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POINTS OF ERROR

POINT OF ERROR NUMBER ONE

APPELLANT IS DENIED A LAWFUL APPEAL BECAUSE A KEY PIECE OF EVIDENCE, I.E. AN EXHIBIT, WAS OMITTED FROM THE STATEMENT OF FACTS AFTER THE HONORABLE TRIAL JUDGE HAD ORDERED THE PREPARATION OF THE STATEMENT OF FACTS AND TRANSCRIPT FOR APPEAL AND APPELLANT HAD TIMELY FILED A NOTICE AND REQUEST FOR SAME.

POINT OF ERROR NUMBER TWO

APPELLANT ASSERTS THAT THE EVIDENCE PRESENTED BY THE STATE IN THE GUILT/INNOCENCE STAGE WAS FACTUALLY-INSUFFICIENT.

\* \* \* \* \*  
BRIEF OF APPELLANT  
\* \* \* \* \*

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant, Desiree Shaw, was charged, by indictment, with the offense of murder. The appellant was found guilty, and was sentenced to (32) thirty-two years in the Institutional Division of the Texas Department of Criminal Justice.

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE

The trial was conducted from December 2, 1996 through December 5, 1996. A timely notice of appeal was filed on January 2, 1997. On January 3, 1997 a designation of record was filed for the statement of facts and the transcript. The judgment was filed on December 9, 1996. After motions for an extension of time for filing the appellant's brief were filed and granted, this brief is timely filed in conformity with the latest order of this Honorable Court.

STATEMENT OF THE FACTS

This is a murder case, alleged to have occurred on the 11th day of August, 1996, in Angelina, County, Texas, where a nurse either shot her husband in the head while he slept OR the husband committed suicide. It is a case based upon what could be called circumstantial evidence, but in many instances when viewed in the totality of the facts of the case, one could rationally conclude that the circumstances were little more than speculation or guess work.

After being found guilty and sentenced, upon timely motions filed by Appellant's counsel, there was an order by the Honorable Trial Judge requiring the preparation of the Statement of Facts and a Transcript. Appellant's counsel was later advised that defense exhibit 4, a photograph, was missing.

Not only is there a missing exhibit in this case, but there is a complete lack of correlation between the Index of the Exhibits Volume of the Statement of Facts and the Statement of Facts.

This is a case where the defendant elected not to testify in the guilt/innocence stage, but did in fact testify in the punishment stage.

#### ARGUMENT AND AUTHORITIES

##### POINT OF ERROR NUMBER ONE

APPELLANT IS DENIED A LAWFUL APPEAL BECAUSE A KEY PIECE OF EVIDENCE, i.e. AN EXHIBIT, WAS OMITTED FROM THE STATEMENT OF FACTS AFTER THE HONORABLE TRIAL JUDGE HAD ORDERED THE PREPARATION OF THE STATEMENT OF FACTS AND TRANSCRIPT FOR APPEAL AND APPELLANT HAD TIMELY FILED A NOTICE AND REQUEST FOR SAME.

On January 3, 1997, Appellant's Counsel timely filed the Designation of Record for transcript, wherein Appellant's request #22 states, "All exhibits admitted into evidence," (Transcript Pg. 137) and the Statement of Facts, request #8 stating, "All exhibits offered or introduced into evidence." (Transcript pg. 139). On this same date the Honorable Trial Judge's order for a Transcript and Statement of Facts to be prepared by the District Clerk and Court Reporter was filed. (Transcript pg. 135).

Effective September 1, 1986, the Court of Criminal Appeals in conjunction with the Supreme Court revised the Texas Rules of Appellate Procedure (TRAP), creating and establishing new rules

while repealing all affected statutes. With these revisions made specifically for applications in criminal causes, Appellant reiterates the argument in Melendez v. State, 936 S.W.2d 287 (Tex.Crim.App. 1996).

... And, particularly germane here, after bringing forward the last sentence in former Article 44.11 (substitution of record), we added the second sentence in TRAP 50(e) (new trial where notes and records of court reporter are lost or destroyed)...(at 290)

... The court of appeals determined that exhibits are part of the statement of facts, so the latter is not complete without the former, and an appellate court cannot review sufficiency of evidence without a complete statement of facts...(at 290)

...When requested to do so, the court reporter is duty bound to attend sessions of court and make "a full record of the evidence;" later, to file "all exhibits with the clerk." TRAP 11(a)(1) & (3). In that connection, conventional practice is for the offering party to have the court reporter "mark" an exhibit for identification, a witness identify it and, after receiving a ruling admitting the exhibit and using it as evidence, ultimately to return it to the court reporter to become part of the "record of the evidence." Then whenever safe-keeping interests are best served, the court reporter files all exhibits received in evidence with the clerk of the court.

*Ibid.* (at 290-291)

...Appendix Rule 1(b)(4) provides:

"The court reporter shall also show in a separate table in the first volume of the statement of facts the page at which any exhibit or other document copied therein appears, and the pages at which it is identified, offered, marked, received, and shown. The table of exhibits may be as shown in the following example or in any other form which shows the same information. (example omitted)." (at 291)

...If a legible copy of a photograph or any other paper cannot be made, "the original exhibit shall be included in the record under order of the trial court made pursuant to rule 51(d)...(at 291-292)

...We there for hold that when a complete statement of facts is timely requested by appellant or ordered by the trial court, the court reporter shall include and display in the statement of facts copies of all admitted exhibits in the form and manner prescribed by the rules of this Court...(at 292)

...See and compare Emery v. State, 800 S.W.2d 530 (Tex.Crim.App. 1990) (where request for statement is timely, and loss of notes and records not fault of appellant, new trial must be granted)...(at 294)

...The second sentence in TRAP 50(e) has no comparable contemporaneous statutory provisions; it is a natural consequence of the evolutionary process demonstrated ante, at n.2. Now a "timely request" implicitly presupposes a productive exercise in "due diligence." We hold that by making a "timely request" for a complete statement of facts through a court order or directly to the court reporter, a defendant establishes the initial premise in the second sentence of TRAP 50(e), and is entitled to a new trial where portions of the statement of facts are lost or destroyed "without appellant's fault." *Id.* Emery v. State, supra, at 531 & 536...(at 295)

... To recapitulate, the Court has considered, determined and decided the questions of law at issue as follows:

Admitted exhibits become part and parcel of the statement of facts, and as such are notes and records of a court reporter for purposes of TRAP 50(e).

A "timely request" for a statement of facts by an indigent to the trial judge or otherwise to the court reporter is by definition one "diligently" made, and satisfies the premise in the second sentence of TRAP 50(e), leaving only to be decided whether any missing exhibit was lost or destroyed "without fault" on the part of the appellant...(at 296)

...The Court of appeals properly concluded appellant is entitled to a new trial...(at 296).

In Emery v. State,, 800 S.W.2d 530 (Tex.Crim.App. 1990), the Court ruled:



...In his first point of error, appellant contends that he is entitled to a new trial because the record on appeal does not and cannot contain a complete transcription of the proceedings in this case. Because appellant's request for a statement of facts was timely, and the loss of the court reporters notes and records were not appellant's fault, we must reverse.

Additionally, the Court ruling in Lewis v. State, 844 S.W.2d 750 (Tex.Crim.App. 1993), states:

...(e) When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.

Supported by the Rules of Appellate Procedure and the Court in the above referenced cases, the loss of exhibit "4" and the complete "disarray" of the Statement of Facts in this case, effectively denies Appellant the lawful appeal to which she is constitutionally entitled.

#### POINT OF ERROR NUMBER TWO

APPELLANT ASSERTS THAT THE EVIDENCE PRESENTED BY THE STATE IN THE GUILT/INNOCENCE STAGE WAS FACTUALLY INSUFFICIENT.

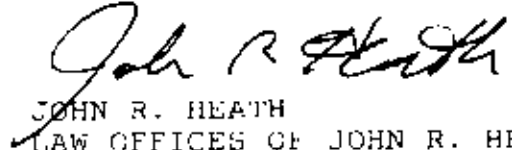
In Clewis v. State, 922 S.W.2d 126 (Tex.Crim.App. 1996), the Court ruled that the new standard for conducting a factual-sufficiency review is that "an Appellant Court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination."

The allocation of the burden of proof in a criminal case, can vary, depending upon circumstances. In most instances the proof is "beyond a reasonable doubt." This is the standard that should be applied here. This was not a case where the appellant raised self-defense, or an affirmative defenses.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court sustain the contentions here advanced, reverse the judgment of conviction entered below, order a new trial on both guilt and punishment.

Respectfully submitted,



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1 have to list witnesses that I anticipate may be  
2 called who under any theory of the case I  
3 don't know, I don't get the benefit of a  
4 witness list from Mr. Heath and that's appropriate  
5 that's the law. Okay. I notify him what I'm  
6 going to do, essentially I get no notice what  
7 the defense is going to do. I have to list  
8 witnesses that I anticipate may become relevant  
9 if the defense puts on a case. So there is a  
10 long list of people that weren't called for that  
11 reason. Another reason witnesses might not be  
12 called and weren't called in this case is because  
13 there is testimony and evidence that was, the  
14 Judge ruled not to be brought before you. So  
15 to explain --

16 MR. JOHN HEATH: Judge, I'll object to that, that's  
17 quite improper.

18 MR. DAVID WILSON II: It's invited argument, Judge.  
19 He brought it up.

20 MR. JOHN HEATH: No, no, now that's quite improper  
21 and I'd like an instruction to --

22 THE COURT: What are you suggesting?

23 MR. JOHN HEATH: Your honor, my objection is --

24 THE COURT: Approach the bench.

25 COURT REPORTER'S NOTE: Off the record discussion is had.

Exhibit "ZZ" 453

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1 MR. JOHN HEATH: Judge, I would like to go on the record  
2 on that objection.

3 THE COURT: All right. I sustain the objection at this  
4 time and instruct the jurors to disregard the  
5 last statement.

6 MR. JOHN HEATH: I ask for a Mistrial your honor.

7 THE COURT: And overruled.

8 MR. DAVID WILSON II: There are reasons besides the  
9 State trying to hid something that the witnesses  
10 on the witness list are not called. Now when  
11 we look at this crime, and that's what it is a  
12 crime, we can look at it in several different  
13 compartments. I suggest to you that one place  
14 to start looking is the crime scene. We have a  
15 gun, a gun tightly wrapped, look at your  
16 State's 32 and 27, you can look at the muzzle  
17 of this gun. That gun, I submit to you, ladies  
18 and gentlemen could not have been wrapped. If you  
19 watch on the video tape the unwrapping of that  
20 gun. There is no reasonable explanation that what  
21 Mrs. Shaw said and Mrs. Shaw's movements that she  
22 admitted to, would have caused that accidentally,  
23 there is simply no way. And what did Mike  
24 Prodan tell you? He told you that if there had  
25 been that kind of movement of the body that caused

F. 114 "ZZ" 1154

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CERTIFICATE OF SERVICE

I heroby verify that a true and correct copy of the foregoing Brief of Appellant has been hand delivered/mailed to David Wilson II, District Attorney, Angelina County, Nacogdoches, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

  
John R. Heath