., a hearing will be had in the 28th District Court of Nueces County, Texas, on said motion.

DONE AND ENTERED this 14th day of December, 1983.

JUDGE PRESIDING

MICROFILMED

CAUSE NO. 83-CR-194-A

THE STATE OF TEXAS
VS.
CARLOS DE LUNA

IN THE DISTRICT COURT
28TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

O R D E R

BE IT REMEMBERED that on the 22nd day of December, 1983, the Court heard Defendant's Objection to the Appellate Record. Both defendant and his attorney and the State represented by the Assistant District Attorney for Nueces County were present and presented evidence. The Court, after hearing all of the evidence is of the opinion that Defendant's Objection to the Appellate Record should be granted in the following respect: that the record on the punishment phase of the case should reflect that an objection was made by defendant's attorney to the Court, but in the absence of the court reporter, as to any further deliberations by the jury on the grounds that the jury had reached a verdict when the jury announced that it could not answer the second question in the verdict form and which objection was overruled by the Court.

IT IS THEREFORE ORDERED that the record on the punishment phase of the case be corrected to reflect that the following objection was made and the following ruling made thereon by the Court in the absence of the Court Reporter:

> "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.
>
> THE COURT: Overruled."

Signed and entered this 3rd day of January, 1984.

Walter Dunham, Jr.
JUDGE PRESIDING.

APPROVED:

ATTORNEY FOR DEFENDANT

ATTORNEY FOR THE STATE

NO. 83-CR-194-A

THE STATE OF TEXAS	X	IN THE 28TH DISTRICT
VS.	X	COURT OF
CARLOS DE LUNA	X	NUECES COUNTY, TEXAS

APPROVAL OF RECORD ON APPEAL AFTER HEARING

The Defendant having presented to the Court in writing ~~and~~ an objection to the record within 15 days after the mailing of the notice of completion of the record, the Court set the matter down for hearing, and after hearing, entered orders which caused the record to speak the truth. Such proceeding is included in the record. The Court approves the following parts of the record on appeal:

Transcript, Vol. I, comprising pages 1 - 110
Statement of Facts, Vol. II comprising pages 2-34, Vol. III comprising pages 2-122, Vol. IV comprising pages 2-302, Vol. V comprising pages 304-601, Vol.VI comprising pages 602-851, Vol. VII comprising pages 852-1134, Vol. VIII comprising pages 1135- 1306, Vol. IX comprising pages 2-5, Vol. X comprising pages 2-294, Vol. XI comprising 296-541, Vol. XII comprising pages 2-92, Vol. XIII comprising pages 2, Vol. XIV comprising pages 2-52, Vol. XV comprising pages i-v, Vol. XVI Exhibit Volume

Signed on the 6th day of January A.D. 1984.

Walter Dunham, Jr.

Judge Presiding of the 28th District Court of Nueces County, Texas

M. CROFILMED

Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
AREA CODE 512 888-0450

January 6, 1984

FILED
JAN 6 - 1984
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

Grant Jones District Attorney
Nueces County, Courthouse
Corpus Christi, Texas 78403

RE: State VS. Carlos De Luna NO. 83-CR-194-A

Dear Sir:

This date, January 4, 1984 the Court has approved the record in the captioned cause. Please be advised that you have thirty (30) days from the date of filing of appellants brief to prepare and file your brief for the Court of Appeals.

Yours very truly,
OSCAR SOLIZ, DISTRICT CLERK
Nueces County, Texas

by ..... deputy

Receipt of the original of the above notice acknowledged this 6 day of January 1984.

Grant Jones District Attorney

by .....

Assistant District Attorney

MICROFILMED

Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
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P 492 249 916

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Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$
Postmark or Date	

Form 3800, Feb. 1982

January 6, 1984

FILED

JAN 6 - 1984

OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ..... Deputy

Mr. James Lawrence Atty

P. O. Box 8365

Corpus Christi, Texas 78412

RE: State VS. Carlos De Luna NO. 83-CR-194-A

Dear Sir:

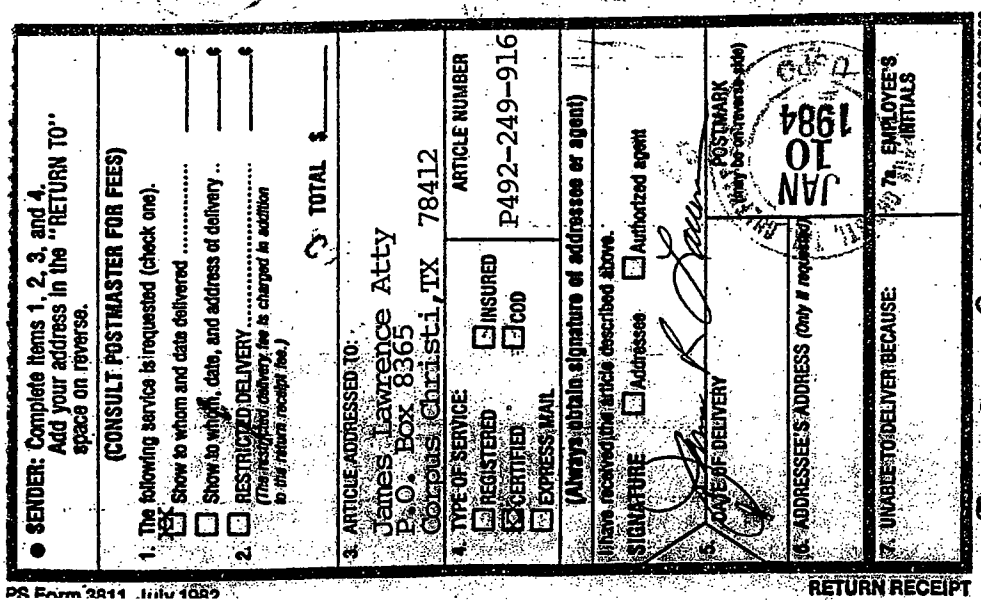
This date, January 6, 1984 the Court has approved the record in the captioned cause. Please be advised that you have thirty (30) day from this date to prepare and file your brief for the Court of Appeals.

Yours very truly,

OSCAR SOLIZ, DISTRICT CLERK

NUECES COUNTY, TEXAS

BY ..... DEPUTY



83-CR-194-A

MICROFILMED

COURT OF CRIMINAL APPEALS

OF TEXAS

NUMBER 69245

CARLOS DE LUNA — IN THE 28th JUD. DIST. COURT

VS. — OF NUECES COUNTY

THE STATE OF TEXAS — TRIAL COURT NO. 83-CR-149-A

83-CR-144-A

On this 26th day of January, 1984, came on to be considered the motion of the Appellant's Counsel for an extension of time within which to file the appellant's brief.

AND SUCH MOTION IS HEREBY GRANTED, and the time for filing said item is extended until the 6th day of March, 1984.

IT IS SO ORDERED.*

FILED

JAN 31 1984

OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By ... Deputy

PER CURIAM

*A certified copy of this order shall be mailed to the Clerk of the Trial Court who shall file it with the other papers of this case and who shall include it in the appellate record.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

BY: ... DEPUTY

COURT OF CRIMINAL APPEALS * TEXAS * OF TEXAS

MICROFILMED

Nueces County
DISTRICT COURTS

OSCAR SOLIZ / DISTRICT CLERK

P. O. BOX 1799 / CORPUS CHRISTI, TEXAS 78403
AREA CODE 512 888-0450

February 1, 1984

Court of Criminal Appeals
Box 12308
Capitol Station
Austin, Texas 78711

NO. 83-CR-194-A STATE VS. DE LUNA

Dear Sir;

Enclosed is a transcript and 16 volumes on the above cause.

Please returned enclosed copy of letter.

Sincerely,
OSCAR SOLIZ, DISTRICT CLERK
NUECES COUNTY, TEXAS

BY _____ DEPUTY

ENCL.

RECEIVED THIS 9th DAY OF February A.D. 1984.

George Miller, Chief Deputy
CLERK OF COURT OF CRIMINAL APPEALS

FILED
FEB 10 1984
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By _____ Deputy

MICROFILMED

COURT OF CRIMINAL APPEALS
RECEIVED
MAR 5 1984
THOMAS F. LOWE
CLERK

CRIMINAL APPEALS
RECEIVED
MAR
THOMAS F. LOWE
CLERK

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

****

James R. Lawrence
P.O. Box 8365
Corpus Christi, Tx 78412
(512) 884-5549
Bar No. 12047000

Attorney for Appellant

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Marquez v. State, 620 S.W.2nd 131 . . . (Tex. Crim. App. 1981)

Britton v. State, 611 S.W.2nd 421 . . . (Tex. Crim. App. 1981)

Phillips v. State, 604 S.W.2nd 904. . . (Tex. Crim. App. 1980)

Carrillo v. State, 597 S.W.2nd 769. . . (Tex. Crim. App. 1980)

Barefoot v. State, 596 S.W.2nd 875. . . (Tex. Crim. App. 1980)

Henderson v. State, 593 S.W.2nd 954 . . (Tex. Crim. App. 1980)

Garcia v. State, 581 S.W.2nd 168. . . . (Tex. Crim. App. 1979)

Glover v. State, 566 S.W.2nd 636. . . . (Tex. Crim. App. 1978)

King v. State, 553 S.W.2nd 105. . . . . (Tex. Crim. App. 1977)

Laws v. State, 549 S.W.2nd 738. . . . . (Tex. Crim. App. 1977)

Reeves v. State, 491 S.W.2nd 159. . . . (Tex. Crim. App. 1973)

Griffin v. State, 486 S.W.2nd 948 . . . (Tex. Crim. App. 1972)

Denny v. State, 473 S.W.2nd 503 . . . . (Tex. Crim. App. 1971)

Lindsey v. State, 393 S.W.2nd 906 . . . (Tex. Crim. App. 1965)

Trussel v. State, 354 S.W.2nd 584 . . . (Tex. Crim. App. 1962)

Pullen v. State, 51 S.W.2nd 592; 111 Tex. Cr.R. 619

Harrell v. State, 47 S.W. 2nd 311; 120 Tex. Cr.R. 359

Articles:

Article 36.29 V.A.C.C.P.

Article 37.071 V.A.C.C.P.

No. 69,245

CARLOS DE LUNA, APPELLANT	)	IN THE COURT OF
VS.	)	CRIMINAL APPEALS
THE STATE OF TEXAS, APPELLEE	)	OF THE STATE OF TEXAS

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

COURT OF
CRIMINAL APPEALS
FILED
APR 6 1984
THOMAS F. LOWE
CLERK

NO. 69,245

IN THE COURT OF CRIMINALS APPEALS

OF THE STATE OF TEXAS

CARLOS DE LUNA,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE 28TH DISTRICT COURT

OF NUECES COUNTY, TEXAS

TRIAL COURT CAUSE NUMBER 83-CR-149A

BRIEF FOR THE STATE

GRANT JONES
DISTRICT ATTORNEY
NUECES, KLEBERG AND
KENEDY COUNTIES

MARY F. KLAPPERICH
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 11550700
(ON APPEAL)

ATTORNEYS FOR APPELLEE

4/6/84
April 6, 1984

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NO. 69,245

CARLOS DE LUNA, Appellant — IN THE COURT OF

VS. — CRIMINAL APPEALS

THE STATE OF TEXAS, Appellee — AUSTIN, TEXAS

BRIEF FOR THE STATE

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

This is an appeal from a conviction for Capital Murder. Punishment was assessed at death after the jury answered yes to both special issues.

REPLY TO GROUNDS OF ERROR NO'S. ONE AND TWO

Appellant claims the trial court erred in overruling his motion for a new trial based on new evidence as this evidence could have and would have resulted in a mistrial. Appellant presented evidence at the hearing on motion for new trial that one of the jurors, Estella Jimenez, was robbed at knife point while working at her job as a convenience store clerk (S.F. Vol. XIV. pgs. 27-31). Appellant contends that since the facts of his case are so similar to Mrs. Jimenez's experience that she should have been dismissed from the jury for a disability and a mistrial granted.

Mrs. Jimenez testified that this incident did not in any way influence her verdict in Appellant's case (S.F. Vol. XIV, pg. 31). She even stated that although she was threatened with a knife she was not scared. If she had been scared she would have stopped working the graveyard shift at the store, but she continued working it by herself (S.F Vol. XIV, pg. 36).

In Carrillo v. State, 597 S.W.2d 769 (Tex. Crim. App. 1980), a case heavily relied on by Appellant, this Court held that it is clear that the legislature's intent in the disabling statute was to limit its application to cases where the juror was physically or mentally impaired in some way, or all parties consented to try the case with just eleven jurors. Id. at 771.

Appellant argues that rather than produce a bias or prejudice in juror Jimenez, the occurrence at the convenience store produced a mental disability which would allow her to be discharged under Article 36.29 V.A.C.C.P. In the case of Bass v. State, 622 S.W.2d 101 (Tex. Crim. App. 1981) en banc, the accused was tried for capital murder with a handgun. After the jury had been selected, one of the jurors was the victim of a burglary in which someone broke into her home and entered her bedroom with a knife. This juror was not dismissed due to disability under Art. 36.29 V.A.C.C.P. This Court stated that an allegation of bias or prejudice does not render a juror disabled under Art. 36.29,

Bass, supra, at 106.

Further, this Court in Bass reiterated the rule that the determination of whether a juror is disabled is within the discretion of the trial court. Absent an abuse of that discretion, no error will be shown.. Bass v. State, supra, citing Griffin v. State, 486 S.W.2d 948 (Tex. Crim. App. 1972).

Appellant's case is similar to the situation in Bass. Both cases involved capital murder trials, and in both cases two jurors were victims of a crime after being selected. In light of the decision in Bass, the trial court did not err in refusing to disable juror Jimenez for bias or prejudice under Article 36.29 V.A.C.C.P. This refusal was not an abuse of discretion, and neither her dismissal, nor a declaration of a mistrial would have been proper. No error exists in failing to disable juror Jimenez for bias or prejudice.

REPLY TO GROUND OF ERROR NO. THREE

Appellant claims error because the trial court did not accept the jury's inability to reach a verdict on two occasions under Article 37.071 V.A.C.C.P. and assess an automatic life sentence.

During the punishment phase of the trial, the jury returned an affirmative answer to special issue number one,

and left blank special issue number two (S.F. Vol. XII, pg. 88). Upon inquiry by the Court the foreman of the jury answered that in his opinion the jury had exhausted both avenues and that it would be rather difficult to go back in the jury room and make a decision on issue number two (S.F. Vol. XII, pg. 88). The Court then questioned the individual jurors and asked their opinion. Ten of the jurors indicated they thought it would be possible to reach a decision. Only one other juror, along with the foreman, felt it would not be possible to reach a decision (S.F. Vol. XII, pgs. 88-89). Based on these responses, the trial judge sent the jurors back for further deliberations (S.F. Vol. XII, pg. 89).

Appellant argues that the court at this time should have proceeded under Article 37.071(e) and assessed punishment at life imprisonment because the jury twice indicated that it was unable to reach a decision. The jury indicated only once that it was having difficulty answering special issue number two. Two jurors indicated they did not think they could come to a conclusion. Although the foreman of the jury expressed that any resolution seemed extremely unlikely, ten of the jurors contradicted him.

The length of time that a jury may be held for deliberation rests in the discretion of the trial court and

absent a showing of abuse of that discretion, no reversible error is shown. Garcia v. State, 522 S.W.2d 203 (Tex. Crim. App. 1975). It has been held no abuse of discretion where the jury was retired for further deliberations and a poll of the jury disclosed that one juror indicated that a verdict could not be reached. Williams v. State, 476 S.W.2d 300 (Tex. Crim. App. 1972). In Williams, the Court told the jury it would let it continue deliberations for a while based on the poll. The Court of Criminal Appeals held this could not be construed as coercing the jury into a verdict, Id. at 305.

In Muniz v. State, 573 S.W.2d 792 (Tex. Crim. App. 1978) en banc, certiorari denied 442 U.S. 924, 99 S. Ct. 2850, 61 L. Ed. 2d. 291 (1978), when the jury had returned, leaving a special issue unanswered in the punishment phase of a capital murder trial, the judge gave a supplemental charge to the jury to continue its deliberations to see if it could arrive at an answer to the issue. This Court held the supplemental charge was not a coercive Allen or dynamite type charge. No abuse of discretion was found to exist.

Appellant's case is similar to Muniz except that the judge in Appellant's case did not give a supplemental charge. He polled the jury, and based on that poll he sent the jury back to deliberate. The trial court's actions in

light of the decision in Muniz, supra, can not be construed as an abuse of discretion. No error is shown.

REPLY TO GROUND OF ERROR NO. FOUR

Appellant contends the trial court erred in the punishment phase in allowing into evidence State's Exhibit 42, for purposes of the record only, and not allowing the jury to examine it. State's Exhibit 42 was offense reports relating to an unadjudicated offense of attempted sexual assault committed by Appellant. The State had already produced testimony regarding this assault against Juanita Garcia (S. F. Vol. XII, pgs. 21-27).

Absent a showing of unfair surprise, proof of unadjudicated, extraneous offenses at the punishment phase of a capital murder case is admissible, Williams v. State, 622 S.W.2d 116 (Tex. Crim. App. 1981) en banc. The trial court has wide discretion in admitting evidence at the punishment phase of a capital murder trial, Garcia v. State, 581 S.W.2d 168 (Tex. Crim. App. 1979) en banc.

Appellant contends it was error not to allow the jury to see State's Exhibit 42, which was three pages of the offense report of offense no. 820475 pertaining to the assault on Juanita Garcia. The court deemed the exhibit hearsay and refused to show it to the jury, but allowed it for the record only (S.F. Vol. XII, pgs. 47-49). This

evidence was not admissible since it is hearsay. Although the trial court has wide discretion in admitting or excluding evidence at the punishment stage of a trial, exclusionary rules of evidence still govern the admissibility of the evidence. King v. State, 657 S.W.2d 109 (Tex. Crim. App. 1983) en banc. The exclusionary rules of evidence also apply to evidence offered pursuant to Art. 37.071 V.A.C.C.P., in the punishment phase of a capital murder trial. Id. at 111. No abuse of discretion shown, the trial court correctly refused to allow the jury to see the offense reports on Appellant's assault upon Juanita Garcia.

REPLY TO GROUND OF ERROR NO. FIVE

Appellant claims the trial court erred in overruling his objection to the court's charge on punishment. Appellant objected to the proposed charge because it did not contain a definition of the words "deliberate" and "a probability" (S. F. Vol. I, pg. 66; Vol. XII, pg. 51), and that these are not terms of common meaning and understanding.

This court in King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977) held that the trial court need not provide special definitions for the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society" in its charge to the jury during the

punishment phase of a capital murder trial. In deciding this, this Court cited Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). In Jurek, the United States Supreme Court concluded that the submission of the issues provided by Article 37.071, V.A.C.C.P., constitutionally guided the jury's determination of the punishment issues. No special definitions of the terms of that statute were required.

The charge to the jury (S.F. Vol. I, pgs. 62-65) tracks the language of Article 37.071 V.A.C.C.P. in the wording of the special issues. A definition of the words "deliberately," and "a probability" was not necessary.

Appellant cites Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980) en banc, to support his assertion. Barefoot again discussed the question concerning definitions of the words "deliberate" and "probability." This Court held in Barefoot that King v. State, supra had decided that issue, and that such definitions are not required, Barefoot v. State, supra, at 887. Appellant tries to differentiate Barefoot from his case because in Barefoot psychiatric testimony was presented to the jury to aid it in deciding the special issues, particularly the probability issue. Appellant claims that since no psychiatric testimony was presented in his case that the holding in Barefoot does not apply to him.

Appellant's contentions are totally irrelevant to the question whether definitions of "deliberate" and "a probability" should have been presented to the jury. The holdings in both Barefoot v. State, supra, and King v. State, supra, support the trial court's decision to refrain from confusing the jury by providing judicial definitions to words of ordinary meaning and understanding.

REPLY TO GROUND OF ERROR NO. SIX

Appellant claims error in admitting into evidence State's Exhibit 17, a picture of the Appellant. The Appellant claims the State did not lay a proper predicate for its admittance.

Photographs are admissible provided there is (1) proof of their accuracy as a correct representation of the subject at a given time and (2) they have material relevance to a disputed issue. Appellant does not question the relevance of the photograph. He only claims the State did not prove the picture was a correct representation of the subject.

During redirect examination Officer Schauer testified that the photograph was of Appellant (S.F. Vol. XII, pg. 151), and that was how he looked the night he arrested Appellant after he took him to the booking desk (S.F. Vol. XII, pg. 151). The photo was taken at the police department up at the booking desk on February 4, 1983 (S.F. Vol. XII,

pg. 152). This was a sufficient to show the photographs is a correct representation of Appellant at a given time, namely February 4, 1983. The witness who verifies the exhibits need not be the photographer. He does not even need to have any knowledge concerning the way in which the photograph was made, Darden v. State, 629 S.W.2d 46 at 49 (Tex. Crim. App. 1982). See also David v. State, 453 S.W."d 172 (Tex. Crim. App. 1970) (one who arrived at crime scene shortly after photographs taken could testify as to their accuracy).

REPLY TO GROUND OF ERROR NO. SEVEN

Appellant claims the trial court erred in failing to respond to his specially requested charge and instructions to the jury on the law of circumstantial evidence.

Appellant filed an objection to the Court's Charge, and also requested a special charge on circumstantial evidence (S.F. Vol. I, pgs. 54-57; S.F. Vol. XI,pg. 470). Both the objection and the requests were overruled (S.F. Vol. XI, pgs. 470-471). Although the Court did not give the jury a charge on circumstantial evidence, it did instruct the jury in its charge on the reasonable doubt standard of proof (S.F. Vol. I, pgs. 46-53). Where the jury was properly instructed on the reasonable doubt standard of proof, a

charge on circumstantial evidence is not required. Hankins v. State, 646 S.W.2d 191, 198-199 (Tex. Crim. App. 1983). No error exits in refusing Appellant's request for a charge on circumstantial evidence.

CONCLUSION

No error being shown, the State, requests that the judgment of the Trial Court be affirmed.

GRANT JONES
DISTRICT ATTORNEY
NUECES COUNTY, TEXAS

BY: Mary F. Klapperich
MARY F. KLAPPERICH
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 11550700
(ON APPEAL)

ORAL ARGUMENT

The State requests oral argument in this cause.

Mary F. Klapperich
MARY F. KLAPPERICH
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 11550700

CERTIFICATE OF SERVICE

This is to certify that a copy of this Brief for Appellee has been served on Appellant by mailing a copy to his attorney, Mr. James R. Lawrence, at his mailing address, P. O. Box 8365, Corpus Christi, Texas, 78412.

Mary F. Klapperich
MARY F. KLAPPERICH
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 11550700

CARLOS DeLUNA, Appellant

NO. 69,245 v. - - - - Appeal from NUECES County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted of capital murder. The jury answered both special issues in the affirmative and death was assessed as punishment. Article 37.071, V.A.C.C.P. Appellant raises seven grounds of error. We will affirm.

The evidence showed that during a robbery in Corpus Christi appellant fatally stabbed the clerk of a gas station. He was seen and identified by witnesses before, during, and after the offense. Police conducted a search of the neighborhood into which the robber had reportedly fled and two officers found appellant hiding under a truck parked at a curb. Appellant does not challenge the sufficiency of the evidence.

Only appellant's sixth ground of error pertains to presentation of evidence at the guilt-innocence phase of trial. Appellant contends a photograph of him taken at police headquarters the night of his arrest was improperly admitted into evidence. Defense counsel objected at trial that "the proper 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 the 4th, 1983. . ."

The photograph was admitted during the testimony of Officer Schauer, who had arrested appellant the night of the robbery and murder. Officer Schauer described appellant as having a glassy, "animal-like stare" at the time of his arrest, a description defense counsel contested on crossexamination on the basis that the officer had not included those words in his offense report. On redirect examination Officer Schauer was shown the photograph of appellant and asked if he recognized it:

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"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: This is how he looked when you took him to the booking desk that night?

A: He has a 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."

At that point the photograph was offered and admitted into evidence. Its admission was not error. A photograph is admissible if it is relevant to a material issue and is an accurate representation of its subject as of a given time. Roy v. State, 608 S.W.2d 645, 649 (Tex.Cr.App. 1980). Whether the photograph was relevant to any material issue in the trial is questionable, but that was not the basis of appellant's objection at trial, nor of his ground of error now. Officer Schauer's testimony established the time, place, and accuracy of the photograph. There was no need to meet appellant's specific objection that "the proper predicate hasn't been laid as to who actually took the picture. . ." The witness who verifies a photograph need not be the photographer, nor need he testify as to the way the photograph was made. Darden v. State, 629 S.W.2d 46, 49 (Tex.Cr.App. 1982). It is not even necessary that the

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witness was present when the photograph was taken. David v. State, 453 S.W.2d 172, 177-178 (Tex.Cr.App. 1970). Appellant's ground of error number six is overruled.

In his seventh ground of error appellant contends the trial court erred in refusing to give a charge on circumstantial evidence. The jury was, however, properly instructed on the presumption of innocence, that the burden of proof was on the State, and on the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. In such a case a charge on circumstantial evidence is no longer required. Hankins v. State, 646 S.W.2d 191, 199 (Tex.Cr.App. 1983) (Opinion on State's motion for rehearing). Ground of error number seven is overruled.

At the punishment phase of trial the State put on evidence that appellant had committed an unadjudicated, extraneous offense. Appellant's parole officer testified that appellant had been released on parole from the Texas Department of Corrections on May 13, 1982, and had been charged with a new offense on May 15, 1982. Three witnesses, including the complainant, then testified to the facts of that offense. The day after appellant's release a friend of his from T.D.C. was also released on parole. Appellant attended a party at the home of his friend's mother, celebrating this event. According to the witnesses appellant returned to the house later that night after the other guests were gone. He found his friend's mother lying in bed, and he held a pillow over her face. When she struggled he told her to be quiet, threatened to kill her, and hit her several times, breaking three of her ribs and bruising her face. The complainant testified that though appellant

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lowered his pants while lying atop her, he did not sexually assault her, but instead left the house after about twenty minutes.

Proof of unadjudicated, extraneous offenses is admissible in the punishment phase of a capital murder trial, absent a showing that the defendant is unfairly surprised by such evidence. Williams v. State, 622 S.W.2d 116, 120 (Tex.Cr.App. 1981). To prove that appellant was not surprised by this evidence the State offered three pages of an offense report describing the offense. The first page of the report had been initialed by defense counsel and dated some months before trial. The trial court accepted this exhibit outside the jury's presence, for the limited purpose for which the State offered it. Appellant objected that the offense report should be admitted before the jury for all purposes. The trial court overruled the objection on the basis that the offense report was "the clearest kind of hearsay, would not be admissible even by agreement, and hearsay is -- has no weight of an evidentiary nature whatsoever."

Appellant now contends, in his ground of error number four, that the exclusion of this evidence was erroneous. He argues that the offense report showed that no rape or attempted rape occurred, only an assault. (In the report the investigating officer concluded, "Upon investigating this complaint it was determined that there was no rape or attempted rape that was prosecutable in this case, however there was a class A assault that could be prosecuted.") Appellant wanted the jury to have this "evidence." In other words, he wanted this out of court statement offered to prove the truth of the matter asserted therein. As the trial court held, this was obvious hearsay. Ex

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parte Martinez, 530 S.W.2d 578, 580 (Tex.Cr.App. 1975); 1A Ray, Texas Law of Evidence (3d ed. 1980) §781. The officer who made the report did not testify concerning the offense, so the report could not have been used to impeach any inconsistent testimony he might have given. Nor did the statement fall within any other exception to the hearsay rule.

A trial court has wide discretion in admitting or excluding evidence at the punishment phase of a capital murder trial. King v. State, 657 S.W.2d 109, 111 (Tex.Cr.App. 1983). Nevertheless, the rules of evidence still govern the admissibility of evidence. Id. The offense report in the instant case constituted inadmissible hearsay and was properly excluded by the trial court. Appellant's ground of error number four is overruled.

Appellant's fifth ground of error complains that the trial court overruled his objection to the charge on punishment. Specifically he objected that the charge did not include definitions of the words "deliberately" and "a probability," as used in Article 37.071(b), supra. In King v. State, 553 S.W.2d 105, 107 (Tex.Cr.App. 1977), this Court expressly held that these terms need not be defined in the court's charge to the jury. This issue appears to be well settled. Barefoot v. State, 596 S.W.2d 875, 887 (Tex.Cr.App. 1980); Russell v. State, 665 S.W.2d 771, 780 (Tex.Cr.App. 1983).[1/] Ground of error five is overruled.

In his third ground of error appellant asserts that the

1/ But see this writer's dissenting opinion in Russell, supra, at 781. See also Williams v. State, 674 S.W.2d 315, 322, n. 6 (Tex.Cr.App. 1984).

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trial court erred in sending the jury back to deliberate further when it first returned with no answer to special issue number two. Appellant contends the court should instead have assessed a sentence of life imprisonment at that time, pursuant to Article 37.071(e), V.A.C.C.P.

The record is unclear as to the exact amount of time the jury deliberated. After the punishment hearing and some time before lunch, the jury began its deliberations. Some time before dinner the same day, they returned with special issue number one answered in the affirmative, but no answer to the second special issue. The following exchange then took place between the foreman and the trial court:

> "THE COURT: Let me ask you, Mr. Morales, as Foreperson, do you think that with further deliberations you could resolve what difficulty you were having with that issue?
>
> JUROR MORALES: I would -- Your Honor, I would have to say that we certainly could give it a try.
>
> THE COURT: What is your thought in the matter? Could you resolve what difficulties you're having and arrive at a verdict, either yes or no on it?
>
> JUROR MORALES: We have exhausted both avenues, sir, and I think that it would be rather difficult to go back in there and try and make a decision, sir."

The court then asked each juror individually if he or she thought they might reach a verdict given more time to deliberate. Each answered affirmatively, except one juror, who said, "I don't think so, Your Honor." Given that large majority of jurors who believed a verdict could be reached, the trial court asked them to continue their deliberations. Some time after a recess for dinner, the jury returned with affirmative answers to both special issues. Upon the defendant's request the jury was polled, and each responded that the answers to the

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special issues reflected his or her own verdict.

Article 36.31, V.A.C.C.P., provides:

> "After the cause is submitted to the jury, it may be discharged when it cannot agree and both parties consent to the discharge; or the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree."

Thus the length of time the jury deliberates rests in the sound discretion of the trial court, and absent an abuse of that discretion there is no error. Garcia v. State, 522 S.W.2d 203, 208 (Tex.Cr.App. 1975).

In Williams v. State, 476 S.W.2d 300, 305 (Tex.Cr.App. 1972), the defendant moved for a mistrial after the jury had deliberated for six and a half hours, whereupon the trial court had the jury return to the courtroom and asked if they could reach a verdict. Only one juror indicated they could not. This Court held there was no abuse of discretion in the trial court's instructing the jury to continue its deliberations. In Andrade v. State, 700 S.W.2d 585 (Tex.Cr.App. 1985), no abuse of discretion was shown when the trial court had the jury continue trying to reach a verdict on special issue number one. The jury had indicated after four and a half hours that they had reached no verdict on that issue, but the trial court overruled the defendant's motion for mistrial. The jury continued deliberating until they retired at 11:00 p.m. They resumed at 9:00 o'clock the following morning and reached unanimity within half an hour. This Court concluded, "Considering the nature of the case, a capital murder, and the time of deliberation, approximately twelve hours, we find no abuse of discretion on the part of the trial court." Id., at 589.

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We note that in the instant case when the trial court requested that the jury continue its deliberations the court gave no additional charge and made no comment on either the law or the evidence. See Muniz v. State, 573 S.W.2d 792, 794, n. 4 (Tex.Cr.App. 1978). Where as here the foreman expressed a willingness to continue trying to reach a verdict, and only one other juror indicated the jury could not, it was not "altogether improbable" that the jury would "agree." Article 36.31, supra. There was no abuse of discretion in the trial court's having the jury continue its deliberations. Ground of error number three is overruled.

Finally, appellant's grounds of error one and two allege the trial court erred in overruling his motion for new trial. A hearing was held on the motion, during which one of the jurors testified. The juror was a clerk in a convenience store, and defense counsel had discovered that during the trial she was the victim of a crime similar to the one of which appellant was accused. Appellant's contention that she was "the victim of the exact same situation" as that presented at trial is inaccurate, however.[2/] The juror testified that she had been working at the store at 1:00 a.m. when she accused a "kid," fourteen or fifteen years old, of shoplifting. When he was cornered by the juror and her coworker, the shoplifter removed a jug of wine from his pants and produced a knife, with which he threatened the juror in order to make his escape. The juror characterized

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2/ That this contention of appellant's must not be read literally is obvious. If the juror had been the victim of the "exact same" type of crime as the capital murder with which appellant was charged she would not have been available to testify at the motion for new trial hearing.

this incident as "just a common shoplifting thing" that had no bearing on her deliberations in appellant's trial. She stated unequivocally that she had not been scared by the incident. Most revealing was this exchange between the trial court and the juror at the hearing:

> "Q: All right. And my question, then, is: Did that situation in any way influence your verdict in the De Luna case?
>
> A: No, sir.
>
> Q: And are you sure of that in your own mind?
>
> A: Yes, sir."

Appellant now contends his motion for new trial should have been granted because the juror was disabled from serving under Article 36.29, V.A.C.C.P., which provides in part:

> ". . . when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict. . ."

Appellant relies on Griffin v. State, 486 S.W.2d 948, 951 (Tex.Cr.App. 1972), which defines "disabled" in this context as "any condition that inhibits the juror from fully and fairly performing the functions of a juror." Appellant contends the juror was disabled under this definition because her experience during trial must have prejudiced her against appellant, who was accused of a similar offense.

In Carrillo v. State, 597 S.W.2d 769, 771 (Tex.Cr.App. 1980), this Court held that disability of a juror in this context refers only to physical, mental, or emotion impairments, not to bias or prejudice. Appellant contends the juror in this case must have been so "mentally impaired" by the bias or prejudice produced by her victimization that she was disabled

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from serving, citing Bass v. State, 622 S.W.2d 101 (Tex.Cr.App. 1981). In Bass after the jury had been selected but before the attempted capital murder trial began one of the jurors was threatened by a man who entered her bedroom with a knife. This Court reiterated, however, that any bias or prejudice produced by such a situation does not render the juror disabled under Article 36.29, supra. Id., at 106. The mental impairment referred to in Bass was that the juror herself testified that she had been so shaken by her experience that she could not concentrate on the case in which she was sitting as a juror. In the instant case, to the contrary, the juror testified that she had not been frightened by the "common shoplifting" incident in her store and that that offense had not colored her decisions at trial. In light of this testimony the trial court did not abuse its discretion in overruling the motion for new trial.

Finding no reversible error, we affirm the judgment of the trial court.

CLINTON, Judge

(Delivered June 4, 1986)

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CARLOS DeLUNA, Appellant

NO. 69,245 vs. - - - APPEAL FROM NUECES COUNTY

THE STATE OF TEXAS, Appellee

CONCURRING OPINION

I am compelled to write because of the way the majority opinion disposes of the appellant's seventh ground of error. The majority opinion states the following: "In his seventh ground of error appellant contends the trial court erred in refusing to give a charge on circumstantial evidence. The jury was, however, properly instructed on the presumption on innocence, that the burden of proof was on the State, and on the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. In such a case a charge on circumstantial evidence is no longer required. Hankins v. State, 646 S.W.2d 191, 199 (Tex.Cr.App.1983) (Opinion on State's motion for rehearing. Ground of error number seven is overruled." (My emphasis.)

The way I interpret what the majority opinion states is that whether an instruction on circumstantial evidence must be given hinges or is conditioned on whether the jury was instructed on presumption of innocence, on the burden of proof, and if there was a reasonable doubt the jury should acquit the defendant. If they were, the defendant does not get such an instruction. If they were not, the defendant does get such an instruction.

The majority opinion thus implies that in some cases, as a matter of law, a defendant will be entitled to receive an instruction on circumstantial evidence. It cites Hankins v. State, supra, as its authority for this proposition. Hankins, supra, however, did not so expressly limit itself.

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In fact, but as I and others, including Judge Clinton, the author of the majority opinion in this cause, correctly pointed out in the concurring and dissenting opinions that were filed in Hankins, supra, the then aggressive and assertive majority of this Court held that no longer, as a matter of law, would an accused person be entitled to an instruction on circumstantial evidence. I stated the following in the dissenting opinion that I filed in Hankins, supra: "In any event, the mighty circumstantial evidence charge in our law is now consigned by the majority opinion to its death and burial in the refuse heap of Texas law, preceded in death only recently by the doctrine of carving. See Ex parte Mc Williams, 634 S.W.2d 815 (Tex.Cr.App.1982)." (221).

In summary, until Hankins v. State, supra, is expressly overruled by this Court, or the Legislature of this State so provides, an accused person in Texas will not ever be entitled, as a matter of law, to receive an instruction on circumstantial evidence.

TEAGUE, Judge

EN BANC

DELIVERED: June 4, 1986

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TRIAL COURT NO. 83-CR-194-A

THE STATE OF TEXAS.

TO THE 28TH. JUDICIAL DISTRICT COURT OF NUECES COUNTY – GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 4th. day of June A.D. 19 86

the cause upon appeal to revise or reverse your Judgment between

CARLOS DE LUNA Appellant ,

No. 69,245 vs.

The State of Texas, Appellee .

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 20th. day of June A.D. 19 86

Thomas Lowe
Clerk.

Belva Ryler
Deputy Clerk.

No. 69,245

MANDATE

FROM

COURT OF CRIMINAL APPEALS

Austin, Texas

CARLOS DE LUNA
Appellant.

vs.

THE STATE OF TEXAS,
Appellee.

Issued June 20 19 86

Thomas Lowe Clerk.

Belva Myler Deputy Clerk.

FILED
JUN 24 1986
OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS
By Juanita L. Barrera, Deputy