

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

H

Court of Appeals of Texas,
Eastland.
Corey Sharod FREEMAN, Appellant,
v.
STATE of Texas, Appellee.

No. 11-05-00254-CR.
May 24, 2007.

Discretionary Review Refused Nov. 14, 2007.

Background: Defendant was convicted in a jury trial in the 194th District Court, Dallas County, [Mary Miller](#), J., of murder, for which he was sentenced to 15 years' confinement and fined \$5,000. Defendant appealed.

Holdings: The Court of Appeals, [Rick Strange](#), J., held that:

- (1) that only seven of 72 potential jurors were African-American did not by itself establish an under-representation of a distinctive group in the jury;
- (2) State's failure to notify defendant that it anticipated State's witness to recant her police statement in her testimony was not a [Brady](#) violation;
- (3) spontaneous statement made by witness's family friend identifying defendant as shooter was not testimonial as to implicate defendant's confrontation rights;
- (4) defendant and witness did not represent to others that they were husband and wife as to evince a common-law marriage rendering spousal privilege inapplicable;
- (5) extraneous offense evidence consisting of witness's testimony that she had purchased drugs from defendant out of his apartment was admissible;
- (6) evidence of murder victim's prior convictions for burglarizing cars was inadmissible; and
- (7) evidence did not warrant administration of requested jury instruction on lesser offense of criminally negligent homicide.

Affirmed.

West Headnotes

[1] Jury 230 ⚙️33(1.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.2) Particular Groups, Inclusion or Exclusion

230k33(1.15) k. Race. Most Cited

Cases

That only seven of 72 potential jurors were African-American did not by itself establish an under-representation of a distinctive group in the community resulting from systematic exclusion of that group in the jury selection process, and thus, trial court was under no obligation to quash jury panel, in murder prosecution; defendant had burden of proof on issue, and defendant offered no evidence beyond his attorney's description of county's demographics. [U.S.C.A. Const.Amends. 6, 14](#); [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[2] Jury 230 ⚙️33(1.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.2) Particular Groups, Inclusion or Exclusion

230k33(1.15) k. Race. Most Cited

Cases

The Constitution does not require proportionate representation of races on jury panels, but it does require that panels be selected without discrimination as to race. [U.S.C.A. Const.Amends. 6, 14](#).

[3] Jury 230 ⚙️33(1.1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

230k33(1.1) k. Representation of community, in general. [Most Cited Cases](#)

A constitutional violation exists when the under-representation of a distinctive group in the community results from systematic exclusion of that group in the jury selection process; this requires proof of more than disproportionate representation in a single panel. [U.S.C.A. Const.Amends. 6, 14.](#)

[4] Criminal Law 110 🔑1034

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1034 k. Continuance. [Most Cited Cases](#)

Issue as to whether trial court should have granted a continuance to allow defendant to locate witness whose statements identifying defendant following shooting were to be admitted under present-sense-impression exception to hearsay rule was waived for appellate review, in murder prosecution, as defendant did not file a written, sworn motion for continuance. [V.T.C.A., Penal Code § 19.02\(b\)\(1\); Vernon's Ann.Texas C.C.P. arts. 29.03, 29.08; Rules of Evid., Rule 803\(1\).](#)

[5] Criminal Law 110 🔑1998

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1993 Particular Types of Information Subject to Disclosure

110k1998 k. Statements of witnesses or prospective witnesses. [Most Cited Cases](#) (Formerly 110k700(4))

State's failure to notify defendant that it anticipated State's witness to recant her police statement by testifying that her friend, rather than she herself, identified defendant as shooter immediately

after hearing gunshots and witnessing remaining incidents in shooting did not constitute a [Brady](#) violation warranting mistrial, in murder prosecution, as witness's trial testimony that she saw the gun flashes, saw the shooter bend down and then stand back up and fire additional shots, and later saw defendant leave the apartment complex in his car was consistent with her written statement, and such information was equally available to both attorneys. [V.T.C.A., Penal Code § 19.02\(b\)\(1\).](#)

[6] Criminal Law 110 🔑1155

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1155 k. Issues related to jury trial. [Most Cited Cases](#)

The denial of a motion for mistrial is reviewed for an abuse of discretion.

[7] Criminal Law 110 🔑1992

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1992 k. Materiality and probable effect of information in general. [Most Cited Cases](#) (Formerly 110k700(2.1))

An alleged [Brady](#) violation is analyzed in light of all the other evidence adduced at trial.

[8] Criminal Law 110 🔑1992

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1992 k. Materiality and probable effect of information in general. [Most Cited Cases](#) (Formerly 110k700(2.1))

The State has an affirmative duty to disclose exculpatory evidence that is material either to guilt

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

or punishment.

[9] Criminal Law 110 ⚔️2007

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k2007 k. Time and manner of required disclosure. [Most Cited Cases](#)
(Formerly 110k700(5))

The State's duty to reveal *Brady* material attaches when the information comes into its possession, not when it is requested.

[10] Criminal Law 110 ⚔️1992

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1992 k. Materiality and probable effect of information in general. [Most Cited Cases](#)
(Formerly 110k700(2.1))

To establish reversible error on account of a *Brady* violation, a defendant must show that: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, i.e., there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different.

[11] Criminal Law 110 ⚔️1990

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1990 k. In general. [Most Cited Cases](#)

(Formerly 110k700(2.1))

The *Brady* rule concerning disclosure of ex-

culpatory evidence recognizes that the State is in the unique position of being an advocate while striving to obtain a just result.

[12] Criminal Law 110 ⚔️1991

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1991 k. Constitutional obligations regarding disclosure. [Most Cited Cases](#)
(Formerly 110k700(2.1))

Brady rule concerning State's obligation to disclose to defense exculpatory evidence is not a general discovery rule and does not require the State to share all useful information with the defendant, nor does it displace the adversary system.

[13] Criminal Law 110 ⚔️1995

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1993 Particular Types of Information Subject to Disclosure

110k1995 k. Diligence on part of accused; availability of information. [Most Cited Cases](#)

(Formerly 110k700(2.1))

Criminal Law 110 ⚔️2004

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k2002 Information Within Knowledge of Prosecution

110k2004 k. Duty to locate information. [Most Cited Cases](#)

(Formerly 110k700(6))

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

Brady does not require State to seek out exculpatory evidence independently on the defendant's behalf or to furnish him with exculpatory or mitigating evidence that is fully accessible from other sources.

[14] Criminal Law 110 ⚔️662.8

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k662 Right of Accused to Confront Witnesses

110k662.8 k. Out-of-court statements and hearsay in general. [Most Cited Cases](#)

Spontaneous statement made by witness's family friend identifying defendant as shooter in shooting incident that both witness and her friend had observed was not testimonial as to implicate defendant's confrontation rights, thus rendering witness's testimony relaying the identification admissible at trial, in murder prosecution; witness testified that her friend had been at her apartment with her family, and she was taking him home when the shooting occurred, and the comments the friend made to her were in immediate response to the shooting both had just observed. [U.S.C.A. Const.Amend. 6](#); [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[15] Criminal Law 110 ⚔️662.8

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k662 Right of Accused to Confront Witnesses

110k662.8 k. Out-of-court statements and hearsay in general. [Most Cited Cases](#)

The confrontation clause applies only to testimonial evidence. [U.S.C.A. Const.Amend. 6](#).

[16] Criminal Law 110 ⚔️662.8

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k662 Right of Accused to Confront Witnesses

110k662.8 k. Out-of-court statements and hearsay in general. [Most Cited Cases](#)

Spontaneous statements to acquaintances are not testimonial as to implicate confrontation clause. [U.S.C.A. Const.Amend. 6](#).

[17] Criminal Law 110 ⚔️419(2.15)

110 Criminal Law

110XVII Evidence

110XVII(N) Hearsay

110k419 Hearsay in General

110k419(2.15) k. Present sense impression. [Most Cited Cases](#)

Witness's testimony relaying spontaneous statement made by witness's family friend identifying defendant as shooter in shooting incident both witness and her friend had observed, though hearsay, was admissible under present-sense-impression exception, in murder prosecution, as friend's statement was made as he watched the shooting, and it described what he had just seen. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#); [Rules of Evid., Rule 803\(1\)](#).

[18] Criminal Law 110 ⚔️419(2.15)

110 Criminal Law

110XVII Evidence

110XVII(N) Hearsay

110k419 Hearsay in General

110k419(2.15) k. Present sense impression. [Most Cited Cases](#)

The rationale of present-sense-impression exception to hearsay rule is that the declarant's statement is free from the defects of memory, that there is little or no time for calculated misstatement, and that the statement is usually made to someone with equal opportunity to observe and thus check a misstatement. [Rules of Evid., Rule 803\(1\)](#).

[19] Witnesses 410 ⚔️63

410 Witnesses

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

410II Competency

410II(A) Capacity and Qualifications in General

410k51 Husband and Wife

410k63 k. Effect of invalidity of marriage. [Most Cited Cases](#)

Defendant and witness did not represent to others that they were husband and wife, which was necessary to evince a common-law marriage, thus rendering inapplicable the spousal privilege and thereby subjecting witness to examination at trial concerning her written statement to police during murder investigation involving defendant; witness referred to defendant as her boyfriend throughout pretrial communication with police. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#); [Rules of Evid., Rule 504\(a\)](#).

[20] Criminal Law 110 ⚡1043(3)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1043 Scope and Effect of Objection

110k1043(3) k. Adding to or changing grounds of objection. [Most Cited Cases](#)

Defendant waived for appellate review issue as to whether police officer's testimony concerning written statement to police by defendant's girlfriend during murder investigation involving defendant constituted inadmissible double hearsay, where, although defendant initially objected to statement because it was hearsay and that admission of statement violated his confrontation rights, he never objected to statement on double hearsay grounds. [U.S.C.A. Const.Amend. 6](#); [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[21] Witnesses 410 ⚡390.1

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k390 Competency of Evidence of Inconsistent Statements in General

410k390.1 k. In general. [Most Cited Cases](#)

Police officer's hearsay testimony confirming that defendant's girlfriend provided the written statement to police in question, during murder investigation involving defendant, was admissible for impeachment purposes, as girlfriend's prior testimony concerning whether she had given the statement was equivocal. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[22] Criminal Law 110 ⚡1169.1(9)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.1 In General

110k1169.1(9) k. Hearsay. [Most Cited Cases](#)

Any error in admitting police officer's hearsay testimony confirming that defendant's girlfriend provided the written statement to police in question, during murder investigation involving defendant, was harmless, where girlfriend ultimately reconsidered her refusal to testify and confirmed the making of the statement. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[23] Criminal Law 110 ⚡1169.5(3)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury

110k1169.5(3) k. Other offenses and character of accused. [Most Cited Cases](#)

Trial court's instruction to disregard witness's statement disclosing extraneous offense or collateral crimes evidence of defendant's drug use cured any prejudice resulting therefrom, in murder prosecution, where, when trial court sustained defend-

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

ant's objection, State did not ask witness any further questions about the subject, and, during defendant's own testimony, he testified about drugs and drug usage in his apartment. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[24] Criminal Law 110 🔑 **1169.5(3)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.5 Curing Error by Withdrawal, Striking Out, or Instructions to Jury

110k1169.5(3) k. Other offenses and character of accused. [Most Cited Cases](#)

A prompt instruction to disregard will cure the prejudicial effect associated with an improper question and answer concerning an extraneous offense.

[25] Criminal Law 110 🔑 **867.12(1)**

110 Criminal Law

110XX Trial

110XX(J) Issues Relating to Jury Trial

110k867 Discharge of Jury Without Verdict; Mistrial

110k867.12 Evidentiary Matters

110k867.12(1) k. In general. [Most Cited Cases](#)

(Formerly 110k867)

To justify a mistrial, the testimony must be so prejudicial that expenditure of further time and expense would be wasteful and futile.

[26] Criminal Law 110 🔑 **371.6**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)6 Other Misconduct Showing Motive

110k371.6 k. Controlled substances.

[Most Cited Cases](#)

(Formerly 110k371(12))

Extraneous offense or collateral crimes evi-

dence consisting of witness's testimony that she had purchased drugs from defendant out of his apartment was admissible to rebut the defense suggestion that defendant had no interest in any crack cocaine that might have been stolen from his apartment. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#); [Rules of Evid., Rule 404\(b\)](#).

[27] Criminal Law 110 🔑 **371.13**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)6 Other Misconduct Showing Motive

110k371.13 k. Homicide, mayhem, and assault with intent to kill. [Most Cited Cases](#)
(Formerly 110k371(12))

Homicide 203 🔑 **1001**

203 Homicide

203IX Evidence

203IX(D) Admissibility in General

203k1000 Motive

203k1001 k. In general. [Most Cited Cases](#)

(Formerly 110k371(12))

Probative value of extraneous offense or collateral crimes evidence consisting of witness's testimony that she had purchased drugs from defendant out of his apartment was not substantially outweighed by danger of unfair prejudice, in murder prosecution; evidence went to motive and it put witness's personal knowledge in context, the challenged testimony consisted of only two questions, and State needed to establish a motive, which the evidence provided. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#); [Rules of Evid., Rule 403](#).

[28] Criminal Law 110 🔑 **1153.5**

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

Evidence

[110k1153.5](#) k. Other offenses. **Most**

Cited Cases

(Formerly 110k1153(1))

When evaluating whether probative value of extraneous offense or collateral crimes evidence was substantially outweighed by danger of unfair prejudice, a reviewing court is to reverse the trial court's judgment rarely and only after a clear abuse of discretion because the trial court is in a superior position to gauge the impact of the relevant evidence. [Rules of Evid., Rule 403](#).

[29] Criminal Law 110 ☞368.13

110 Criminal Law

[110XVII](#) Evidence

[110XVII\(F\)](#) Other Misconduct by Accused

[110XVII\(F\)1](#) Other Misconduct as Evidence of Offense Charged in General

[110k368.7](#) Factors Affecting Admissibility

[110k368.13](#) k. Prejudicial effect and probative value. **Most Cited Cases**

(Formerly 110k369.2(1))

In determining whether the probative value of extraneous offense or collateral crimes evidence is substantially outweighed by the danger of unfair prejudice, the trial court is to consider: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. [Rules of Evid., Rule 403](#).

[30] Homicide 203 ☞1051(2)

203 Homicide

[203IX](#) Evidence

[203IX\(D\)](#) Admissibility in General

[203k1049](#) Self-Defense

[203k1051](#) Character and Habits of

Victim

[203k1051\(2\)](#) k. Knowledge of defendant as to victim's character. **Most Cited Cases**

Evidence of murder victim's prior convictions

for burglarizing cars or evidence that victim was known as a car burglar was inadmissible, even though defendant claimed that he shot victim upon catching him breaking into his car, where defendant testified that he did not know who was breaking into his car, meaning victim's prior criminal history and general reputation would have had no bearing on the reasonableness of defendant's actions. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[31] Criminal Law 110 ☞1770

110 Criminal Law

[110XXXI](#) Counsel

[110XXXI\(B\)](#) Right of Defendant to Counsel

[110XXXI\(B\)5](#) Procedure and Affirmative Duties by Court in Protection of Right to Counsel and Right to Self-Representation

[110k1770](#) k. In general. **Most Cited Cases**

(Formerly 110k641.10(2))

Criminal Law 110 ☞1828(1)

110 Criminal Law

[110XXXI](#) Counsel

[110XXXI\(B\)](#) Right of Defendant to Counsel

[110XXXI\(B\)9](#) Choice of Counsel

[110k1824](#) Discharge by Accused

[110k1828](#) Particular Cases

[110k1828\(1\)](#) k. In general. **Most Cited Cases**

(Formerly 110k641.10(2))

Trial court was under no obligation to advise defendant of preparation provision under statute governing substitution of appointed counsel so that defendant could make an informed decision on whether to discharge his retained counsel, in murder prosecution, where no authority required such advisement from trial court, and statute's only expressly required admonishment required trial court to advise a defendant wishing to waive the right to appointed counsel of the dangers and disadvantages of self-representation. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#); [Vernon's Ann.Texas C.C.P. art. 1.051](#).

[32] Criminal Law 110 ⚖️1036.1(5)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1036 Evidence

110k1036.1 In General

110k1036.1(3) Particular Evidence

110k1036.1(5) k. Confessions, declarations, and admissions. [Most Cited Cases](#)

Defendant waived for appellate review claim that State attempted to use defendant's retention of attorney as inculpatory evidence, in murder prosecution, where defendant failed to object when State questioned witness who hired and paid for defendant's attorney, and, although State's examination of witness concerned defendant's constitutional right to the assistance of counsel, this was an evidentiary issue that required an objection. [U.S.C.A. Const.Amend. 6](#); [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#); [Rules App.Proc., Rule 33.1\(a\)](#).

[33] Criminal Law 110 ⚖️1030(1)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in
General

110k1030(1) k. In general. [Most Cited Cases](#)

Criminal Law 110 ⚖️1043(2)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1043 Scope and Effect of Objec-

tion

110k1043(2) k. Necessity of specific objection. [Most Cited Cases](#)

A party must make a timely and specific objection at trial to preserve an issue for appellate review. [Rules App.Proc., Rule 33.1\(a\)](#).

[34] Criminal Law 110 ⚖️1028

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1028 k. Presentation of questions in general. [Most Cited Cases](#)

Criminal Law 110 ⚖️1035(1)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1035 Proceedings at Trial in General

110k1035(1) k. In general. [Most Cited Cases](#)

Criminal Law 110 ⚖️1035(7)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1035 Proceedings at Trial in General

110k1035(7) k. Counsel for accused. [Most Cited Cases](#)

Waiver rule applies to all objections except complaints involving violations of rights which are waivable only, or the right to assistance of counsel and the right to trial by jury, and denials of absolute systemic requirements, or jurisdiction of the person, jurisdiction of the subject matter, and a penal stat-

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

ute's compliance with the Separation of Powers Section of the state constitution. [U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 33.1\(a\)](#).

[35] Homicide 203 ⚖️1457

203 Homicide

203XII Instructions

203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense

203k1457 k. Manslaughter. [Most Cited Cases](#)

Evidence did not warrant administration of requested jury instruction on lesser offense of criminally negligent homicide, in murder prosecution; there was no evidence that defendant did not appreciate the risks inherent with a firearm, that he did not know his revolver was loaded, or that it accidentally discharged, but in fact showed that he intentionally fired a loaded weapon. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[36] Criminal Law 110 ⚖️795(1.5)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k795 Grade or Degree of Offense; Included Offenses

110k795(1.5) k. Relation between offenses; sufficiency of charging instrument. [Most Cited Cases](#)

Criminal Law 110 ⚖️795(2.10)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k795 Grade or Degree of Offense; Included Offenses

110k795(2) Evidence Justifying or Requiring Instructions

110k795(2.10) k. Some, any, slight, or weak evidence. [Most Cited Cases](#)

The trial court is required to include an instruction on a lesser included offense if the lesser included offense is included within the proof necessary to establish the offense charged and some evidence exists that, if the defendant is guilty, he is guilty only of the lesser offense.

[37] Homicide 203 ⚖️657

203 Homicide

203IV Manslaughter

203k657 k. Murder and manslaughter compared and contrasted. [Most Cited Cases](#)

The distinction between murder, manslaughter, and criminally negligent homicide is the defendant's culpable mental state.

[38] Criminal Law 110 ⚖️1173.2(4)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.2 Instructions on Particular Points

110k1173.2(4) k. Grade or degree of offense; included offenses; punishment. [Most Cited Cases](#)

Even if defendant was entitled to requested jury instruction on lesser offense of criminally negligent homicide, error was harmless; manslaughter instruction provided jury with compromise, and defendant's testimony, if believed, squarely presented jury with a situation of reckless conduct, and their decision to reject that option and find defendant guilty of murder indicated that jury legitimately believed defendant was guilty of the greater, charged offense. [V.T.C.A., Penal Code § 19.02\(b\)\(1\)](#).

[39] Homicide 203 ⚖️1193

203 Homicide

203IX Evidence

203IX(G) Weight and Sufficiency

203k1192 Self-Defense

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

203k1193 k. In general. [Most Cited](#)

Cases

Evidence was sufficient to establish that defendant was not acting in self-defense when he shot victim, thus supporting murder conviction; defendant contended that he reacted to a car burglary in the middle of the night and that he shot at victim to make him stop running and return whatever he had taken from his car, whereas other witnesses testified that defendant had previously threatened to hurt or kill victim in retaliation for stealing crack cocaine from his apartment, that defendant had been looking for victim, and that on the night of the shooting he sent someone to see if victim was at a particular house. [V.T.C.A., Penal Code §§ 9.41\(a\), 19.02\(b\)\(1\)](#).

[40] Criminal Law 110 1159.5

110 Criminal Law

110XXIV Review

110XXIV(P) Verdicts

110k1159 Conclusiveness of Verdict

110k1159.5 k. Particular issues or elements. [Most Cited Cases](#)

When a defendant raises a factual sufficiency challenge to the jury's implied adverse finding on a defensive theory, Court of Appeals performs a factual sufficiency review of the jury's verdict.

[41] Criminal Law 110 1159.2(9)

110 Criminal Law

110XXIV Review

110XXIV(P) Verdicts

110k1159 Conclusiveness of Verdict

110k1159.2 Weight of Evidence in

General

110k1159.2(9) k. Weighing evidence. [Most Cited Cases](#)

Criminal Law 110 1159.4(2)

110 Criminal Law

110XXIV Review

110XXIV(P) Verdicts

110k1159 Conclusiveness of Verdict

110k1159.4 Credibility of Witnesses

110k1159.4(2) k. Province of jury or trial court. [Most Cited Cases](#)

When reviewing sufficiency of evidence claim on appeal, the Court of Appeals gives appropriate deference to the jury findings in order to prevent intruding on the fact-finder's role as the sole judge of the weight and credibility of the evidence.

[42] Homicide 203 1193

203 Homicide

203IX Evidence

203IX(G) Weight and Sufficiency

203k1192 Self-Defense

203k1193 k. In general. [Most Cited](#)

Cases

Evidence was sufficient to allow jury to determine that shooting was not in response to a break-in of defendant's car but in retaliation for prior theft of cocaine from defendant's apartment, thus supporting murder conviction. [V.T.C.A., Penal Code § 19.02](#).

[43] Homicide 203 668

203 Homicide

203IV Manslaughter

203k666 Sudden Passion or Heat of Passion

203k668 k. Passion as element or as factor affecting degree or grade of offense. [Most Cited Cases](#)

Ordinary anger is not adequate cause to support finding of sudden passion homicide. [V.T.C.A., Penal Code § 19.02\(a\)\(1\)](#).

*397 [William D. Cox, III](#), Dallas, for appellant.

[Craig Watkins](#), Dist. Atty., [Anne Wetherholt](#), Asst. Dist. Atty., Dallas, for appellee.

Panel consists of [WRIGHT, C.J.](#), [McCALL, J.](#), and [STRANGE, J.](#)

OPINION

RICK STRANGE, Justice.

The jury convicted Corey Sharod Freeman of murder and assessed his punishment at fifteen years confinement and a \$5,000 fine. We affirm.

I. Background Facts

In the early morning hours of February 16, 2002, Steve Fields (Red) was fatally shot three times at the Aspen Chase apartment complex. During the ensuing investigation, the police received a call from Red's common-law wife. She gave them Priscilla Brewer's name and phone number. Detective Randy Edward Loboda contacted Brewer and arranged a meeting. He showed her six pictures, including a picture of Freeman. Brewer was unable to identify the shooter, but she did provide a written statement implicating Freeman. She indicated that Freeman shot Red in retribution for stealing crack cocaine from his apartment.

Detective Lauran Elterman subsequently interviewed Schawana Johnson. She too provided a written statement implicating Freeman. Johnson and Freeman were living together. She stated that someone broke into their apartment and stole Freeman's crack cocaine. Freeman believed Red was responsible and threatened to beat him. The night of the shooting, Freeman came into their apartment, woke her, and took her to a park. There, he told her that he had gotten into an altercation with Red and started shooting.

Detective Elterman also obtained a statement from Bridget Daniels. Daniels saw Freeman driving through the complex two days before the shooting. He stopped and asked her if she had seen Red. Freeman told her that Red had kicked in his door and stolen \$80 worth of drugs and that he intended to "[k]ick his ass." After the shooting, Freeman called her and asked what was being said in the complex about the shooting. She told him that people believed he had killed Red. He responded that "[i]t wasn't supposed to go *398 down like that." Freeman was arrested and was indicted for murder.

II. Issues

Freeman challenges his conviction with nineteen issues. These can be grouped into seven areas:

- the composition of the venire panel;
- rulings made by the trial court in response to Brewer's testimony;
- other evidentiary rulings made during trial;
- the trial court's admonitions to Freeman when his trial counsel indicated an intention to not put on a defense following an adverse ruling;
- the trial court's failure to sua sponte grant a mistrial in response to actions taken by the State;
- requests for lesser included offenses in the charge; and
- factual sufficiency challenges.

III. Analysis

A. The Composition of the Jury Panel.

[1] Freeman objected to the jury panel because only seven of seventy-two potential jurors were African-American. Freeman contended that African-Americans constituted approximately 45% to 48% of Dallas County's population and, therefore, that it would be impossible to pick a constitutionally sufficient jury from this panel.^{FN1} The trial court denied Freeman's motion to quash the panel noting that it had been randomly selected and that the clerk of the Central Jury Room did not know the defendant's race when a jury was ordered.

FN1. The State does not concede the accuracy of Freeman's statement, contending that, as of the 2000 census, African-Americans comprised 20.31% of Dallas County's population. See http://en.wikipedia.org/wiki/Dallas—County,—Texas#Demo_graphics. It is unnecessary for us to resolve this issue.

[2][3] The Constitution does not require pro-

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

portionate representation of races on jury panels, but it does require that panels be selected without discrimination as to race. *May v. State*, 738 S.W.2d 261, 269 (Tex.Crim.App.1987). A constitutional violation exists when the under-representation of a distinctive group in the community results from systematic exclusion of that group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). This requires proof of more than disproportionate representation in a single panel. *May*, 738 S.W.2d at 269.

Freeman argues that the under-representation of African-Americans necessarily resulted from systematic exclusion because the record contains no evidence of a random selection process. The record contains few details concerning Dallas County's jury selection process, but because Freeman had the burden of proof, this silence weighs against rather than for his position. Because Freeman offered no evidence beyond his attorney's description of Dallas County demographics, the trial court did not err when it denied his motion to quash. Freeman's fifteenth issue is overruled.

B. The Trial Court's Rulings in Response to Priscilla Brewer's Testimony.

Freeman's counsel advised the trial court prior to the start of testimony that he believed the State would attempt to offer inadmissible hearsay evidence. The State responded that it intended to offer evidence through Brewer that fell within the present-sense-impression exception. The trial court then conducted a hearing to determine the admissibility of Brewer's expected testimony. Brewer testified that, *399 in February 2002, she lived in the Aspen Chase Apartments and that, on the morning of February 16, 2002, she witnessed a shooting. Brewer and an individual named Miquel were riding in her car. They heard gunfire and looked up. Miquel said, "That's Corey." Brewer asked, "[I]s it?" Miquel responded, "[Y]es."

Freeman lodged several objections to this testimony and asked for a continuance to try to locate Miquel. The trial court overruled Freeman's objec-

tions and allowed Brewer to testify about Miquel's statements. Freeman asserts four issues related to the admission of this testimony.

1. Did the Court Err by not Granting a Continuance?

[4] Freeman asserts first that the trial court erred by not granting his oral motion for continuance. Freeman's issue has not been preserved because he did not file a written, sworn motion for continuance. See TEX.CODE CRIM. PROC. ANN. arts. 29.03, 29.08 (Vernon 2006); see also *Dewberry v. State*, 4 S.W.3d 735, 755 (Tex.Crim.App.1999). Freeman's first issue is overruled.^{FN2}

FN2. Even if the issue were before us, the record does not indicate that the trial court abused its discretion. The trial court noted that counsel had interviewed Brewer before trial and that she had been accessible to him for some time. The court indicated that counsel had been afforded the opportunity to learn about Miquel and that his name should not have come as a surprise. We cannot say based upon the record that these conclusions constitute an abuse of discretion.

2. Did the Trial Court Err by not Granting Freeman's Motion for Mistrial?

[5] When the State rested, Freeman asked for a mistrial contending that the State concealed *Brady* material by not revealing that Brewer was recanting her statement.^{FN3} The State responded that Brewer did not recant but provided additional detail. The trial court was already aware that Freeman's counsel had spoken to Brewer before trial^{FN4} and had previously noted that the State tendered more discovery material before trial than was required or requested.^{FN5} Following counsel's argument, the trial court reconfirmed that Freeman's counsel had interviewed Brewer and then held that her testimony did not constitute *Brady* material.

FN3. *Brady v. Maryland*, 373 U.S. 83, 83

S.Ct. 1194, 10 L.Ed.2d 215 (1963).

FN4. This was developed during the hearing on Freeman's motion for continuance.

FN5. Pursuant to TEX.R. EVID. 615, the State was not required to provide Freeman with Brewer's statement until after her testimony on direct.

[6][7] The denial of a motion for mistrial is reviewed for an abuse of discretion. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex.Crim.App.1999). We analyze the alleged *Brady* violation in light of all the other evidence adduced at trial. *Hampton v. State*, 86 S.W.3d 603, 612–13 (Tex.Crim.App.2002).

[8][9][10] The State has an affirmative duty to disclose exculpatory evidence that is material either to guilt or punishment. *Brady*, 373 U.S. at 86, 83 S.Ct. 1194. The State's duty to reveal *Brady* material attaches when the information comes into its possession, not when it is requested.^{FN6} *Thomas v. State*, 841 S.W.2d 399, 407 (Tex.Crim.App.1992). To establish reversible error, a defendant must show that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, i.e., *400 there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different. *Hampton*, 86 S.W.3d at 612.

FN6. Freeman did not submit any written discovery requests, but he did receive seventy-two pages of material from the district attorney's office pursuant to its open file policy.

The State called Brewer as its first witness. Brewer testified that she was taking Miquel, a family friend, home. As she got into her car, she saw Red walk past. She and Miquel heard gunshots and looked up. She saw sparks coming from a gun and heard Miquel say, "That's Corey." She saw the shooter bend down as if he had dropped something,

stand up, and start shooting again. The shooter then walked to the back of the apartment complex where Freeman and Johnson lived. Brewer checked on Red, went to her apartment to call the police, and came back to Red. When she did, she saw Freeman and Johnson speed away from the complex. Brewer later spoke with the police and told them that she saw Freeman shoot Red.

The State provided Freeman's counsel with a copy of Brewer's statement after her direct examination. Brewer's statement included the following:

I was in my car fixin [sic] to leave and I saw Red walk past my car. Red turned the corner and then I heard shots. I looked up and saw Corey shooting at Red. Corey fired a couple of shots, stopped, then fired two more shots. Red was running and ducking. I saw the flash coming from Corey's gun. I turned around the corner and that's when I saw Red laying on the ground. Corey got into his car, a gray or silver Mustang and took off out of the apartments. I haven't seen him since that night.

In support of his motion for mistrial, Freeman pointed out that Brewer's statement made no reference to Miquel and contended that the investigating officer probably caused his name to be omitted. Freeman argued that the trial disclosure of Miquel's name had "obliterated" his planning, defensive theory, and strategy and, therefore, that he had been blind-sided because he now realized that the State's identification was based upon an unknown person that he could not subject to cross-examination. Freeman advised the trial court that, had he known about Miquel, he would have tried to find and interview him, and might have possibly called him as a witness.

Unquestionably, it would have benefitted Freeman to know prior to trial that Brewer would testify that she was with Miquel; that she heard him say "[t]hat's Corey"; and that her identification of Freeman was based, at least in part, on Miquel's comment. We do not doubt that this lack of information

caused Freeman's counsel to misjudge the State's trial strategy. The State's failure to provide Freeman with information that put him at a tactical disadvantage, however, does not automatically constitute a *Brady* violation.

[11][12][13] The *Brady* rule recognizes that the State is in the unique position of being an advocate while striving to obtain a just result. *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). It is not a general discovery rule and does not require the State to share all useful information with the defendant. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). Nor does it displace the adversary system. *Bagley*, 473 U.S. at 675, 105 S.Ct. 3375. The State is not required to seek out exculpatory evidence independently on the defendant's behalf or to furnish him with exculpatory or mitigating evidence that is fully accessible from other sources. *Harm v. State*, 183 S.W.3d 403, 407 (Tex.Crim.App.2006).

The record does not establish that the trial court abused its discretion. Freeman's*401 contention is more of a discovery concern than a *Brady* complaint. Brewer did not recant her written statement, and the fact that someone else would presumably identify Freeman as the shooter was not exculpatory. Brewer believed that Freeman was the shooter when she met with the police, and she testified at trial that Freeman was the shooter. Her trial testimony that she saw the gun flashes, saw the shooter bend down and then stand back up and fire additional shots, and later saw Freeman leave the complex in his car is consistent with her written statement. Her trial testimony about Miquel explains why she believed Freeman was the shooter. This additional information was equally available to both attorneys. Freeman's second issue is overruled.

3. Did the Trial Court Err by Denying Freeman's Confrontation Clause Objection?

[14][15][16] Freeman argues that the admission of Miquel's comments via Brewer's testimony viol-

ated his constitutional right to confront the declarant. See *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (the Sixth Amendment guarantees the accused the right to confront the witnesses against him). The confrontation clause applies only to testimonial evidence. *Spencer v. State*, 162 S.W.3d 877, 879 (Tex.App.-Houston [14th Dist.] 2005, pet. ref'd). Spontaneous statements to acquaintances are not testimonial. *Woods v. State*, 152 S.W.3d 105, 114 (Tex.Crim.App.2004); see also *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354 (“[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not”). Brewer testified that Miquel was a family friend. He had been at her apartment with her family, and she was taking him home when the shooting occurred. The comments he made to her were in immediate response to the shooting both had just observed. These comments were not testimonial, and the trial court did not err when it denied Freeman's objection. Freeman's third issue is overruled.

4. Did the Trial Court Err by Denying Freeman's Hearsay Objection?

[17] Freeman also argues that Miquel's comments were inadmissible hearsay. The State does not dispute that they are hearsay but contends that they fall within the present-sense-impression exception. TEX.R. EVID. 803(1). The trial court's decision to admit evidence is reviewed under an abuse of discretion standard. *Burden v. State*, 55 S.W.3d 608, 615 (Tex.Crim.App.2001). An appellate court may not reverse that decision unless it falls outside the zone of reasonable disagreement. *Id.*

[18] The present-sense-impression exception requires that the statement be made simultaneously with the event or immediately thereafter and that it describe or explain an event or condition. STEVEN GOODE ET AL, *Courtroom Handbook on Texas Evidence* 507 (2005). The exception's rationale is that the declarant's statement is free from the defects of memory, that there is little or no time for

calculated misstatement, and that the statement is usually made to someone with equal opportunity to observe and thus check a misstatement. *Rabbani v. State*, 847 S.W.2d 555, 560 (Tex.Crim.App.1992).

In *Rabbani*, present-sense-impression evidence was used to establish identity in a murder trial. A witness was allowed to testify that, the day before the murder, the victim was standing in front of a window and said that he saw the defendant outside. *Id.* at 559. The testimony was relevant because it indicated that the defendant was in the vicinity of the victim's *402 home prior to his murder. Because the statement described something the victim was observing and was made at the same time as he observed it, the court concluded that it was a present sense impression. *Id.* at 560. The same situation exists here. Miquel's statement "[t]hat's Corey" was made as he watched the shooting, and it described what he had just seen. It constitutes a present sense impression; thus, the court did not err by allowing this testimony. Freeman's fourth issue is overruled.

C. Other Evidentiary Rulings.

1. Did the Trial Court Err by Compelling Johnson to Testify?

[19] Freeman and Johnson were ceremonially married on February 22, 2002. Freeman contends that he and Johnson were previously common-law married. Therefore, he argues that the spousal privilege applied and that Johnson could not be compelled to testify against him. See *TEX.R. EVID. 504(a)*. The trial court conducted a pretrial evidentiary hearing pursuant to *TEX.R. EVID. 104(a)* to determine whether the spousal privilege applied. Following that hearing, the trial court ruled that a common-law marriage did not exist and that Johnson would be required to testify. We review this decision for an abuse of discretion. *McDuffie v. State*, 854 S.W.2d 195, 212–13 (Tex.App.-Beaumont 1993, pet. ref'd). While performing this review, we consider the evidence in the light most favorable to the trial court's ruling. *Jasper v. State*, 61 S.W.3d

413, 419 (Tex.Crim.App.2001).

Freeman had the burden of proof to establish that a common-law marriage existed. *Welch v. State*, 908 S.W.2d 258, 264–65 (Tex.App.-El Paso 1995, no pet.). This required proof that (1) Freeman and Johnson agreed to be married, (2) they lived together after the agreement in Texas as husband and wife, and (3) they represented to others that they were husband and wife. *Colburn v. State*, 966 S.W.2d 511, 514 (Tex.Crim.App.1998). The State does not dispute that Freeman and Johnson were living together when Red was killed but focuses its attention on Johnson's actions shortly before and after the shooting to argue that the trial court had sufficient evidence to conclude that no informal marital relationship existed.

Freeman testified himself, and he called several friends and family members as witnesses. Their testimony established that Freeman and Johnson moved into the apartment complex together sometime in 2001. Several witnesses testified that they understood Freeman and Johnson were married, that Freeman and Johnson conducted themselves as a couple, and that Johnson treated Freeman's son as her own. Freeman testified that, when they moved in together in 2001, they agreed to become husband and wife. Three days after the shooting, Freeman and Johnson applied for a marriage license and were formally married shortly thereafter.

Other evidence was inconsistent with an informal marriage agreement. Detective Elterman testified that he met with Johnson two days after the shooting. Johnson referred to Freeman as her boyfriend, and she indicated that they were living together. Johnson provided the police with a written statement and personal information sheet. She listed her mother as her emergency contact person on the information sheet, and in her affidavit, she referred to Freeman by name rather than as her husband. Johnson executed an apartment lease in August 2001 when she and Freeman moved into the apartment complex together. On the space for spouse, Johnson indicated "not applicable."

The trial court was, thus, presented with conflicting evidence concerning whether, at *403 the time of the shooting, Freeman and Johnson had agreed to be married and were representing to others that they were married. Viewing this evidence in the light most favorable to the trial court's ruling, we cannot conclude that the trial court abused its discretion when it held that Freeman did not carry his burden of proof. Freeman's sixth issue is overruled.

2. Was Johnson's Written Statement Inadmissible Hearsay?

[20][21][22] The State called Johnson as a witness and attempted to ask her about a written statement that she provided to Detective Elterman. When Johnson did not respond, the trial court ordered her to answer the State's questions and threatened to hold her in contempt. Johnson testified that she recalled providing a written statement, and she identified the signature on State's Exhibit 3 as her own. Johnson then testified that she did not recall providing the statement to Detective Elterman, and she refused to answer any further questions about it. The trial court ordered Johnson removed from the courtroom, and the State called Detective Elterman. He testified that Johnson provided the police with a statement on February 18, 2002, and he identified State's Exhibit 3 as that statement. The trial court allowed the State to introduce State's Exhibit 3 into evidence to impeach Johnson's testimony that she did not recall providing it to Detective Elterman.

Freeman contends the trial court abused its discretion because the statement itself is hearsay and because it contains hearsay statements allegedly made by him to Johnson. Freeman's double hearsay objection has not been preserved for our review. Freeman initially objected to Johnson's statement because it was hearsay and had been disavowed by Johnson. Freeman then objected because the statement's admission denied him his right of confrontation and cross-examination. Neither objection preserves a double hearsay issue. See *Ricketts v. State*,

89 S.W.3d 312, 319 n. 1 (Tex.App.-Fort Worth 2002, pet. ref'd) (hearsay objection does not preserve a double hearsay issue).

The trial court did not abuse its discretion by admitting Johnson's statement for impeachment purposes because her testimony was equivocal. See *McGary v. State*, 750 S.W.2d 782, 786 & n. 3 (Tex.Crim.App.1988) (unless a witness unequivocally admits making a prior inconsistent statement, it may be used for impeachment). Moreover, the record shows no harm. Johnson subsequently reconsidered her refusal to testify, and she testified about the matters covered in her statement. Freeman's seventh issue is overruled.

3. Did the Trial Court Err by Denying Freeman's Motion for Mistrial after Evidence that Crack Cocaine had been Stolen from Freeman's Apartment was Admitted?

[23] Brewer testified that someone broke into Freeman and Johnson's apartment and stole crack cocaine. Freeman objected, contending that this was inadmissible hearsay. The trial court sustained Freeman's objection and instructed the jury to disregard Brewer's statement. Freeman then moved for a mistrial. The trial court overruled his motion. Freeman argues that this was an abuse of the trial court's discretion.

[24][25] The general rule is that a prompt instruction to disregard will cure the prejudicial effect associated with an improper question and answer concerning an extraneous offense. *Ovalle v. State*, 13 S.W.3d 774, 783 (Tex.Crim.App.2000). To justify a mistrial, the testimony must be so prejudicial that expenditure of further *404 time and expense would be wasteful and futile. *Ladd*, 3 S.W.3d at 567.

Freeman contends that such a situation is present because Brewer's statement allowed the State during closing argument to paint him as a drug dealer and a bad person in general. Freeman's position ignores both what occurred immediately after his objection and what subsequently occurred

during trial. First, when the trial court sustained Freeman's objection, the State did not ask Brewer any further questions about the break-in. Second, during Freeman's own testimony, he testified about drugs and drug usage in his apartment. Freeman testified that, when he moved in with Johnson, he knew that she had a cocaine habit. He denied using or selling drugs himself, pointed to the fact that he never failed a drug test at work, and contended that his lifestyle was inconsistent with drug dealing. He testified that, if any drugs were taken from his apartment, they would have belonged to Johnson. In fact, Freeman contended that Johnson had been heavily using drugs the day before the shooting.

Freeman has failed to establish the level of prejudice necessary to constitute an abuse of discretion. The jury was properly and timely instructed to disregard Brewer's single remark concerning crack cocaine. The State's closing argument was not directly tied to that single remark but reflects significant other evidence—much of it coming from Freeman's own testimony on direct. We cannot say that the trial court abused its discretion when it denied Freeman's motion for mistrial, and his eighth issue is overruled.

4. Did the Trial Court Err by Allowing Daniels to Testify that She Purchased Drugs from Freeman?

[26] The State called Daniels as a rebuttal witness. During her cross-examination, Freeman's counsel asked if Johnson was a known drug addict, and counsel confirmed that, when Freeman threatened to retaliate against Red for breaking into his apartment and stealing drugs, Freeman did not say the stolen drugs were his. The State argued that these questions opened the door to further testimony. The trial court conducted a hearing outside the jury's presence and ruled that the State could ask Daniels if she had ever personally purchased drugs from Freeman. Freeman argues that the trial court abused its discretion because his cross-examination did not open the door to this testimony or, alternatively, that the probative value of this evidence was outweighed by its unfair prejudice.

The only motive ever developed for the shooting was the theft of crack cocaine from Freeman and Johnson's apartment. When Freeman cross-examined Daniels, the jury had already heard her testify that Freeman was looking for Red because of the theft of his drugs, and the jury had heard and seen Johnson's statement in which she told the police that Freeman had threatened to hurt Red in retaliation for stealing his cocaine. Freeman understandably wanted to undermine this motive by establishing that the stolen cocaine actually belonged to Johnson. Daniel's testimony that she had purchased drugs from Freeman out of his apartment was relevant because it rebutted the suggestion that Freeman had no interest in any crack cocaine that might have been stolen from his apartment.

[27][28][29] Even though relevant, Daniel's testimony may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* TEX.R. EVID. 403. When evaluating a trial court's determination under Rule 403, a reviewing court is to reverse the trial court's judgment “rarely and only after a clear abuse *405 of discretion” because the trial court is in a superior position to gauge the impact of the relevant evidence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex.Crim.App.1999). In conducting a Rule 403 analysis, the court is to consider (1) the probative value of the evidence, (2) the potential to impress the jury in some irrational yet indelible way, (3) the time needed to develop the evidence, and (4) the proponent's need for the evidence. *Prible v. State*, 175 S.W.3d 724, 733 (Tex.Crim.App.2005).

Daniel's testimony had probative value because it went to Freeman's motive and it put her personal knowledge in context. The challenged testimony consisted of only two questions. The State needed to establish a motive. Allowing these two questions not only addressed that need but also kept the testimony in context because they were asked in immediate response to Freeman's cross-examination. Finally, the evidence was not likely to impress the jury in some irrational but indelible way. Daniel's

rebuttal testimony was not the first time that the jury had heard that the crack cocaine belonged to Johnson rather than Freeman. When Johnson reconsidered her refusal to testify, she testified in response to Freeman's cross-examination that the cocaine belonged to her and not Freeman, acknowledged her drug addiction, and agreed that Freeman was required to take random drug tests at work. Daniel's testimony provided a logical explanation for why, nonetheless, the crack cocaine could still belong to Freeman. Issue nine is overruled.

5. Did the Trial Court Err by not Allowing Evidence of Red's Prior Car Burglaries?

[30] Freeman argues that the trial court abused its discretion by not allowing evidence of Red's prior convictions for burglarizing cars or evidence that he was known as a car burglar. Freeman's principal argument is that this evidence was admissible to show that he acted reasonably to defend his property. Freeman testified on his own behalf. He told the jury that on the day of the shooting his car alarm woke him and that he went outside and saw that Red had his car door open. Freeman yelled, Red took off running, and Freeman shot at him to make him stop. On cross-examination, Freeman clarified that at the time of the shooting he did not know who was breaking into his car and did not learn that he had shot Red until two weeks to a month later.

Because Freeman testified that he did not know who was breaking into his car, Red's prior criminal history and general reputation would have had no bearing on the reasonableness of Freeman's actions. The trial court did not abuse its discretion by not admitting this evidence.^{FN7} Issues ten and eleven are overruled.

^{FN7}. Freeman was allowed to testify that Red was a crack addict and was unemployed but that he always seemed to have money. Freeman also testified that Red had tried to sell him car stereos that he believed were stolen. Consequently, the exclusion of additional evidence of Red's

criminal history and reputation would be harmless in any event.

D. Did the Trial Court Err When It Admonished Freeman after his Trial Counsel Indicated an Intention to Put on No Defense?

[31] During the pretrial hearing on the admissibility of Brewer's testimony, Freeman's trial counsel stated that allowing Brewer to testify about Miquel's comments was so unfair:

[T]hat my proclivity would be to just make this argument to the Court and just sit here and let the State put on the rest of their case without any cross-examining, without any defense, and we'll just go to the Courts of Appeal and *406 see what they say about it. Now, that's something I certainly don't want to do, but I have done it in the past and I would be loath to do it, but I will do it.

The trial court ruled that Brewer's testimony would be admitted, and trial counsel then began what the trial court would later accurately describe as juvenile behavior.^{FN8}

^{FN8}. We note that Freeman is represented by different counsel on appeal and that appellate counsel's representation before this court has at all times been professional and conscientious.

During his opening statement, Freeman's trial counsel told the jury: "And if you folks see me sitting here and not participating in this trial because I don't think that—" The State objected, the trial court sustained the objection, and counsel announced that he had no further opening. During Brewer's direct testimony, when the State proffered exhibits and the trial court asked counsel if he had any objection, he made comments such as:

We have no comments, no objections, nor anything else other than our motion for continuance to try to find the missing witness who we learned about this morning.

I have no comments, no objections, no anything.

I'm not prepared at this time, Your Honor, to consider that. I renew my motion for continuance.

Your Honor, excuse me, but my position is I am not in a position to make objections to these exhibits. So if the Court finds them to be admissible, the Court may admit them.

The Court can construe the record any way it wants to, Your Honor.

After this last comment, the trial court excused the jury, confirmed that trial counsel was retained, and advised Freeman:

[THE COURT]: Mr. Freeman, certain rulings have been made which your attorney of record disagrees with. That is the whole purpose of appellate records, Mr. Freeman. However, your attorney has stated in open court on the record that he basically intends not to offer a defense for you, not to basically represent you, and to just sit there and let the State continue with their case. You understand that?

[FREEMAN]: Yes, ma'am.

THE COURT: You were present when he made those statements in court; is that correct?

[FREEMAN]: Yes, ma'am.

THE COURT: We have had one witness so far. You were present when he made the statements regarding certain evidence being admitted. Do you recall that?

[FREEMAN]: Yes, ma'am.

THE COURT: You have a choice, Mr. Freeman. Because he is retained, I cannot remove him from the case. That is entirely your decision. You have the choice to either proceed forward with Mr. Gray, knowing what he intends to do in not offering a defense, not questioning witnesses, etcetera. Or you can remove Mr. Gray and the Court will appoint you an attorney. It is your choice, but I will tell you this. If you choose to

continue with Mr. Gray, any ineffective assistance of counsel claim that may try to be raised in all likelihood will no longer be valid because you will be choosing to go forward knowing that that is what he's choosing to do. Do you understand that?

[FREEMAN]: Yes, ma'am.

THE COURT: So it's your choice, Mr. Freeman.

[FREEMAN]: I'll continue.

*407 Freeman argues that the trial court erred because it did not advise him that, if new counsel was appointed, they would have ten days to prepare for trial pursuant to [TEX.CODE CRIM. PROC. ANN. art. 1.051\(e\)](#) (Vernon 2005) and that this effectively denied him the statutorily required preparation period. However, [Article 1.051](#)'s application is not before us. The statute was never triggered because Freeman did not receive appointed counsel. Moreover, from this exchange, we cannot say whether the court would have denied a request for additional time if Freeman had accepted the trial court's offer or whether the court would have even continued with the trial.^{FN9} The issue before us is: Was the trial court required to advise Freeman of the statute's preparation provision so that he could make an informed decision on whether to discharge his retained counsel?

^{FN9}. In our discussion of this issue, we need not decide if the trial court would have been required to provide appointed counsel ten days to prepare for trial. The ten-day preparation period is not mandatory each time counsel is appointed. For example, [Article 1.051\(h\)](#) provides that, if a defendant waives his right to counsel but subsequently withdraws that waiver, the trial court has the discretion to provide appointed counsel ten days to prepare.

First, we are aware of no authority requiring

the trial court to even advise Freeman that he could dismiss his retained counsel. Second, the statute's only expressly required admonishment is in [Article 1.051\(g\)](#). This requires the court to advise a defendant wishing to waive the right to appointed counsel of the dangers and disadvantages of self-representation. Neither this provision, nor any case construing it, indicates that the trial court is also required to advise the defendant that, if he is appointed counsel, his counsel will have at least ten days to prepare for trial. Applying this by analogy, the trial court confirmed that Freeman understood the risks of proceeding with his retained counsel. We cannot conclude that more was required. Freeman's fifth issue is overruled.

E. Did the Trial Court Err by not Sua Sponte Granting a Mistrial?

[32][33] Freeman argues that the trial court erred by not sua sponte granting a mistrial when the State's counsel commented upon his exercise of the Sixth Amendment right to counsel. Specifically, Freeman complains that, when the State asked Johnson who hired and paid for Freeman's attorney and if this attorney had been representing him since he was in jail, the State was attempting to prove Freeman's guilt by pointing to the fact that he had sought the assistance of counsel. Freeman acknowledges that he did not object to these questions at trial but contends that this case is comparable to [United States v. McDonald](#), 620 F.2d 559, 564 (5th Cir.1980), and that no objection was required. The State responds that Freeman's failure to object waived any error. See [TEX.R.APP. P. 33.1\(a\)](#).

[34] The general rule is that a party must make a timely and specific objection at trial to preserve an issue for appellate review. [Ibarra v. State](#), 11 S.W.3d 189, 197 (Tex.Crim.App.1999). This rule applies to all objections except complaints involving violations of "rights which are waivable only" and denials of "absolute systemic requirements." [Aldrich v. State](#), 104 S.W.3d 890, 895 (Tex.Crim.App.2003). Rights that are waivable only include the right to assistance of counsel and

the right to trial by jury. Absolute systemic requirements include jurisdiction of the person, jurisdiction of the subject matter, and a penal statute's "compliance with the Separation of Powers Section of the state constitution."*408 [Saldano v. State](#), 70 S.W.3d 873, 888 (Tex.Crim.App.2002).

In [Saldano](#), the court held that the failure to object to evidence that violated the defendant's rights under the Equal Protection Clause waived any error because this was neither a waivable only right nor an absolute systemic requirement even though the evidence concerned the defendant's constitutional rights. *Id.* at 889. We believe the same holds true here. The State's examination of Johnson concerned Freeman's constitutional right to the assistance of counsel, but this was an evidentiary issue that required an objection. Because Freeman did not object, issues sixteen and seventeen are overruled.

F. Freeman's Requests for Lesser Included Offenses.

[35] Freeman argues that the trial court erred by not submitting the lesser included offenses of criminally negligent homicide and aggravated assault in the charge. The trial court initially declined to include aggravated assault, but the court's charge included instructions on the lesser included offenses of aggravated assault and manslaughter. Issue fourteen is, therefore, overruled.

[36] The Texas Court of Criminal Appeals has adopted a two-prong test to determine if the trial court is required to include an instruction on a lesser included offense: (1) the lesser included offense must be included within the proof necessary to establish the offense charged and (2) some evidence must exist in the record that, if the defendant is guilty, he is guilty only of the lesser offense. [Hampton v. State](#), 109 S.W.3d 437, 440 (Tex.Crim.App.2003). The State does not dispute that criminally negligent homicide is a lesser included offense but contends that there was no evidence that if Freeman was guilty it was only of that offense.

[37] The distinction between murder, manslaughter, and criminally negligent homicide is the defendant's culpable mental state. Murder, as alleged in the indictment, required proof that Freeman knowingly or intentionally caused Red's death or intended to cause serious bodily injury and committed an act clearly dangerous to human life that caused Red's death. See [TEX. PEN.CODE ANN. § 19.02\(b\)\(1\)](#) (Vernon 2003). Manslaughter requires proof that the defendant recognized the risk of death but consciously disregarded it. For criminally negligent homicide, the defendant is not, but ought to be, aware of the risk that death will result from his conduct. *Masterson v. State*, 155 S.W.3d 167, 171 (Tex.Crim.App.2005).

Freeman testified that, when he heard his car alarm, he grabbed his revolver and went outside. Freeman knew the gun was loaded. When Red took off, Freeman pointed the gun at him and fired two or three times. Freeman testified that he did so to scare Red and make him stop running. Freeman denied any intention to kill or injure Red and admitted that he did not know where the bullets would go.

This testimony does not justify the submission of a lesser included instruction on criminally negligent homicide. The Texas Court of Criminal Appeals has held that a defendant was presumed to know the risks of injury or death by exhibiting a loaded, cocked pistol. See *Salinas v. State*, 644 S.W.2d 744, 746 (Tex.Crim.App.1983). In *Thomas v. State*, 699 S.W.2d 845, 849–52 (Tex.Crim.App.1985), the court recognized that, in most instances involving a firearm, the evidence will not justify a criminally negligent homicide instruction because the defendant will ordinarily have some appreciation of the risks. Here, there was no evidence that Freeman did not appreciate the risks inherent with a firearm, that he did not know his revolver was loaded, or *409 that it accidentally discharged. In fact, the evidence shows that he intentionally fired a loaded weapon.

[38] Moreover, even if he was entitled to an in-

struction, the record shows no harm. The harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has a reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer. *Masterson*, 155 S.W.3d at 171. The manslaughter instruction provided the jury with a compromise. Freeman's testimony, if believed, squarely presented the jury with a situation of reckless conduct. Their decision to reject that option and find him guilty of murder indicates that the jury legitimately believed he was guilty of the greater, charged offense. Issue thirteen is overruled.

G. Is the Jury's Rejection of Freeman's Defenses Supported by Factually Sufficient Evidence?

1. Defense of Property.

[39][40] Freeman contends that he was justified in using deadly force to defend his property and that the jury's implied rejection of this defense was based upon factually insufficient evidence. When a defendant raises a factual sufficiency challenge to the jury's implied adverse finding on a defensive theory, we perform a factual sufficiency review of the jury's verdict. See, e.g., *Roy v. State*, 161 S.W.3d 30, 34–35 (Tex.App.-Houston [14th Dist.] 2004, no pet.). This requires that we begin with the assumption that the evidence supporting the jury's verdict is legally sufficient. *Clewis v. State*, 922 S.W.2d 126, 134 (Tex.Crim.App.1996). We view all of the evidence in a neutral light, without favoring either party. *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex.Crim.App.2000). We will set aside the verdict only if the evidence supporting the verdict is so weak that the verdict is clearly wrong and manifestly unjust or if the verdict is against the great weight and preponderance of the conflicting evidence. *Watson v. State*, 204 S.W.3d 404, 414 (Tex.Crim.App.2006).

[41] When reviewing the evidence, we must give appropriate deference to the jury findings in order to prevent intruding on the fact-finder's role

as the sole judge of the weight and credibility of the evidence. *Johnson*, 23 S.W.3d at 7. Therefore, unless the record clearly reveals a different result is appropriate, we “must defer to the jury’s determination concerning what weight to give contradictory testimonial evidence because resolution often turns on an evaluation of credibility and demeanor.” *Id.* at 8.

A person in lawful possession of property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other’s unlawful interference with the property. [TEX. PEN.CODE ANN. § 9.41\(a\)](#) (Vernon 2003). A person unlawfully dispossessed of property by another is justified in using force against the other when and to the degree the actor reasonably believes the force is immediately necessary to recover the property if the actor uses the force immediately or in fresh pursuit after dispossession and the actor reasonably believes the other had no claim of right when he dispossessed the actor. [Section 9.41\(b\)](#).

A person is justified in using deadly force against another to protect property if (1) he could otherwise use force (2) when and to the degree he reasonably believes deadly force is immediately necessary to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property *410 and (3) he reasonably believes the property cannot be recovered by any other means. [TEX. PEN.CODE ANN. § 9.42](#) (Vernon 2003). A reasonable belief is a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. [TEX. PEN.CODE ANN. § 1.07\(a\)\(42\)](#) (Vernon Supp.2006).

The jury was provided two explanations for the shooting. Freeman contended that he reacted to a car burglary in the middle of the night and that he shot at Red to make him stop running and return whatever he had taken from Freeman’s car. Other witnesses testified that Freeman had threatened to

hurt or kill Red in retaliation for stealing crack cocaine from his apartment, that Freeman had been looking for Red, and that on the night of the shooting he sent someone to see if Red was at a particular house. It was the jury’s responsibility to resolve this conflicting evidence. Their verdict necessarily reflects a credibility determination that we cannot second guess. The evidence supporting a determination that Red was shot in retaliation for the crack cocaine theft and not to recover property taken from Freeman’s car is neither so weak that the jury’s verdict is clearly wrong and unjust nor is it against the overwhelming weight of the evidence. Issue twelve is overruled.

2. Sudden Passion.

[42] Freeman also argues that the jury’s rejection of his sudden passion defense was based upon factually insufficient evidence. Murder is ordinarily a first degree felony, but if the defendant proves by a preponderance of the evidence that he caused the death under the immediate influence of sudden passion arising from an adequate cause, it becomes a second degree felony. [TEX. PEN.CODE ANN. § 19.02\(d\)](#) (Vernon 2003). During the punishment phase of the trial, Freeman testified and told the jury that, when he shot Red, he was angry because “[he] was tired of getting ripped off.” The trial court instructed the jury on sudden passion and included a jury issue on sudden passion. The jury found against Freeman on this issue.

[43] [Section 19.02](#) defines “adequate cause” to mean cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. [Section 19.02\(a\)\(1\)](#). The statute defines “sudden passion” to mean passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation. [Section 19.02\(a\)\(2\)](#). Ordinary anger is not adequate cause. *Ybarra v. State*, 890 S.W.2d 98, 109 (Tex.App.-San Antonio 1994, pet. ref’d). The de-

230 S.W.3d 392
(Cite as: 230 S.W.3d 392)

fendant's action must be taken while in an excited and agitated state of mind arising out of the victim's direct provocation. *Merchant v. State*, 810 S.W.2d 305, 310 (Tex.App.-Dallas 1991, pet. ref'd).

For the same reasons the jury was entitled to reject Freeman's defense of property defense, it was entitled to reject his sudden passion defense. The evidence was sufficient to allow the jury to determine that the shooting was not in response to a break-in of Freeman's car that night but in retaliation for the prior theft of cocaine from Freeman's apartment. Issue eighteen is overruled.

H. Cumulative Effect.

Freeman's final issue is that the cumulative effect of the trial court's errors warrants a reversal of his conviction. We have considered, and overruled, each of his issues. Cumulative consideration of the *411 issues raised by Freeman does not alter our analysis. Issue nineteen is overruled.

V. Holding

The judgment of the trial court is affirmed.

Tex.App.-Eastland,2007.
Freeman v. State
230 S.W.3d 392

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History

Direct History

=> **1 Freeman v. State**, 230 S.W.3d 392 (Tex.App.-Eastland May 24, 2007) (NO. 11-05-00254-CR),
petition for discretionary review refused (Nov 14, 2007)

Court Documents

Appellate Court Documents (U.S.A.)

Tex.App.-Eastland Appellate Briefs

- 2** Corey Sharod FREEMAN, Appellant, v. The State of Texas, Appellee., 2006 WL 690532
(Appellate Brief) (Tex.App.-Eastland Feb. 23, 2006) **Appellant's Brief** (NO. 11-05-00254-)
- 3** Corey Sharod FREEMAN, Appellant, v. State of Texas, Appellee., 2006 WL 1706707 (Appellate
Brief) (Tex.App.-Eastland May 1, 2006) **State's Brief** (NO. 11-05-00254-)

Dockets (U.S.A.)

Tex.App.-Eastland

- 4** COREY SHAROD FREEMAN v. THE STATE OF TEXAS, NO. 11-05-00254-CR (Docket)
(Tex.App.-Eastland Aug. 4, 2005)

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H **Freeman v. State**, 230 S.W.3d 392 (Tex.App.-Eastland May 24, 2007) (NO. 11-05-00254-CR)

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- P** 2 Ward v. State, 2010 WL 1266777, *1+ (Tex.App.-Amarillo Mar 31, 2010) (NO. 07-09-0116-CR)
- H** 3 Martinez v. State, 2009 WL 2633020, *2 (Tex.App.-Amarillo Aug 27, 2009) (NO. 07-07-0279-CR) **HN: 40 (S.W.3d)**
- H** 4 Sain v. State, 2007 WL 4462599, *6 (Tex.App.-Fort Worth Dec 20, 2007) (NO. 2-06-184-CR) **HN: 17 (S.W.3d)**
- 5 Walker v. State, 2010 WL 2698782, *4+ (Tex.App.-Dallas Jul 09, 2010) (NO. 05-09-00023-CR) **HN: 38 (S.W.3d)**

★ Mentioned

- 6 Dentler v. State, 2008 WL 2933086, *2 (Tex.App.-Eastland Jul 31, 2008) (NO. 11-07-00013-CR, 11-07-00014-CR, 11-07-00015-CR, 11-07-00016-CR) **HN: 28 (S.W.3d)**
- H** 7 Obryant v. State, 2009 WL 4724667, *5+ (Tex.App.-Hous. (1 Dist.) Dec 10, 2009) (NO. 01-08-00740-CR, 01-08-00741-CR)

Secondary Sources (U.S.A.)

- P** 8 Lesser-related state offense instructions: modern status, 50 A.L.R.4th 1081 (1986)
- C** 9 Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R.2d 1291 (1948) **HN: 1,3 (S.W.3d)**
- C** 10 Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to, or right of jury to convict of, lesser degree, 102 A.L.R. 1019 (1936)
- 11 Constitutional Rights of the Accused s 23:9, The use of hearsay-In general (2011)
- 12 Texas Practice Guide, Criminal Practice & Procedure s 22:32, Prohibited challenges on race (2011) **HN: 1,3 (S.W.3d)**
- 13 1 Tex. Prac. Series s 504.2, Rule 504: Who is a spouse; how is the issue to be resolved; by the judge or jury who is a spouse (2011)
- 14 2A Tex. Prac. Series R 504, Rule 504. Husband-Wife Privileges (2011) **HN: 19 (S.W.3d)**
- 15 42 Tex. Prac. Series s 27:18, Undisclosed evidence must be "material"-General definition of materiality (2011) **HN: 12 (S.W.3d)**

- C** 16 42 Tex. Prac. Series s 29:28, Defendants' right to replace retained counsel (2011) **HN: 31 (S.W.3d)**
- 17 43 Tex. Prac. Series s 33:50, Resolving motions to secure witnesses-Adequacy of diligence-In general (2011)
- 18 36 Am. Jur. Proof of Facts 2d 441, Validity of Marriage (2011)
- C** 19 Am. Jur. 2d Criminal Law s 1090, Use of nontestimonial out-of-court statements (2011) **HN: 15,16 (S.W.3d)**
- 20 Texas Jurisprudence, Third Criminal Law: Offenses Against The Person s 26, Degrees of murder-Proof of sudden passion arising from adequate cause (2011) **HN: 43 (S.W.3d)**
- 21 Texas Jurisprudence, Third Criminal Law: Offenses Against The Person s 4, Culpable mental states; definitions (2011) **HN: 35 (S.W.3d)**
- 22 Texas Jurisprudence, Third Criminal Law: Offenses Against The Person s 93, Character and reputation of deceased-Evidence of specific acts (2011) **HN: 30 (S.W.3d)**
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- 24 TX Jur. 3d Evidence s 266, Declarants generally (2011) **HN: 17 (S.W.3d)**
- 25 TX Jur. 3d Evidence s 268, Rationale; nature of event; elements generally (2011) **HN: 18 (S.W.3d)**
- 26 TX Jur. 3d Evidence s 270, Timeliness of statement (2011) **HN: 17 (S.W.3d)**
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Court Documents

Appellate Court Documents (U.S.A.)

Appellate Briefs

- 30 Ralph Franklin WELSH, Appellant, v. THE STATE OF TEXAS, Appellee., 2009 WL 5453003, *5453003+ (Appellate Brief) (Tex.Crim.App. Dec 22, 2009) **Appellant's Brief on the Merits** (NO. PD-0811-09) ★ ★ **HN: 38 (S.W.3d)**
- 31 Buford Glen WHITEHEAD, Appellant, v. THE STATE OF TEXAS, State., 2007 WL 2403185, *2403185+ (Appellate Brief) (Tex.Crim.App. Jul 11, 2007) **State's Brief on the Merits** (NO. PD-0234-07) ★ ★ **HN: 40 (S.W.3d)**
- 32 Markum Woodrow PEAHEY, Appellant, v. STATE OF TEXAS, State., 2010 WL 2678125, *2678125+ (Appellate Brief) (Tex.App.-Eastland May 27, 2010) **State's Brief** (NO. 11-10-00012-) ★ ★
- 33 CHRISTUS HEALTH SOUTHEAST TEXAS d/b/a Christus St. Elizabeth Hospital, Appellant, v.

Flo WILSON and James Wilson, Appellees., 2008 WL 2478017, *2478017 (Appellate Brief)
(Tex.App.-Eastland May 30, 2008) **Appellees' Brief** (NO. 11-08-00014-CV) " ★ ★ **HN: 28**
(S.W.3d)