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SEVENTH COURT OF APPEALS
AMARILLO, TEXAS
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IN THE

COURT OF APPEALS

FOR THE

SEVENTH JUDICIAL DISTRICT OF TEXAS

AMARILLO, TEXAS

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MATTHEW RYAN HUBBELL,
APPELLANT,
VS.

THE STATE OF TEXAS,
APPELLEE

****

ON APPEAL FROM THE 108TH DISTRICT COURT
CAUSE NO. 078,539-E-CR
POTTER COUNTY, TEXAS
HONORABLE DOUGLAS WOODBURN, PRESIDING

****

STATE'S BRIEF

****

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NO. 07-24-00200-CR

IN THE

COURT OF APPEALS

FOR THE

SEVENTH JUDICIAL DISTRICT OF TEXAS

AMARILLO, TEXAS

MATTHEW RYAN HUBBELL,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

****

TO THE HONORABLE COURT OF APPEALS:

COMES NOW the State of Texas, appellee in the above entitled and numbered appeal, by and through its 47th District Attorney Jason Herring, and submits its brief in response to the brief of appellant, Matthew Ryan Hubbell. Appellant was convicted of murder. A jury assessed appellant's punishment at ninety-nine (99) years imprisonment and a $10,000.00 fine; the court imposed sentence accordingly.

STATEMENT OF THE CASE

Appellant appeals his murder conviction and the resulting ninety nine-year prison sentence and $10,000.00 fine. He challenges the sufficiency of the evidence to support the conviction and the effectiveness of his counsel at the punishment phase.

The Potter County grand jury on December 4, 2019 indicted appellant for the offense, alleged to have occurred on or about September 5, 2019. *CR: 33.* After a May 20-22, 2024 trial, a jury convicted appellant of the indicted offense. Appellant elected to try the punishment issue to the jury. The jury answered in the negative the punishment special issue whether appellant acted out of sudden passion arising from an adequate cause; it assessed his punishment at ninety-nine (99) years imprisonment and a $10,000.00 fine. *CR: 77, 86.*.

Appellant did not file a motion for new trial. He timely filed, on May 24, 2024, a notice of appeal. *CR: 81.*

STATE'S RESPONSIVE POINTS

RESPONSIVE POINT ONE (ADDRESSED TO APPELLANT'S "ISSUE ONE"):

Appellant's conviction, being founded on ample incriminating evidence, satisfies due process requirements.

RESPONSIVE POINT TWO (ADDRESSED TO APPELLANT'S "ISSUE TWO"):

The record in this direct appeal does not substantiate appellant's assertion he received constitutionally ineffective assistance of counsel at his trial's punishment phase. To the contrary, the record reflects appellant received the competent legal representation the Constitution requires.

FACT STATEMENT

The Essence of the Case

Police officers on September 5, 2019 made the grisly discovery of appellant's mother, 62-year-old Doris Jane Love's, decomposing body in the crawl space under an Amarillo residence. Their presence resulted from a call to police from appellant's friend, who voiced concern that appellant had killed a female inside the residence. In separate conversations with two friends and in his trial testimony, appellant admitted the killing. Established from the expert testimony of a forensic pathologist from her autopsy was that the victim died from multiple blows that crushed part of her skull. The contested issues at trial were whether he killed the victim, his mother, in self -defense or in sudden passion arising from an adequate cause.

The State's Evidence

On a day in the first week of September, 2019, about 3 a.m., appellant's friend Tendrick Sargent ("Tendrick"), received a telephone call from Tendrick's brother, Karl Scott ("Karl"); Karl was a closer friend to appellant than was Tendrick. *RR3: 139,141*. Karl related to Tendrick what appellant had told him had occurred; Tendrick urged Karl to call the police. *RR3: 141.* Later that morning, appellant called Tendrick himself, telling Tendrick he had "messed up" and was going to jail for a long time. *RR3: 141.* Appellant asked Tendrick to come to appellant's residence. When Tendrick approached the residence, he saw police vehicles there. *RR3: 142.*

After Tendrick spoke with an officer at the scene, the officer had him sit in a patrol car. *RR3: 142.* While he was speaking with the officer, appellant called Tendrick. *RR3: 143.* Tendrick handed his phone to the officer, and did not hear the conversation between appellant and the officer. *RR3: 143-44.* As the officer requested, Tendrick wrote out a witness statement; he then left the scene. *RR3: 144.*

Earlier in the week, appellant called Karl and asked to come by Karl's residence. Appellant did not enter Karl's residence; instead, the two men sat in a car and talked. *RR3: 152.* Appellant told Karl he had killed a female. *R3: 152.* Karl and appellant discussed how to dispose of the body. *RR3: 153.* Karl developed misgivings, fearing the victim was a little girl, and decided to inform the police. He met an officer near an elementary school to relate his interaction with appellant. *RR3: 153.*

Because appellant had been secretive about where he resided, Karl could not provide appellant's address. *RR3: 154.* Police ultimately located the victim's address through TLO, a company the police contracts with, utilizing such data bases as credit card applications. *RR4: 13.* Once police located appellant's residence, officers surrounded it, apprehending from given information that appellant had a firearm. *RR4: 24.* During the police standoff, Karl called appellant, putting appellant on speakerphone. *RR3: 155.* Via a body cam police Sergeant Eatley recorded the conversation. *RR3: 155, 166.* With Eatley as sponsoring witness, the recorded

conversation was received into evidence. *RR3: 171; State's Exhibit 1.* After police commands over a public address loudspeaker, telephone calls, and text messages, appellant emerged from the residence and was placed in custody – detained, but not immediately arrested. *RR4: 25, 28.*

Appellant's explanation to officer Norman Fisher at the scene was that the victim had gone to Dallas or Houston to visit a friend; he could not identify the friend. *RR4: 29.* Police secured a search warrant for the residence. While appellant and Fisher were conversing, a detective approached and reported that officers had found the body of a deceased female in the crawlspace under the house. *RR4: 30*. Soon thereafter, appellant was arrested. *RR4: 46.*

The last the victim was seen in public was September 1, 2019, when she purchased items at a convenience store not far from the residence; her presence there searching for items and purchasing them was captured on a store surveillance recording, which was admitted into evidence. *RR4: 58; State's Exhibit 28.* Bank records reflected ATM withdrawals from the victim's bank account on September 3, 2019 totaling more than $1,500. *RR4: 79.*

Forensic pathologist Dr. Luisa Florez performed the victim's autopsy on September 6, 2019. *RR4: 126.* The victim died 3-5 days before the autopsy and was decomposing Dr. Florez opined. *RR4: 126.* The cause of death, said Dr. Florez, was cranial-encephalic injuries from blunt force trauma.*RR4: 137.* Dr. Florez noted "big

holes " on the top and right side of the victim's head. *RR4: 130*. The injuries were caused by separate impacts, at least five strikes on the face and five on the head, Dr. Florez related. *RR4: 131, 139*.

Despite indications the residence was recently scrubbed, police detected blood stains throughout a bedroom and bathroom via chemical agents applied to those areas. *RR4: 142-147* (testimony of Amarillo police crime scene investigator Ed Carroll).

The Defense Case

The defensive theme projected through cross-examination of the State's witnesses and appellant's testimony was that appellant acted in self-defense. In that connection, appellant elicited from Karl Scott that in his encounter with appellant in early September 2019 he saw a bite mark on appellant's arm and appellant told him the killing was in self-defense. *RR 3: 157-58.* Testifying as a defense witness, Amarillo police officer Jennifer Jones recounted that, at the scene Tendrick Sargeant told her appellant's conduct was "very out of character for him." *RR5: 18*.

In his testimony, appellant related how his relationship with his mother had changed over the years. As a child, said appellant, he and his mother were close. *RR5: 30.* As an adult, appellant, now an Amarillo resident, regularly visited the victim in New York, where she resided. *RR5: 31*. "Out of the blue" the victim decided to move to Amarillo, appellant related; she did so in September 2018,

sharing a house with appellant. *RR5: 35-36.* Appellant worked at odd jobs, but the victim provided most of the money for the household. *RR5: 38.* The victim did not drive; appellant ran for her such errands as getting prescriptions and going to the grocery store. *RR5: 38.*

Appellant noticed his mother's erratic behavior even from the last time he went to visit her in New York in 2018. *RR5: 40.* On one occasion, recounted appellant, the victim left her luggage in a cab at Grand Central Station. *RR5: 40.* Also in New York she gave her credit card to "a guy off the street" representing a fake moving company, but she reported the incident to the Amarillo police. *RR5: 4,. 106.* The victim's bizarre actions continued when residing with appellant in Amarillo, appellant testified. During the day the victim would watch cable news and yell at the television. *RR5: 43.* Two or three times while appellant was driving with the victim as passenger, she grabbed the steering wheel, almost causing a wreck. *RR5: 46.*

On the day of her death, the victim and appellant argued over his refusal to buy cigarettes for her. *RR5: 47.* Appellant repaired to his bedroom to watch television, and he heard the front door slam. The victim entered appellant's room and attacked him with a steak knife from the kitchen, appellant professed. The victim bit his arm and he defended himself with a crowbar. *RR5: 50.* Appellant struck the victim with the crowbar, then passed out; he awoke later that night and saw that the

victim was lying nearby, dead. *RR5: 63*. He moved her body into the bathroom, leaving it there for several days. *RR5: 64.* He vaguely remembered buying supplies then cleaning the house. As police officers arrived at the residence, appellant related, he placed the victim's body underneath the house through the crawl space. *RR5: 66.* In testifying appellant expressed remorse for what had transpired. *RR5: 74*.

SUMMARY OF THE STATE'S ARGUMENT

The State proved each element of the murder offense alleged beyond a reasonable doubt. Not required was the State's presentment of affirmative evidence to refute appellant's theories he acted in self-defense or acted under the immediate influence of sudden passion arising from an adequate cause. Implicit in the jury's verdict was its rejection of those defensive theories. The established appellate review standard for gauging the incriminating evidence's sufficiency subsumes the evidence's sufficiency to support the jury's rejection of those defensive theories.

From the record in this direct appeal the Court is not positioned to credit appellant's contention he was denied his Sixth Amendment right to effective representation of counsel at the punishment phase. Appellant did not file a motion for new trial, and no facts relating to counsel's trial strategy were developed in the trial court. Beyond that, the record as a whole reflects counsel's conscientious advocacy in appellant's behalf.

STATE'S RESPONSIVE POINT ONE
(Addressed to Appellant's "Issue One")(Restated)

Appellant's conviction, being founded on ample incriminating evidence, satisfies due process requirements.

I. The Pertinent Statutes, the Indictment, and the Court's Instructions in the Jury Charge

Our law provides:

> . . A person commits an offense if the person:
>
> > . . intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code Sec. 19.02 (b)(2).

Consistent with that penal statute, the indictment contained the essential accusatory language as follows:

> THE GRAND JURORS for Potter County, Texas, . . . present that MATTHEW RYAN HUBBELL, . . on or about the 5th day of September, 2019 . . .did then and there, with intent to cause serious bodily injury to an individual, namely, DORIS JANE LOVE, commit an act clearly dangerous to human life that caused the death of DORIS JANE LOVE, by striking DORIS JANE LOVE in the head with an object unknown to the Grand Jury.

CR: 33.

In its jury charge the court included instructions on deadly force in defense of person. The instructions paralleled the statutory language setting out that justification absolving criminal responsibility:

> Under our law, a person is justified in using force against another when and to the degree that he reasonably believes the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force. The use of force is not justified in response to verbal provocation alone.
>
> A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as set out above, and when he reasonably believes that such deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.
>
> "Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the defendant.
>
> "Deadly force" means force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury.
>
> The defendant's belief that deadly force was immediately necessary is presumed to be reasonable if the Defendant:
>
> 1) Knew or had reason to believe that the person or person against whom deadly force was used was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery or aggravated robbery
> AND
>
> 2) did not provoke the person against whom the deadly force was used; AND

3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of law or ordinance regulating traffic at the time the force was used.

The presumption applies unless the State proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist. If the State fails to prove beyond a reasonable doubt that the facts giving rise to the presumption do not exist, you must find that the presumed fact exists. Even though you may find that the presumed fact does not exist, the State must prove beyond a reasonable doubt each of the elements of the offense charged. If you have a reasonable doubt as to whether the presumed fact exists, the presumption applies and you must consider the presumed fact to exist.

A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time deadly force is used, is not required to retreat before using deadly force to defend himself or a third person. If you find from the evidence that the Defendant was such a person, or if you have a reasonable doubt thereof, in determining whether the Defendant reasonably believed that the use of deadly force was necessary, you may not consider whether the Defendant failed to retreat.

CR: 69-70. Tex. Penal Code Secs. 9.31 and 9.32.

Presented in the court's punishment charge was a special issue for the jury determination. Incorporated into the special issue instruction was a verdict form for the jury to indicate its finding on the issue. The instructions and jury verdict were as follows:

SPECIAL ISSUE

Now, having found the defendant guilty of the offense of murder, you must determine by a preponderance of the evidence whether or not the

defendant caused the death under the immediate influence of sudden passion arising from an adequate cause.

"Adequate cause" means 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.

"Sudden passion" means 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.

The burden of proof is by a preponderance of the evidence, and that burden rests upon the defendant. By the term "preponderance of the evidence" is meant the greater weight of the credible evidence.

Now, bearing in mind the foregoing instructions, if you believe the defendant proved by a preponderance of the evidence that the defendant, having committed the offense of murder, caused the death of DORIS JANE LOVE under the immediate influence of sudden passion arising from an adequate cause, you must make an affirmative finding as to the special issue, and the punishment you must assess is by confinement in the institutional division of the Texas Department of Criminal Justice for any term of not more than twenty years or less than two years. In addition a fine not to exceed $10,000.00 may be imposed.

But, if you do not believe the defendant proved by a preponderance of the evidence that the defendant, having committed the offense of murder, caused the death of DORIS JANE LOVE under the immediate influence of sudden passion arising from an adequate cause, you must make a negative finding as to the special issue, and the punishment you must assess is by confinement in the institutional division of the Texas Department of Criminal Justice for life or for any term of not more than ninety-nine years or less than five years. In addition, a fine not to exceed $10,000.00 may be imposed.

Do you the jury unanimously find by a preponderance of the evidence that the defendant caused the death of DORIS JANE LOVE under the immediate influence of sudden passion arising from an adequate cause?

The jury will answer either, “We do” or “We do not.”

ANSWER: We do not

__/s/______________________
Presiding Juror

CR: 77.

II. The Injustice Appellant Alleges

In appellant’s view, his conviction is unsustainable because the State failed to overcome the presumption he acted in self-defense. He points to evidence he had told Tendrick Sargeant and Karl Scott the killing was an accident and done in self-defense, and to his own trial testimony to that effect. He argues alternatively the evidence preponderates in favor of a finding he acted under the influence of sudden passion arising from an adequate cause. *Brief of Appellant,* pp. 15-16.

III. Argument and Authority

A. Standard of Review Generally

A challenge to the sufficiency of the evidence should be reviewed under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979) and *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). *Starks v. State*, 686 S.W.3d 779, 782 (Tex. App. - - Eastland 2024, pet. ref’d). Under that standard, all of the evidence is reviewed in the light most favorable to the

verdict to determine whether any rational trier of fact could have found the essential elements of charged offense beyond a reasonable doubt. *Id.* citing *Garcia v. State*, 667 S.W.3d 756, 761 (Tex. Crim. App. 2023).

The reviewing court should defer to the factfinder's credibility and weight determinations because the factfinder is the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Starks*, 686 S.W.3d at 782, citing *Winfrey v. State,* 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). "This deference accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."*Id.,* citing *Jackson*, 443 U.S. at 319 and *Garcia*, 667 S.W.3d at 762. The reviewing court should not reevaluate the weight and credibility of the evidence to substitute its judgment for that of the factfinder. *Id.,* citing *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). If the record supports conflicting inferences, the reviewing court presumes that the factfinder resolved the conflicts in favor of the verdict and defers to that determination. *Id.,* at 782-83, citing *Jackson*, 443 U.S. at 326, and *Garcia*, 667 S.W.3d at 762.

Because the standard of review is the same, the reviewing court treats direct and circumstantial evidence equally. *Id.* citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). "It is not necessary that the evidence directly prove the defendant's guilt. Rather, circumstantial evidence is as probative as direct evidence

in establishing the guilt of the actor and can, without more, be sufficient to establish his guilt." *Id.* citing *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013). A guilty verdict does not require that every fact must directly and independently prove a defendant's guilt. *Id.* citing *Hooper*, 214 S.W.3d at 13. Instead, the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id.* Therefore, the reviewing court should consider the cumulative force of all the evidence. *Id.*

B. Standard of Review Applied to Sufficiency of the Evidence Underlying the Jury's Rejection of the Self-Defense Justification

A defendant raising the issue of self-defense has the burden of producing evidence to support the defense. *White v. State*, No. 08-23-00238-CR, 2024 WL 2002212 at * 3 (Tex. App. - -El Paso May 6, 2024, no pet.) (mem. op. not designated for publication), citing *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). The State then has the burden of persuasion to rebut the defense; the State does not have a burden of production of evidence. *Id.*

A guilty verdict implicitly rejects a defendant's theory of self-defense. *Id.* Because the State bears the burden of persuasion to disprove self-defense by establishing its case beyond a reasonable doubt, an evidentiary sufficiency challenge of the jury's rejection of the self-defense theory is reviewed under the *Jackson* standard. In that review, the appellate court should not look to whether the State presented evidence refuting self-defense. Rather, the reviewing court determines,

after viewing all the evidence in the light most favorable to the prosecution, whether any rational trier of fact would have found the essential elements of the offense beyond a reasonable doubt and also would have found against the appellant on the self-defense issue beyond a reasonable doubt. *Braughton v. Stat*e, 569 S.W.3d 592, 609 (Tex. Crim. App. 2018); *Saxton v. State*, 810 S.W.2d 910, 914 (Tex. Crim. App. 1991).

C. The Jury's Conviction of Appellant and Implicit Rejection of His Self-Defense Theory Has a Sound Evidentiary Basis and Does not Violate Due Process

Appellant admitted to striking his mother with a crowbar but professed having done so only after she attacked him with a kitchen knife. The jury was authorized to discredit appellant's defensive theory from the evidence before it, including:

- Appellant dwarfed his mother in stature and physical prowess. The victim was 5'1'' tall and was 62 years old; appellant was age 37, 6'2" tall, wore size 13 shoe, and because of his size had the nickname "Lurch. *RR4: 137, 139, 182; RR3: 146; RR5: 76, 79.*
- Appellant's assault on his mother was savage, to the extent her skull was misshapen from the massive blows she sustained. The wound appellant

ostensibly had, if it even came from the victim,[1] was described as a bite mark, barely visible at the time of trial. *RR5: 70.*

- The implausibility of appellant's testimony he struck his mother with a crowbar to ward off her attack, then immediately passed out. *RR5*. *63*. The evidence, especially Dr. Florez's testimony about the victim's autopsy, reflects a sustained assault consisting of at least ten heavy blows to the victim's head. *RR4: 139.*
- Appellant went to great lengths to conceal the killing of his mother. He bought cleaning supplies and thoroughly scrubbed the residence's bedroom and bathroom in a vain effort to preclude discovery of blood. He stuffed the body under the house through a crawl space in the floor. Police were alerted to the death only days after it occurred, through the reports from appellant's friend Karl Scott. *RR4: 153.* Appellant's actions were not consistent with the behavior of someone who believed a killing was justifiable self-defense.
- After killing the victim, appellant made withdrawals from her bank account totaling more then $1,500. *RR5: 93.*

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[1]Officer Fisher testified to thinking appellant said, when taken into custody, that the scratches on his arm came from his cat. *RR4: 35.*

Effectively the only evidence appellant acted in self-defense was his own testimony and Karl Scott's testimony about what appellant said to him. A defendant's testimony alone will not conclusively prove self-defense as a matter of law. *London v. State,* 325 S.W.3d 197, 203 (Tex. App. - - Dallas 2008, pet. ref'd).

The jury, as the sole arbiter of witness credibility, could choose to believe or disbelieve appellant's testimony. *Metcalf v. State*, 597 S.W.3d 847, 855 (Tex. Crim. App. 2020). Here, a rational trier of fact could have found the essential elements of murder as charged were met and found against appellant's self-defense assertion beyond a reasonable doubt. *See Vasquez v. State,* 2 S.W.3d 355, 358-59 (Tex. App. - - San Antonio 1999, pet. ref'd) (reviewing court would not disturb implicit finding defendant did not stab victim in self-defense while being attacked); *White v. State*, *supra*, 2024 WL 2002212 at *5 (Tex. App. - - El Paso May 6, 2024, no pet.) (jury authorized to disbelieve defendant's statement he was defending himself in shooting victim, who he asserted drove her car toward him).

D. *Standard of Review Vis-à-vis the Jury's Negative Finding on the Punishment Issue Whether Appellant Acted Under the Immediate Influence of Sudden Passion Arising from an Adequate Cause*

A reviewing court applies the traditional Texas civil burdens of proof and standards of review to defensive issues, such as sudden passion, that the defendant must prove by a preponderance of the evidence; that includes challenges to both the

legal and factual sufficiency of the evidence. *Matlock v. State*, 392 S.W.3d 662, 667; 670-71. (Tex. Crim. App. 2013).

"The civil legal sufficiency standard requires a two-step analysis." *Moncivais v. State*, 425 S.W.3d 403, 407 (Tex. App.- - Houston [1st Dist.] 2011, pet. ref'd). First, the reviewing court examines the record for any evidence that supports the jury's negative finding while ignoring all evidence to the contrary. *Id.* Second, if no evidence supports the negative finding, then the reviewing court examines the entire record to determine whether the evidence establishes the affirmative evidence as a matter of law. *Id.* The appellate court should defer to the fact finder's determination of the weight and credibility to give the testimony and the evidence at trial. *Id.*

Here, some evidence supports the jury's negative finding on the sudden passion issue. According to appellant, his mother attacked him as he lay on his bed watching television. Again, according to appellant the only conflict between him and his mother preliminary to her assault and his killing of her was verbal in nature, centering on appellant's refusal to buy her cigarettes. Appellant testified he struck his mother, then "passed out" asleep for several hours. Appellant's behavior hardly reflects a mind rendered incapable of cool reflection. *See Rankin v. State*, 617 S.W.3d 169, 185 (Tex. App. - - Houston [1st. Dist.] 2020, pet. ref'd) (defendant fatally stabbed her boyfriend after he assaulted her by impeding her breathing, and

after she had broken free from his grasp; her actions did not show she was emotionally aroused to the point she would be incapable of cool reflection).

Except in rare instances, when the State's evidence is sufficient to overcome a claim of self-defense, it will also be sufficient to show the absence of sudden passion. *Chavez v. State*, 6 S.W.3d 66, 73 (Tex. App. - - San Antonio 1999, pet. ref'd). Because some evidence exists that appellant was not under the immediate influence of sudden passion when he killed his mother, the first prong of the civil legal sufficiency standard of review is satisfied. Therefore, the Court need not address the second prong of the civil legal sufficiency standard: whether appellant proved sudden passion as a matter of law because that prong applies only in the absence of any evidence to support the jury's finding. *Moncivais v. State*, 425 S.W.3d at 408.

For factual sufficiency determinations, an appellate court applies the factual sufficiency standard enunciated in *Meraz v. State*, 785 S.W.2d 146, 154-55 (Tex. Crim. App. 1990) to review an issue on which the defendant has the burden of proof by a preponderance of the evidence. *Moncivais v. State*, 425 S.W.3d at 408. Under that standard, the reviewing court considers all the evidence neutrally, to determine if the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.* at 408-09. In so doing, the appellate court should not

intrude on the fact finder's role as the sole judge of the weight and credibility of the witnesses' testimony. *Id.* at 409.

In essence, appellant argues that the same evidence said to justify the killing as self-defense alternatively showed he acted under the provocation of sudden passion. *Brief of Appellant,* p. 16. As with his self-defense assertion, the jury was authorized to discredit appellant's testimony. Considerations such as the disparate statures of appellant and his mother, the superficial nature of the injury to appellant, if it even was inflicted by his mother, and the contrasting violence of the assault on his mother weighed against his version of events. *See Rankin v. State, supra* 617 S.W.3d at 186-87 (defendant asserted she stabbed much larger victim in self-defense or in sudden passion; given lack of visible injuries to defendant, jury's rejection of sudden passion was not manifestly unjust or against the great weight and preponderance of the evidence).

RESPONSIVE POINT TWO (ADDRESSED TO APPELLANT'S "ISSUE TWO") (RESTATED):

The record in this direct appeal does not substantiate appellant's assertion he received constitutionally ineffective assistance of counsel at his trial's punishment phase. To the contrary, the record reflects appellant received the competent legal representation the Constitution requires.

I. Background

After the jury returned its guilty verdict, the prosecutor asked to re-tender the guilt-innocence evidence for the punishment phase; he then announced the State had no punishment witnesses or additional evidence. *RR5:151.*Appellant's counsel expressed he had no objection to the State's proffer of the guilt-innocence evidence; he said nothing about presenting punishment witnesses, and the court proceeded to read the punishment charge to the jury. *RR5: 151.*

Arguments of both the prosecutor and appellant's counsel centered on the sudden passion issue - - whether the jury should find appellant acted under the immediate influence of sudden passion arising from an adequate cause and assess punishment within the second-degree felony range. Appellant's counsel reminded the jury of appellant's expression of "great remorse" in his trial testimony at the guilt-innocence phase. *RR5: 161.*

II. Appellant's Complaint

In condemning counsel's alleged inaction here, appellant invokes Supreme Court and other appellate court decisions addressing an attorney's duty to investigate and

present mitigating punishment evidence. “There can be no valid excuse, tactical or strategic decision to justify not calling a single witness or presenting a shred of evidence in mitigation of punishment for a murder trial,” appellant concludes. *Brief of Appellant*, p. 30. He seeks a new punishment hearing.

III. Argument and Authority

A. Established Guiding Principles in Reviewing Assertion of Counsel's Ineffectiveness

The right to effective assistance of counsel is guaranteed a defendant in a criminal case carrying a potential penalty of confinement. U.S. Const. Amendment VI; Tx. Const. Art. I Sec. 10. Evaluating claims of ineffective assistance involves a two-pronged test: (1) whether counsel was deficient; and (2) whether the defendant suffered prejudice as a result of counsel's error. *Hart v. State,* 667 S.W.3d 774, 781 (Tex. Crim. App. 2023), citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish that counsel's actions were deficient, an appellant must show, by a preponderance of the evidence, that counsel's actions fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 687-88; *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the

challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Claims of ineffective assistance must be firmly rooted in the record. *Hart v. State, supra*, 667 S.W.3d at 782, citing *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). "Under most circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the strong presumption that counsel's conduct was reasonable and professional." *Hart*, 667 S.W.3d at 782, quoting *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004).

Trial counsel should ordinarily be afforded an opportunity to explain his conduct before being denounced as ineffective. *Id., citing Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). "In the absence of such an opportunity, when faced with an undeveloped record on direct appeal, 'courts commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it.'" *Id.*, quoting *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). Counsel's actions are considered deficient only if the court finds, as a matter of law, that "no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning." *Id.*, quoting *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

B. Appellant's Bare Argument in this Direct Appeal is Insufficient to Overcome The Presumption Counsel's Decision to Present No Punishment Evidence was Sound Strategy

Appellant did not file a motion for new trial to develop his contention counsel was ineffective in presenting no evidence at the trial's punishment phase. Absent counsel's explanation on the record, assigning fault to counsel's decision is not supportable. Counsel's thought processes, given the posture of the record, can only be speculated upon. Nonetheless, several circumstances evinced in the record, largely through appellant's testimony at the guilt-innocence phase, conduced to justify counsel's decision:

- Counsel elicited appellant had a good relationship with his mother until she experienced a drastic change in personality;
- Developed through appellant's testimony was his concern about his mother's smoking and his effort to encourage her to quit;
- Appellant testified to the care-giving he provided in running errands for his mother and taking her to doctor appointments and the grocery store;
- Appellant expressed "great remorse" for killing his mother ; and
- In jury argument counsel said he did not call appellant to testify at punishment because counsel did not think such "would add anything."

A defendant complaining about trial counsel's failure to call witnesses must show that such witnesses were available and that he would have benefitted from such

testimony. *Robinson v. State*, 514 S.W.3d 816, 824 (Tex. App. - - Houston [1st Dist.] 2017, pet. ref'd), citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). Appellant here made neither such showing. His complaint, then, cannot be credited. *See Ewing v. State*, 971 S.W.2d 204, 209 (Tex. App. - - Beaumont 1998, pet. ref'd) and *Goblish v. State*, No. 09-18-00207-CR, 2019 WL 1547972 at * 2-3 (Tex. App. - - Beaumont, Apr. 10, 2019, no pet.) (mem. op. not designated for publication)..

For the foregoing reasons, appellant has failed to demonstrate deficiency in counsel's performance. The "prejudice" prong of the *Strickland* analysis, then, is rendered moot.

By his "Issue Presented Two," appellant has shown no creditable reason to disturb the judgment. The Issue should be decided in favor of the judgment.

CONCLUSION AND PRAYER

WHEREFORE, the State prays that the judgment be affirmed.

Respectfully submitted,
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__/s/ John L. Owen___

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2025, a true copy of the foregoing State's brief was served on appellant's attorney, W. Brooks Barfield by email at barfieldlawfirm@gmail.com.

__/s/ John L. Owen______

Assistant District Attorney

CERTIFICATE OF COMPLIANCE

In accordance with Tex.R.App.P. 9.4 (i)(3), I hereby certify that the foregoing brief contains, as reflected in the computer program word count, 6,808 words. That count includes words in portions of the brief which, under the Rule, are excluded from the prescribed word limit. The brief is printed in 14-point typeface.

__/s/ John L. Owen___

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