

NO. _____

COURT OF CRIMINAL APPEALS OF TEXAS

DESIREE SHAW, Appellant

v.

THE STATE OF TEXAS

On Petition for Discretionary Review from

The Ninth Court of Appeals
In No. 09-97-021 CR Affirming The
Conviction in No. 19,058 From the 159TH Judicial
District Court of Angelina County, Texas

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

RESPECTFULLY SUBMITTED,

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BY 

JOHN R. HEATH
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COUNSEL FOR DEFENDANT

NAMES OF ALL PARTIES

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Appellant's Trial Counsel:

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State's Trial Counsel:

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Trial Judge:

Honorable Gerald Goodwin
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Appellant's Counsel on Appeal:

John R. Heath
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State's Counsel on Appeal:

David Wilson II
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STATEMENT REGARDING ORAL ARGUMENT

Not requested.

STATEMENT OF THE CASE

After pleading no guilty, Appellant was convicted of the offense of murder, in the 159th Judicial District Court of Angelina County, Texas, Honorable Gerald Goodwin, judge presiding. The jury assessed punishment at confinement for thirty-two (32) years.

PROCEDURAL HISTORY

Appellant's conviction was affirmed by the Ninth Court of Appeals in an opinion delivered March 11, 1998.

GROUND FOR REVIEW

GROUND FOR REVIEW 1

THE COURT OF APPEALS ERRED BY HOLDING THAT THE EVIDENCE PRESENTED BY THE STATE IN THE GUILT INNOCENCE STAGE WAS FACTUALLY INSUFFICIENT.

REASONS FOR REVIEW

1. The court of appeals has decided an important question of state law in conflict with the applicable decisions of the Court of Criminal Appeals, namely, Clewis vs. State, 922 S.W.2d 126 (Tex.Crim.App. 1996).

ARGUMENT AND AUTHORITIES

The State cites Clewis v. State, 922 S.W.2d 126

(Tex.Crim.App. 1996): "those Courts are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." We are not asking the Court to reweigh the evidence and come to a more reasonable decision; rather, we are requesting the Court to review the evidence to determine if the verdict was "clearly wrong and unjust." Appellant's point from Clewis, and as stated in same, is that the Court of Appeals "views all the evidence without the prism of 'in the light most favorable to the prosecution.' . . . [and] set[s] aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." Id. at 129.

The State refers to the lack of damage to the underwear which was wrapped around the gun (R. II- 28-29) and the fact that there was no gun powder residue detected on the underwear. (R. II - 146-149). In addition to this they refer to the empty cartridge that was still in the gun. (R. II- 29). Their own expert testified that the only way the phenomenon of the casing not being ejected when the pistol was fired, was to apply pressure on the slide mechanism, which is consistent with someone attempting to muzzle (thus silencing) the gun with a foreign object. (R. II- 165-166).

If the underwear were put around the gun after the gun was fired, as the State claims, what was used to muffle the sound and prevent the ejection of the cartridge? Additionally, the atomic absorption testing failed to detect gunpowder residue on either the decedent's hand NOR the Appellant's hand. (R. II- 145-150).

Where was any residue found?

The following testimony of the State's witnesses, are clearly lacking in merit and are questionable at best. For example:

1.) Elizabeth Hodges testified that Appellant told her she found decedent on the floor on his right side. (R. III- 371-372). There was no blood found on the floor and the feasibility of the Appellant's ability to lift and move the body of a 200 pound man from the floor to the bed is highly improbable.

2.) Lisa Juizer testified that Appellant told her the decedent had asked Appellant to leave, that he wanted a divorce. Appellant's statement to the Texas Rangers was that her marriage was the "utmost trusting relationship" and they had no marital problems in the summer of 1996. (R. III- 397-398). It is certainly not unheard of for a spouse content with the status of a marriage to be unaware of the discontent of his or her partner, much less their intentions to seek a divorce, which could very well have purposely been kept secret. (R. III- 273; 366; 377; 386-387).

3.) Further testimony by Ms. Juizer states decedent intended to seek custody of their son and one of Appellant's daughters. (R. III- 366; 377; 386-387). Why would the decedent seek custody of a child that was not his, and why only one child when Appellant had three children that were not the decedents?

Our ground for review is the lack of sufficient evidence to sustain a guilty verdict. The above arguments clearly support our belief that there was insufficient evidence to sustain a

guilty verdict as required in Clewis.

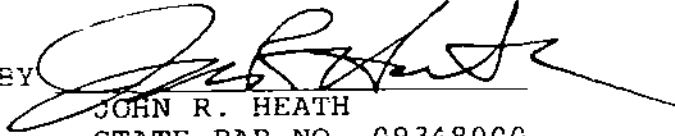
PRAYER FOR RELIEF

Appellant prays that this Court grant this petition for discretionary review. Following the grant of review, appellant prays that the judgment of the Court of Appeals be reversed and the case remanded to the trial court or order any other appropriate relief.

RESPECTFULLY SUBMITTED,

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BY


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellant's Petition for Discretionary Review was mailed to the Angelina County District Attorney's Office on April 7, 1998.


JOHN R. HEATH