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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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JOE LUIS BECERRA, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

On Petition for Discretionary Review from the Tenth Court of Appeals in No. 10-17-00143-CR affirming the Judgment in Cause Number 14-03925-CRF-361 from the 361st District Court of Brazos County, Texas

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STATE'S BRIEF ON THE MERITS

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TRIAL COURT:	Hon. Steve Smith Presiding Judge, 361st District Court (Jury Selection and Motion for New Trial) Senior Visiting Judge J.D. Langley (Guilt and Punishment Phases of Trial) 300 E. 26th Street, Suite 420 Bryan, Texas 77803 (979)361-4220

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JOE LUIS BECERRA, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

On Petition for Discretionary Review from the
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affirming the Judgment in Cause Number
14-03925-CRF-361 from the 361st District Court
of Brazos County, Texas

STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and files this brief in response to the two points of error alleged by Appellant, and would respectfully show the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

This Court denied oral argument upon granting of discretionary review.

STATEMENT OF THE CASE

Appellant, Joe Becerra, was originally indicted for the offenses of Murder and Unlawful Possession of a Firearm by a Felon [1]. (CR 5). The State amended Appellant's indictment on September 28, 2016. (CR 209-212); (2 RR 6-7).

On March 6, 2017, the State proceeded to trial only on the Unlawful Possession of a Firearm charge. (2 RR 8). On March 8, 2017, the jury convicted Appellant of that offense. (4 RR 46). Prior to trial, the State gave notice of punishment enhancements which enhanced Appellant as a habitual offender. (2 RR 8). Following Appellant's conviction, the Trial Court found the punishment enhancements to be true and assessed punishment at 55 years in prison. (4 RR 89-91).

On April 27, 2017, the Trial Court held a hearing on Appellant's Motion for New Trial and denied it. (5 RR 28); (Supp. CR 97). Appellant then appealed to the Tenth Court of Appeals. (Supp. CR 194).

STATEMENT OF PROCEDURAL HISTORY

The Tenth Court of Appeals affirmed Appellant's conviction on June 12, 2019, ruling that Appellant failed to preserve error. *Becerra v. State*, No. 10-17-00143-CR, 2019 Tex. App. LEXIS 4850 (Tex. App. – Waco June 12, 2019) (not

[1] In his Brief, Appellant states that he was originally indicted for Murder and Manslaughter. (Appellant's Brief, p. x). However, Appellant was never charged with Manslaughter and his indictment alleged Murder (Count One), and Unlawful Possession of a Firearm by a Felon (Count Two). (CR 5).

designated for publication). Appellant filed a Motion for Rehearing on June 20, 2019, which was denied on July 5, 2019.

This Court reversed on April 14, 2021, holding that error was preserved, and remanded the case back to the Tenth Court of Appeals to address the merits of Appellant's appeal. *Becerra v. State*, 620 S.W.3d 745 (Tex. Crim. App. 2021) (*Becerra II*). Subsequently, the Tenth Court of Appeals again affirmed Appellant's conviction. *Becerra v. State*, No. 10-17-00143-CR, 2022 Tex. App. LEXIS 2602 (Tex. App. – Waco Apr. 20, 2022) (not designated for publication) (*Becerra III*).

This Court then granted discretionary review again.

STATEMENT OF FACTS

State's Evidence During the Guilt-Innocence Phase

Anthony Williams testified that he was employed with Brazos County 911 District for ten years. (3 RR 53). Williams was the day shift communications supervisor for the Brazos County 911 District on May 24, 2014. (3 RR 53-54, 57).

Through Williams, the State admitted State's Exhibit 1, a 911 call made by Amanda Mauricio. (3 RR 60). The nature of the call was shots fired and someone had been hit. (3 RR 60); (6 RR 8).

Officer Daniel Castelline testified that he was a patrol officer and a certified peace officer with the Bryan Police Department (BPD). (3 RR 63-64). Castelline was working as a night shift patrol officer on May 24, 2014. (3 RR 64). He received

information from dispatch regarding a shooting incident that occurred at a home located at 1312 Groesbeck in Bryan. (3 RR 64-65).

The State admitted State's Exhibits 2 through 9. (3 RR 66). State's Exhibits 2 through 4 are pictures of the scene where the incident occurred. (3 RR 66-67; 6 RR 9-11). Castelline testified that he drove down to 1312 and 1314 Groesbeck. (3 RR 67-68).

Once at the scene, Castelline spoke to another officer and then went looking for the suspect. (3 RR 68). Castelline found Appellant approximately one hour after the shooting, around a half mile from the crime scene. (3 RR 62, 69, 71-72). Appellant was heading in a direction consistent with the direction that Castelline was told the suspect was heading. (3 RR 72). Appellant matched the suspect description provided by law enforcement. (3 RR 70-71). Castelline did not locate a firearm on Appellant. (3 RR 72). However, between the area where he found the suspect and 1312 Groesbeck, there were many drains and dumpsters. (3 RR 70).

Michelle Becerra is Appellant's sister and explained that she did not want to testify against her brother. (3 RR 76).

Michelle described how, on the night of May 24, 2014, she was at the home of Heather Becerra and Heather's boyfriend, Jose Guardado. (3 RR 77). That home was located at 1312 Groesbeck in Bryan, Texas. (3 RR 77).

Appellant was also present at the house, along with his long-term girlfriend, Sylvia. (3 RR 78). Another of Appellant's nieces, Selena Becerra, also came to the house for part of the day. (3 RR 79, 81). Additionally, a friend of Guardado's named "Guicho" and a friend of Appellant's named Mark were at the home that day. (3 RR 79).

Heavy drinking occurred at 1312 Groesbeck on May 24, 2014. (3 RR 80-81). Michelle explained that, during the afternoon, she and Sylvia were going to give Selena a ride home in a car belonging to Sylvia and Appellant. (3 RR 81-82).

As the three women were leaving, Appellant called to Sylvia from the house asking her to bring him his gun. (3 RR 85-86, 95-97). At trial, Michelle initially denied that she told police or prosecutors that Appellant had asked for his gun. (3 RR 82-84). Michelle instead claimed she said Appellant asked for a "cuete," which means gun and other things as well. (3 RR 84). Michelle agreed that before she and the other women left, Appellant came out near the stairs of the house and called to Sylvia asking for his "cuete." (3 RR 84). Michelle further agreed that Sylvia then rummaged in the driver's area of the car, went to where Appellant was standing, stood there with him for a brief time, and then returned to the car. (3 RR 84-85).

Ultimately, though, Michelle acknowledged that she unequivocally told police that Appellant had asked Sylvia for a gun, and that she believed that Sylvia gave Appellant a gun from the couple's car. (3 RR 85-87, 95-97)

Michelle conceded that the car used to drop off Selena, and from which Sylvia retrieved what Michelle believed was Appellant's gun, was one that Appellant had driven throughout that day. (3 RR 96-97).

Michelle testified that when she and Sylvia returned to the party after dropping Selena off, Appellant became angry at Jose Guardado and punched him in the face. (3 RR 92-93). Michelle made clear that, when Appellant assaulted Guardado, it was not in self-defense. (*Id.*). Following Appellant's assault of Guardado, Michelle left, along with Mark and Sylvia. (3 RR 93-94). The only three people who remained at the house were Appellant, Jose, and Jose's friend, "Guicho." (3 RR 94).

Detective Travis Hines testified that he was a police officer with the Bryan Police Department. (3 RR 122). Hines was called to investigate the shooting death of Jose Guardado, which occurred at 1312 Groesbeck on May 24, 2014. (3 RR 122-123).

Hines explained that, shortly after the shooting, he conducted a gunshot residue kit on Appellant's hands. (3 RR 125-127).

Later, as part of his investigation into Guardado's death, Hines spoke with Appellant's girlfriend, Sylvia on May 28, 2014. (3 RR 123). Sylvia told Hines that, prior to the shooting, Appellant asked her for a gun out of their car. (3 RR 124). When Appellant asked Sylvia for the gun, she asked him where it was, and he told

her it was under the driver's floor mat. (3 RR 124-125). Sylvia described finding a "little bitty" gun under the floor mat and handing it to Appellant. (3 RR 125, 133).

Detective Candido Amaya testified that he was a detective with the Bryan Police Department. (3 RR 136). Amaya assisted in the shooting investigation that occurred at Guardado's home on May 24, 2014. (3 RR 136). Amaya went to 1312 Groesbeck and contacted "Guicho." (3 RR 137). Guicho was still present at the scene, and he cooperated with Amaya [2]. (3 RR 137).

Maria Nava testified that in 2014 she lived at 1314 Groesbeck in Brazos County, Texas. (3 RR 140). Through Nava, the State admitted State's Exhibits 15 through 27, photographs of Nava's house, and of the house next door at 1312 Groesbeck. (3 RR 141); (6 RR 18-30).

Nava testified that on the evening of May 24, 2014, she was sitting outside her home, along with her husband, aunt, and brother-in-law. (3 RR 142-143).

Nava saw a group of people in the yard of the house next door, 1312 Groesbeck. (3 RR 146). Nava heard an argument among that group and then saw several people leave the house at 1312. Three other people, all men, remained at 1312 Groesbeck and went upstairs. (3 RR 146-147). Nava stated that after the three men went upstairs, no one else arrived or left the house until she heard a gunshot about ten minutes later. (3 RR 147).

[2] "Guicho" was deported prior to trial and was thus unable to testify. (3 RR 10, 24, 45).

Following the gunshot, Nava saw one of the men come down the stairs of 1312 Groesbeck. (3 RR 148-149). The man then walked down the driveway and made a right in front of Nava's house towards Palasota Drive, shown in State's Exhibit 6. (3 RR 149); (6 RR 13). The man never spoke to, or acknowledged, anyone at Nava's home, even though everyone was outside. (3 RR 149).

Nava testified that a second of the three men also came out of 1312 after the first man walked out. (3 RR 150). The second man spoke to Nava's husband, and after their conversation, Nava's cousin called 911. (3 RR 150); (6 RR 8 – 911 recording). That second man who exited 1312 Groesbeck remained on scene until police arrived. (3 RR 151).

Nava walked up the stairs of 1312 Groesbeck and saw the third man on the floor of the home. (3 RR 151).

Selena Becerra stated that Appellant was her uncle and that she did not want to testify against him. (3 RR 156). Selena explained that on May 24, 2014, she went to visit her sister, Heather, at 1312 Groesbeck. (3 RR 156-157; 159).

As Selena was getting ready to leave the party, she got into a maroon car that belonged to Appellant's girlfriend, Sylvia. (3 RR 159). At that point, Appellant yelled at Sylvia to bring him his gun. (3 RR 160). Sylvia then got out of the car and walked up the stairs to Appellant before returning back to the car. (3 RR 160-161).

Investigator Eric Henderson testified that he supervised the Forensic Crime Scene Unit for the Bryan Police Department. (3 RR 167-168). His job duties involved processing major crime scenes. (3 RR 168).

On May 24, 2014, Henderson was dispatched to a homicide at 1312 Groesbeck. (3 RR 169). Through Henderson, the State admitted photographs of the crime scene and surrounding areas. (3 RR 170); (State's Exhibits 28 through 55 - 6 RR 31-58). Henderson searched Jose Guardado's home for anything of evidentiary value. (3 RR 173). State's Exhibits 39 through 43 showed the interior of the home. (3 RR 173); (6 RR 42-46). Henderson specifically looked for a gun or any shell casings when searching the home, but none were present. (3 RR 174-175).

Detective Shawn Davis testified that he was a detective with the Bryan Police Department. (3 RR 181).

Davis assisted in the investigation of the shooting and attended the autopsy of Jose Guardado. (3 RR 183). Davis was present when Dr. Katherine Callahan retrieved a bullet from Guardado's body, and Davis collected that bullet as evidence. (3 RR 183-184); (State's Exhibit 57 - 6 RR 60). Davis testified that the bullet in State's Exhibit 57 was a small caliber bullet, which is capable of causing death or serious bodily injury. (3 RR 185).

Dr. Katherine Callahan testified that she was a forensic pathologist. (3 RR 187). Callahan performed an autopsy on Guardado on May 25, 2014. (3 RR 189).

She determined that Guardado's cause of death was a gunshot wound to the abdomen. (3 RR 189). State's Exhibit 56 accurately depicted the injury Guardado suffered. (3 RR 190); (6 RR 59 – Photo of Guardado's wound).

Callahan testified that she recovered the bullet admitted in State's Exhibit 57. (3 RR 191-192); (6 RR 60). Callahan testified that there was no question that Guardado was shot with a firearm. (3 RR 194).

Thomas Russell White testified that he was a forensic chemist with DPS. (3 RR 201). White testified that samples were taken from Appellant using the gunshot residue collection kit admitted as State's Exhibit 14. (3 RR 204-205). When White performed analysis on the samples, White confirmed the presence of gunshot primer residue. (3 RR 205).

Jury Deliberations and Motion for New Trial Hearing

The facts and circumstances of events relating to jury deliberations and Appellant's Motion for New Trial hearing are critical to the resolution of this appeal and are therefore described in detail in the discussion of Appellant's issues. (*See* pp. 22-24, 39 - 45).

Evidence During the Punishment Phase

Because this appeal does not pertain to issues connected to the trial's punishment phase, the punishment evidence will not be specifically summarized in this brief.

SUMMARY OF THE ARGUMENT

In his first and third issues, Appellant claims that the alternate juror's accidental 46-minute presence and participation violated Articles 33.011(b) and 36.22 of the Texas Code of Criminal Procedure. Appellant further claims that the Tenth Court of Appeals failed to apply the rebuttable presumption of harm which arises upon a violation of Article 36.22.

With his second issue, Appellant contends that the alternate's participation violated Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure. Appellant further asserts that the Tenth Court of Appeals erroneously excluded part of Juror Joshua Marion's affidavit which was admitted at the Motion for New Trial hearing under Tex. R. Evid. 606(b). Specifically, the court of appeals disregarded the portion of the juror's affidavit describing the jury's actions after the removal of the alleged outside influence – the alternate juror. That excluded portion of the affidavit states that, while the alternate participated in an initial vote to convict Appellant, the petit jurors did not revote after the alternate's removal because they unanimously agreed that Appellant was guilty, thereby, according to Appellant, violating Article V, Section 13.

Appellant further claims that, even if the Tenth Court's partial exclusion of the juror's affidavit was proper, the limitations of Rule 606(b) should give way to

Appellant's need to establish a violation of Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure.

For the sake of simplicity and brevity, the State will respond to Appellant's three issues collectively.

Appellant's first and third issues center on an in-depth analysis of legislative intent concerning the role and status of alternate jurors. Appellant correctly observes that the Texas Code of Criminal Procedure and existing precedent offer little guidance on what role and abilities alternate jurors should have during deliberations.

Yet, as was the case twelve years ago in *Trinidad v. State* [3], and again recently in *Laws v. State* [4], the circumstances of Appellant's case do not require this Court to address, let alone resolve, the question of statutory construction pertaining to the role of alternate jurors. Regardless of how this Court might interpret Articles 33.011(b) and 36.22 of the Texas Code of Criminal Procedure, Appellant is not entitled to relief.

Similarly with respect to Appellant's second issue addressing the application of Tex. R. Evid. 606(b) and whether alternates are "jurors" within the meaning of the Texas Constitution or Article 33.01 of the Code of Criminal Procedure, the

[3] *Trinidad v. State*, 312 S.W.3d 23, 29 (Tex. Crim. App. 2010)

[4] *Laws v. State*, 640 S.W.3d 227, 231 (Tex. Crim. App. 2022)

circumstances of Appellant's case do not entitle him to relief, regardless of what this Court's interpretation might be.

Through all of his arguments, Appellant fails to address the undisputable fact that appellate review of this case must occur through the lens of whether the Trial Court abused its discretion in denying Appellant's Motion for New Trial. To that end, the Trial Court found on the record that, even if the alternate juror's degree of participation amounted to either constitutional or statutory error, the record established that Appellant was not harmed. Thus, unless that ruling is unsupported by the record, Appellant's appeal is meritless.

Because none of Appellant's issues are dispositive, the State's response will focus on the issue of harm and the exercise of the Trial Court's discretion, rather than engaging on matters upon which the outcome of the case does not depend.

This Court has notably ruled that, even when lower courts have not conducted a harm analysis, this Court may do so when the record is clear and judicial economy calls for it. This case presents such a scenario.

Having now been considered twice by the Tenth Court of Appeals without a harm analysis, and with this Court now reviewing the case for a second time, judicial economy is well-served by this Court resolving the matter on the following basis: Regardless of what type of error occurred, of whether harm was presumed or not, or of which statutory construction might prevail, the Trial Court acted within its

discretion by denying Appellant's Motion for New Trial on the basis of harmless error. The Trial Court's ruling is supported by a record which shows affirmatively, unequivocally, and beyond a reasonable doubt that, no matter the type of error claimed, or the type of harm analysis applied, Appellant was not prejudiced by the alternate's participation.

STATE'S RESPONSE TO APPELLANT'S ISSUES

Even assuming the alternate juror's participation violated Article V, Section 13 of the Texas Constitution, or Articles 33.01, 33.011(b) and/or 36.22 of the Texas Code of Criminal Procedure, the Trial Court properly denied Appellant's Motion for New Trial on the basis of harmless error.

The record affirmatively shows beyond a reasonable doubt that the alternate's participation did not contribute to Appellant's conviction or punishment. The petit jurors, *without the alternate*, found beyond a reasonable doubt that Appellant *actually used* a firearm, which exceeded the mere *possession* of a firearm required for jurors to convict. Additionally, a petit juror's affidavit established on its face that the alternate did not influence the jury's verdict. Further, all twelve petit jurors affirmed their individual verdicts during post-verdict polling. Finally, evidence of Appellant's guilt was overwhelming.

Thus, in a harm analysis pursuant to either Texas Rule of Appellate Procedure 44.2(a) or (b), the Trial Court appropriately found that any error was harmless, the Motion for New Trial was properly denied, and Appellant's conviction and sentence should now be affirmed.

Standard of Review

A trial court's denial of a Motion for New Trial is reviewed under an abuse of discretion standard. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App.

2013); *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012). Reviewing courts do not substitute their own judgment for that of the trial court, but rather decide whether the trial court's decision was arbitrary or unreasonable. *McQuarrie*, 380 S.W.3d at 150.

A trial court abuses discretion when no reasonable view of the record could support the trial court's ruling. *Okonkwo*, 398 S.W.3d at 694; *McQuarrie*, 380 S.W.3d at 150. This Court must view the evidence in the light most favorable to the trial court's ruling. *Okonkwo*, 398 S.W.3d at 694; *Riley v. State*, 378 S.W.3d 453, 459 (Tex. Crim. App. 2012).

Further, the trial court, as factfinder, is the sole judge of the witnesses' credibility at a hearing on a Motion for New Trial with respect to both live testimony and affidavits. *Okonkwo*, 398 S.W.3d at 694; *Riley*, 378 S.W.3d at 459. Accordingly, reviewing courts must afford almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility. *Okonkwo*, 398 S.W.3d at 694; *Riley*, 378 S.W.3d at 458.

Applicable Law

Article V, Section 13 of the Texas Constitution states:

> Grand and petit juries in the District Courts shall be composed of twelve persons…When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

Tex. Const. art. V, § 13.

Article 33.01 of the Texas Code of Criminal Procedure states that, in a district court, "the jury shall consist of twelve qualified jurors." Tex. Code Crim. Proc. art. 33.01(a).

Article 33.011(b) of the Texas Code of Criminal Procedure states in relevant part:

> Alternate jurors…shall take the same oath, and shall have the same functions, powers, facilities, security and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment.

Tex. Code Crim. Proc. art. 33.011(b).

Article 36.22 of the Texas Code of Criminal Procedure states:

> No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.

Tex. Code Crim. Proc. art. 36.22.

When an unauthorized person converses with a juror about a case on trial, a rebuttable presumption of harm is triggered. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). When determining whether the State sufficiently rebutted the presumption of harm, reviewing courts view the evidence in the light most favorable to the trial court's ruling. *Id.*

If the record contains evidence that rebuts the presumption of harm, it should be considered, whether presented by the State or the defense. *Alexander v. State*, 919 S.W.2d 756, 767 (Tex. App.—Texarkana 1996, no pet.).

The "paramount issue" in an analysis under Article 36.22 is whether Appellant received a fair and impartial trial, and therefore that analysis "must focus on whether a juror was biased as a result of the improper conversation." *Ocon*, 284 S.W.3d at 887.

The presumption of harm under Article 36.22 is rebutted when evidence shows that the presence of the alternate juror did not influence or prejudice any of the jurors. *Rojas v. State*, 171 S.W.3d 442, 450-51 (Tex. App. – Houston [14th Dist.] 2005, pet. ref'd); *see also Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997) (noting that Article 36.22's presumption of harm is rebutted, and a new trial is properly denied, when the record shows that an alleged outside influence did not influence any jurors in reaching a verdict).

No error, other than federal constitutional errors labeled as structural by the United States Supreme Court, i.e., those involving "fundamental constitutional systemic requirements," is categorically immune to harmless error analysis. *Salinas v. State*, 980 S.W.2d 219, 219 (Tex. Crim. App. 1998); *Foster v. State*, 8 S.W.3d 445, 446 (Tex. App.--Waco 1999, no pet.) (citing *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999)).

The United States Constitution does not grant the right to a twelve-member jury. *Williams v. Florida*, 399 U.S.78, 86, 99-100 (1997) (stating, "…the [twelve-man] requirement cannot be regarded as an indispensable component of the Sixth Amendment.").

Constitutional error requires reversal unless the record establishes beyond a reasonable doubt that the error did not contribute to Appellant's conviction or punishment. Tex. R. App. P. 44.2(a).

Constitutional harm analysis should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000), cert. denied, 532 U.S. 944 (2001).

In a constitutional harm analysis, a reviewing court should take into account every circumstance in the record that logically informs a determination of whether, beyond a reasonable doubt, the error did not contribute to the conviction or punishment, and if applicable, consider the nature of the error, its probable collateral implications, and the weight a juror would probably place on the error. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011) (quoting Tex. R. App. P. 44.2(a)).

Thus, when reviewing a claim of constitutional error, this Court must evaluate the entire record in a neutral, impartial, and even-handed manner, not in the light

most favorable to the prosecution. *Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989), disagreed with in part on other grounds by *Snowden*, 353 S.W.3d at 821-22.

By contrast, statutory errors must be disregarded unless the error affected Appellant's substantial rights. Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

The presence of overwhelming evidence supporting the finding in question is a factor in harm analysis conducted under either Rule 44.2(a) or (b). *See Tillman v. State*, 376 S.W.3d 188, 202 (Tex. App. – Houston [14th Dist.] 2012, no pet.); *Motilla v. State*, 78 S.W.3d 352, 357-358 (Tex. Crim. App. 2002).

Jurors are presumed to have followed a trial court's instructions. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

Texas Rule of Evidence 606(b) states:

(b) During an Inquiry into the Validity of a Verdict or Indictment.

> (1) Prohibited Testimony or Other Evidence. --During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* --A juror may testify:

(A) about whether an outside influence was improperly brought to bear on any juror; or

(B) to rebut a claim that the juror was not qualified to serve.

Tex. R. Evid. 606(b).

A trial court may not receive a juror's affidavit or evidence of a juror's statement except on matters enumerated in Rule 606(b)(2). *Vargas v. State*, No. 13-18-00225-CR, 2020 Tex. App. LEXIS 9045, at *26 (Tex. App. – Corpus Christi, Nov. 19, 2020, pet. ref'd) (not designated for publication).

Relevant Facts

Appellant was charged by indictment with Unlawful Possession of a Firearm by a Felon. (CR 5). At trial, jurors were instructed that they must convict if evidence proved beyond a reasonable doubt that Appellant intentionally or knowingly possessed a firearm at a location other than his home after the fifth anniversary of his release from confinement from his October 11, 2001 felony conviction. Tex. Penal Code § 46.04(a)(2); (3 RR 38); (CR 172, 209-210).

Evidence showed that on May 24, 2014, during a party at the home of Jose Guardado, Appellant's sister, Michelle, and niece, Selena, both overheard Appellant ask his girlfriend, Sylvia, to bring him his gun from the couple's car. (3 RR 77-78, 84-86, 94-97, 160-161). Both Michelle and Selena saw Sylvia then retrieve

something from the area of the car's driver's seat and walk over to Appellant. (*Id.*). Michelle and Selena both believed that Sylvia gave Appellant a gun, per his request. (*Id.*).

Sylvia herself later confirmed to police that Appellant asked her for his gun, and that she retrieved a small handgun from their car and handed it to Appellant. (3 RR 123-125).

Later in the evening, after Appellant got his gun from Sylvia, Appellant physically assaulted Jose Guardado by punching him in the face. (3 RR 91-93). Shortly after that assault, everyone left Guardado's home except for Appellant, Guardado, and Guardado's friend, "Guicho." (3 RR 93-94). A group of nearby neighbors watched as those three men went back inside Guardado's home. (3 RR 146-147). Minutes later, the neighbors heard a single gunshot. (3 RR 147).

Following the shot, Appellant walked out of Guardado's home, passed by the neighbors without saying a word, and walked away down the street. (3 RR 147-149). Appellant was followed out of the home by "Guicho," who implored the neighbors to call 911 because his friend had been shot. (3 RR 150-151), (6 RR 8 – State's Exhibit 1: 911 call). The neighbors called 911. (*Id.*). "Guicho" remained with the neighbors until he was contacted by police. (3 RR 137, 151).

Guardado was found on the floor of his home with a single gunshot wound to his torso. (3 RR 151, 189), (6 RR 59 – State's Exhibit 56: Photo of Jose Guardado's

wound). After an extensive search, crime scene investigators discovered that no firearm remained at the home. (3 RR 171-180). The only person who had left the scene after the shooting was Appellant. (3 RR 146-151). Approximately one hour after the shooting, police found Appellant walking half a mile away from Guardado's home. (3 RR 62, 70-73). While Appellant was not carrying a firearm when found by police, he did have gunshot residue on his hands. (3 RR 126-127, 205).

Guardado died from his wound. (3 RR 189). During an autopsy, a medical examiner recovered the bullet that killed Guardado, thereby confirming that Guardado was shot with a firearm. (3 RR 184, 192).

Appellant stipulated to the felony conviction listed in his indictment. (3 RR 218-219); (6 RR 65). That stipulation was admitted and read to the jury without objection. (*Id.*).

At the conclusion of Appellant's trial, the jury retired to deliberate at 9:45 a.m. (4 RR 35). Approximately 45 minutes later, the State realized that the alternate had not been removed from the jury room and alerted the bailiff. (4 RR 39-40).

At 10:31 a.m., 46 minutes after deliberations began, the Trial Court removed the alternate juror from the jury room. (4 RR 35).

Fourteen minutes after the alternate's removal, at 10:45 a.m., the twelve petit jurors sent a note to the Trial Court asking for clarification on the special issue of the deadly weapon finding. (4 RR 36-37); (CR 187).

After a discussion with the parties on how to proceed, the Trial Court brought the twelve jurors into the courtroom and gave the following instruction:

> Members of the jury, jury deliberations began at 9:45 a.m. At 10:31 a.m., the Court realized that the alternate juror, Mr. Carl Sherman, was allowed into the jury room by mistake and Mr. Sherman was at that time asked to separate from the jury. Mr. Sherman has been placed in a separate room over here and he will continue to serve as the alternate juror in this case. He simply cannot be present during the deliberations of the twelve jurors.
>
> **You are to disregard any participation during your deliberations of the alternate juror**, Carl Sherman. And following an instruction on this extra note[5] that the Court received, you should simply resume your deliberations[6] without Mr. Sherman being present.

(4 RR 43) (emphasis added).

Following the Trial Court's instruction, the twelve petit jurors resumed their deliberations at 11:01 a.m. (4 RR 44).

At 11:30 a.m. the twelve jurors returned with a verdict of guilty, and an affirmative finding that Appellant discharged the firearm at or in the direction of Guardado. (CR 17, 83, 84), (4 RR 45-46). After announcing the verdict, the Trial

[5] (CR 187).

[6] At the time the alternate was removed, there was no evidence that the jurors had reached a verdict or taken a vote on Appellant's guilt. (4 RR 35).

Court polled the jury. (4 RR 46). All jurors confirmed that Appellant's conviction and deadly weapon finding represented their individual verdicts. (4 RR 46-48).

Following his conviction and sentence, Appellant filed a Motion for New Trial which raised both his constitutional and statutory complaints related to the alternate juror's participation. (CR 97-114).

At a hearing on the merits of Appellant's Motion for New Trial, Appellant offered into evidence the affidavit of petit juror, Joshua Marion. (5 RR 7, 13, 25), (Defendant's Exhibit 1 - 7 RR 5); (CR 43). The State objected to the admissibility of Marion's affidavit pursuant to Tex. R. Evid. 606(b). (CR 192-193). The Trial Court admitted Marion's affidavit, specifically stating that his reason for doing so was that the alternate juror could possibly be considered an "outside influence" under Texas Rule of Evidence 606(b). (5 RR 13, 25).

The Trial Court ultimately denied Appellant's Motion for New Trial and found that any error in the alternate's participation was harmless. (5 RR 26-27). The Trial Court specifically stated, "I don't believe any of the actions of the 13th juror had an adverse affect [sic] on the guilty verdict returned by the other 12 individuals." (5 RR 26).

Discussion

This Court can Conduct a First Instance Harm Analysis

This Court conducts harm analyses in the first instance when "error is so plainly harmless that principles of judicial economy support" doing so [7]. *Johnston v. State*, 145 S.W.3d 215, 224 (Tex. Crim. App. 2004). Appellant's case presents such a scenario.

Furthermore, as Justice Newell recently contended in his concurring opinion in *Maciel v. State*:

> [This] Court should recognize that an evaluation for harm flowing from error is as much a systemic requirement as determining whether that error has been preserved. As such, this Court should feel free (after holding that error occurred) to address the question of whether a particular error harmed the defendant. Reflexively remanding for an evaluation of harm under well-established standards is unnecessary.
> …
>
> [C]onducting a harm analysis is based upon an examination of the record under established harm standards… Rather than expecting the courts of appeals to be clairvoyant on remand, [this Court] should just answer the question when we have the chance.

Maciel v. State, 631 S.W.3d 720, 727 (Tex. Crim. App. 2021).

In Appellant's case, as discussed in extensive detail below, the record establishes beyond *any* doubt that the alternate's participation did not contribute to Appellant's conviction or punishment, regardless of whether harm is analyzed under

[7] In both of the Tenth Court of Appeals' reviews of Appellant's case, the parties briefed and provided oral argument on the issue of harm. (*See* Appellant's Original Brief, pp. 7-9, 11-13); State's Original Brief, pp. 29-31, 42-45); (Appellant's Brief on Remand, pp. 9-12); (State's Brief on Remand, pp. 19-32, 41-47). Nevertheless, the Tenth Court of Appeals did not address harm in either of its previous opinions on the case. *Becerra*, 2022 Tex. App. LEXIS 2602; *Becerra v. State*, No. 10-17-00143-CR, 2019 Tex. App. LEXIS 4850 (Tex. App. – Waco June 12, 2019).

Tex. R. App. P. 44.2(a) or (b). Thus, any error was harmless and the Trial Court acted within its discretion by denying Appellant's Motion for New Trial.

Consequently, in the interest of judicial economy, this Court should affirm Appellant's conviction and sentence without further prolonging an appellate battle on an issue where the record affirmatively proves that the Trial Court's finding of harmless error was correct.

Harm Analysis Applies to Appellant's Case

In this appeal, Appellant makes effectively the same argument that this Court flatly rejected in *Gonzalez v. State*, namely, that jurors failing to restart deliberations after a personnel change to the jury is structural error and immune from harm analysis. 616 S.W.3d 585, 593 (Tex. Crim. App. 2020). While Appellant no longer *overtly* claims that the error here is structural, the *substance* of his arguments nevertheless seeks to create a *de facto* structural error in which the error itself *is* the harm.

Throughout his brief, Appellant explicitly makes arguments equating to a claim of structural error. For instance, Appellant states:

> Although each of the twelve [jurors] in the box when the polling took place affirmed the verdict was theirs, the verdict they delivered and affirmed as theirs was not a product of those twelve jurors. It was instead a product of more than Constitutionally and statutorily permitted.

> Although the petit jury also made a deadly weapon affirmative finding, **the harm to [Appellant] is the violation of his Constitutional guarantee of a twelve-person jury.**

(Appellant's Brief, pp. 33-34) (emphasis added);

> [U]nanimity of the vote to convict does not define harm. Instead, it is the alternate's voice in deliberation on that vote of a number other than required by the Texas Constitution and statute that define harm analysis.

(*Id.*, p. xxiv);

> Because evidence shows the alternate juror participated in deliberations and in a vote to convict, **"[Appellant] has demonstrated constitutional-dimensioned harm**."

(*Id.*, p. 35) (emphasis added).

> Constitutional harm is grounded at least in part to the alternate's additional improper participation – **whatever the tone and tenor or their deliberative voice to other jurors** – and those jurors to the alternate – that reflect their later unconstitutional vote to convict.

(*Id.*) (emphasis added);

Thus, in this appeal, Appellant overtly claims that the *error is the harm and the error's effect does not matter*. Such a position is the very definition of structural error, and is merely the latest incarnation of a meritless argument which Appellant has pursued since his Motion for New Trial hearing.

At Appellant's Motion for New Trial hearing, he *overtly* contended that the alternate's participation was structural error and was therefore not subject to harm analysis. (5 RR 22).

On direct appeal, Appellant again contended that the error was structural and thereby immune from harm analysis. (Appellant's Original Brief on Direct Appeal, p. 8 – fn3).

Following this Court's ruling in *Becerra II* that Appellant properly preserved error, the case was remanded to the Tenth Court of Appeals to address the merits of Appellant's claims. *Becerra*, 620 S.W.3d at 749. On remand, Appellant implicitly conceded that the alternate's participation was not structural error, but then argued that the error itself was the harm, thereby advocating for the creation of a *de facto* structural error. (*See* Appellant's Brief on Remand, pp. 9-12). Appellant specifically stated, "once [the alternate's] erroneous equal standing was found, the Trial Court did not instruct the jury to restart deliberations without the alternate's voice or vote. **This is the harm**." (Appellant's Brief on Remand, p. 10) (emphasis added). Further, at oral argument on remand, Appellant stated, "**the harm is the vote, and the error is the vote**." (Appellant's Oral Argument at the Tenth Court of Appeals –https://www.youtube.com/watch?v=RHuFDo7KPdg&t=728s, at 36:07) (emphasis added).

Now, Appellant again advances his circular claim that the error is the harm and the harm is the error.

Significantly, through his Motion for New Trial hearing, two appeals to the Tenth Court of Appeals, and now two appeals to this Court, Appellant has never

cited, nor does he cite now, any evidence that the alternate's participation *actually* harmed him. Nor does Appellant refute the affirmative evidence (discussed in detail further below) that the alternate's participation *did not* harm him. Rather, Appellant merely clings to his conclusory and unsupported claim that the error itself is the harm.

Because the United States Supreme Court has specifically ruled that a twelve-member jury is not a fundamental right under the Sixth Amendment, any error related to the alternate's participation in Appellant's case is not structural and is therefore subject to harm analysis under either Rule 44.2(a) or (b) of the Texas Rules of Appellate Procedure. *See Williams*, 399 U.S. at 99-100; *Salinas*, 980 S.W.2d at 219; *Foster*, 8 S.W.3d at 446.

Presumption of Harm Under Article 36.22

Appellant complains that the Tenth Court of Appeals erroneously failed presume harm as required following a violation of Article 36.22 of the Code of Criminal Procedure. (Appellant's Brief, pp. 14-17). Appellant contends that the alternate juror's participation in deliberations violated Article 36.22 and triggered that presumption. (*Id.*).

In its opinion on remand, the Tenth Court of Appeals acknowledged that a presumption of harm arises under Article 36.22 from an unauthorized person conversing with a juror about a case, but held that Appellant failed to trigger that

presumption because he did not establish that the alternate specifically said anything at all to petit jurors. *Becerra III*, 2022 Tex. App. LEXIS 2602 at *7-8. Juror Marion's affidavit merely notes that the alternate "participated" in deliberations until his removal, but does not state what, if anything, the alternate said. (CR 43).

Similarly, the Sixth Court of Appeals recently ruled on remand in *Laws v. State* that, where an alternate juror participated in deliberations, Article 36.22's presumption of harm does not apply unless the record establishes that an alternate actually said anything about the case on trial. No. 06-19-00221-CR, 2022 Tex. App. LEXIS 4921, *16 (Tex. App. – Texarkana July 19, 2022, pet. filed August 15, 2022) (not designated for publication).

As he does with the Tenth Court of Appeals' ruling in his own case on remand, Appellant similarly criticizes the Sixth Court's recent decision in *Laws* as being misguided. (Appellant's Brief, pp. 15-16).

Yet, even assuming the alternate's participation violated Tex. Code Crim. Proc. art. 36.22, thereby triggering a presumption of harm, that presumption is rebuttable. *See Ocon*, 284 S.W.3d at 884. Specifically, the presumption of harm is rebutted and a new trial is properly denied when evidence shows that the alternate juror did not influence any petit jurors in reaching a verdict. *See Quinn*, 958 S.W.2d at 401; *Rojas*, 171 S.W.3d at 442.

In deciding whether the presumption of harm was rebutted, this Court must consider the evidence in the light most favorable to the Trial Court's denial of Appellant's Motion for New Trial. *Id.*

In his brief to this Court, Appellant makes the conclusory claim that his case "has an evidentiary record of unrebutted harm" under Article 36.22. (Appellant's Brief, p. 18). Yet, as outlined in detail on pages 39-45 of this brief, the existing record affirmatively destroys any claim that the alternate's erroneous participation harmed Appellant, and amply supports the Trial Court's finding that any error related to the alternate's participation was harmless. Indeed, the record goes so far as to *indisputably prove* that the alternate juror's participation *did not* influence Appellant's conviction at all.

Statutory Construction is Not Dispositive in Appellant's Case

In this appeal, Appellant goes to great lengths to explore the statutory construction of Articles 33.01, 33.011, and 36.22 of the Texas Code of Criminal Procedure. (*See* Appellant's Brief, pp. 1-11). Appellant advocates for a statutory construction requiring alternates to be separated from petit jurors during deliberations unless called into service by the disability of one or more jurors. (*Id.*, pp. 9-11). Indeed, such an approach was the intention of the Trial Court in Appellant's case. (4 RR 35-44).

Yet, as this Court observed in *Trinidad*, no clear answer exists for exactly what the Legislature intended the role of alternate jurors to be. *Trinidad*, 312 S.W.3d at 24. And, whereas in *Trinidad*, this Court did not need to resolve the issue of statutory construction because error was not preserved, resolution of the statutory construction issue is unnecessary in Appellant's case because, regardless of the nature of the error or the type of harm analysis applied, the Trial Court acted within its discretion in denying Appellant's Motion for New Trial.

Court of Appeals Correctly Ruled that Appellant's Ultimate Verdict was the Product of Twelve Jurors

Appellant claims that the alternate juror "voted on **the** verdict." (Appellant's Brief, p. 13) (emphasis added). Yet, the Tenth Court of Appeals found that the *ultimate* verdict that Appellant *received* was the product of twelve, rather than thirteen jurors. *See Becerra*, 2022 Tex. App. LEXIS 2602, at *11-*12.

In *Trinidad*, this Court found that an alternate was not a thirteenth juror under Article V, Section 13 of the Texas Constitution, so long as the alternate did not vote on the **"ultimate verdict"** that was **"received**." 312 S.W.3d 23, 28 (Tex. Crim. App. 2010) (emphasis added).

Here, Appellant essentially argues that, once the alternate participated in a vote to convict, then the verdict is forever tainted unless the Trial Court specifically instructed petit jurors to begin deliberations anew and revote subsequent to the

alternate's removal, regardless of anything else. (*See* Appellant's Brief, pp. 19, 31-36).

Appellant's argument rests upon a premise that the alternate had "equal voice and vote" at the time Appellant *received* his verdict. (Appellant's Brief, p. 19). Yet, following the alternate's removal, the Trial Court instructed petit jurors that the alternate should never have participated in deliberations, and specifically told them to disregard anything the alternate may have said. (4 RR 43). The law presumes that the jurors followed that instruction. *Colburn*, 966 S.W.2d at 520.

At the time of the Trial Court's instruction to disregard the alternate's participation, no verdict had been delivered to the Trial Court, nor had petit jurors informed the court that they had reached a verdict. (4 RR 35 – wherein the Trial Court noted that "there [was] no return of a verdict" when the alternate was removed).

The petit jurors continued deliberating for an hour after the alternate's removal and 29 minutes after being instructed to disregard the alternate's participation. (4 RR 44 – showing the court's instruction was completed at 11:01 a.m.); (CR 17 showing the verdict was returned at 11:30 a.m.). Only then did the twelve petit jurors deliver the *ultimate* verdict which Appellant *received*: Guilty of Unlawful Possession of a Firearm, and a separate affirmative finding that Appellant

discharged the firearm at or in the direction of Guardado. *See Trinidad*, 312 S.W.3d at 28.

Gonzalez v. State

While addressing a different technical issue, this Court's analysis in *Gonzalez v. State*, is instructive on whether the verdict of Appellant's petit jurors was truly their own.

Gonzalez was a death penalty case wherein a petit juror became disabled during punishment deliberations. *Gonzalez*, 616 S.W.3d at 589. Consequently, an alternate juror substituted onto the petit jury. *Id.*

Prior to the petit juror's disability, the jury issued two notes to the Trial Court indicating that they were discussing the second special issue, including one which said, "Can you clarify Issue #2?" [8] *Id.* at 588-589. From those notes, the parties speculated that, before the juror became disabled, the jury had already decided the first special issue against Gonzalez. *Id.* at 588-591.

Following the juror substitution, the parties and Trial Court debated whether to instruct jurors to begin deliberations anew. *Id.* at 589-590. Ultimately, the Trial

[8] Note that, in Appellant's case, the jury's note, "We would like clarification on issue #1" (CR 187) is nearly identical to the jury note in *Gonzalez* asking, "Can you clarify Issue #2?" *Gonzalez*, 616 S.W.3d at 588.

Court did not instruct the jury to restart deliberations. *Id*. Thereafter, Gonzalez was sentenced to death. *Id.* at 587, 591.

On appeal, Gonzalez complained that the Trial Court committed a structural violation of his Sixth Amendment jury trial rights by failing to instruct jurors to begin deliberations anew after the alternate joined them. *Id.* at 592. Ultimately, this Court rejected that argument, holding that failing to instruct jurors to restart deliberations after a substitution is not structural error [9], and is thus subject to harm analysis pursuant to TX. R. App. P. 44.2(a). *Id.* at 593.

This Court's harm analysis in *Gonzalez* illustrates why Appellant's arguments here are without merit. While *Gonzalez* addressed an alternate substituting for a disabled petit juror rather than an alternate inadvertently participating in deliberations, the circumstances and harm analyses in the two cases are similar.

Appellant complains here that he was harmed by the absence of an instruction to deliberate anew or revote after the alternate juror's removal [10]. (Appellant's Brief, pp. 22, 31-33). He claims that a juror note and Juror Marion's affidavit establish that the ultimate verdict on Appellant's guilt had already been rendered before the

[9] This Court also ruled that Gonzalez failed to preserve the issue of the jury instruction for review, but then nevertheless conducted a constitutional harm analysis. *Gonzalez*, 616 S.W.3d at 592.
[10] While this Court held in *Gonzalez* that the defendant never actually asked for an instruction to restart deliberations, such an instruction was at least discussed by the parties. *Gonzalez*, 616 S.W.3d at 590-592. By contrast, Appellant's trial counsel never made any mention or suggestion of such an instruction. (3 RR 35-44).

alternate's removal, despite the fact that no verdict had been announced or delivered to the Trial Court. (Appellant's Brief, pp. 31-34).

Appellant's argument is essentially identical to the claim in *Gonzalez* that juror notes showed that the first special issue was resolved against the defendant prior to the alternate's inclusion. *Gonzalez*, 616 S.W.3d at 588-591.

In reviewing Gonzalez's claim, this Court determined that any error in failing to instruct jurors to start over was harmless beyond a reasonable doubt. *Id.* at 594. Doing so, this Court emphasized the following factors:

- While jurors were not explicitly instructed to begin deliberations anew, the Trial Court did not *prevent* them from starting over. *Id.*;

- The length of post-substitution deliberations indicated that the alternate did not merely acquiesce to a previously decided verdict. *Id*. at 594;

- During post-verdict polling, "**each juror confirmed that the [verdict was] his own, alleviating any concerns that the alternate juror might have simply acquiesced in a predetermined verdict as a result of coercion, unease, or incomplete deliberation**." *Id.* (emphasis added) (internal quotations omitted).

Relying on these factors, this Court ruled that any constitutional error was harmless beyond a reasonable doubt under Tex. R. App. P. 44.2(a) and denied relief. *Id*. at 594.

Returning to Appellant's case, the record demonstrates that the factors upon which this Court relied in finding harmless error in *Gonzalez* also weigh in favor of

the same finding here. Moreover, application of those factors supports the Tenth Court of Appeals' holding that Appellant's ultimate verdict was the product of twelve jurors, rather than thirteen.

As was the case in *Gonzalez*, the Trial Court's instructions to Appellant's jurors did not prohibit them from revoting or from beginning their deliberations anew after the alternate's removal. (3 RR 43). Additionally, the Trial Court specifically instructed jurors to "**disregard any participation during your deliberations of the alternate juror**…" (*Id.*) (emphasis added).

Furthermore, just as this Court found in *Gonzalez* that the duration of deliberations after the juror substitution indicated that each juror's individual verdict was his own, the length of deliberations in Appellant's case following the alternate's removal indicates the same.

Appellant's alternate juror was removed from the jury room at 10:31 a.m. after 46 minutes of deliberations. (3 RR 35). The Trial Court's instruction to disregard the alternate's participation occurred approximately 30 minutes later. (3 RR 35); (3 RR 44 - showing that deliberations resumed after the court's instruction at 11:01 a.m.). The petit jurors continued deliberating for another 29 minutes after that

instruction before delivering their verdicts on both Appellant's guilt and the deadly weapon finding to the Trial Court at 11:30 a.m. [11] (4 RR 44); (CR 17).

Thus, as in *Gonzalez*, the timeline of juror deliberations supports the position that each petit juror's verdict was his own, rather than the product of any undue influence from the alternate juror. Well-before the verdicts were delivered to the Trial Court, the petit jurors affirmatively knew that the alternate lacked "equal voice and vote" with them, and further affirmatively knew that they were bound to disregard the alternate's participation entirely.

Also as in *Gonzalez*, the individuality of each petit juror's verdict was confirmed during jury polling. As noted previously, this Court stated in *Gonzalez* that post-verdict polling showed "**each juror confirmed that the [verdict was] his own, alleviating any concerns that the alternate juror might have simply acquiesced in a predetermined verdict as a result of coercion, unease, or incomplete deliberation**." *Gonzalez*, 616 S.W.3d at 594.

Similarly, in Appellant's case, each petit juror affirmed his individual verdict to convict Appellant during the post-verdict poll. (3 RR 46-47).

[11] Appellant claims in his brief that "There is no record on the length of deliberations after the instruction was read." (Appellant's Brief, p. xx). However, docket entries in the Court's file show that the jury returned their verdict at 11:30 a.m. (CR 17 – stating, "Evidence closed and jury deliberated from 9:45 until 11:30 a.m.; Jury found Def. guilty; Jury discharged at 11:45 a.m.").

Given those facts, the Tenth Court of Appeals correctly ruled that Appellant was *ultimately* convicted by twelve, rather than thirteen jurors. Yet, even if that conclusion was erroneous, this Court's harm analysis in *Gonzalez* reinforces the Trial Court's ruling in Appellant's case that any error was harmless.

Unlike *Gonzalez*, though, Appellant's record goes the additional step of *affirmatively proving* that any error related to the alternate juror had no influence whatsoever on the petit jury's verdict.

The Record Affirmatively Proves Beyond a Reasonable Doubt that the Alternate's Participation was Harmless

In his brief, Appellant claims, "No reported case has near the length of the alternate presence and participation present in this case – forty six minutes – or the critical evidence that the alternate juror actually voted on the verdict." (Appellant's Brief, p. 18). That statement is true.

What is equally true, and what Appellant wholly ignores, is that no reported case on this issue also has a record affirmatively proving beyond a reasonable doubt that the alternate juror's inadvertent participation had no impact or influence on the petit jurors. Appellant's case has such a record.

Typically, harm analysis requires a reviewing court to engage in a certain degree of speculation based upon facts in an appellate record. Appellant's case, though, requires no such speculation. Appellant's twelve petit jurors, *without the*

alternate, rendered a specific finding beyond a reasonable doubt which proves that the alternate's participation did not contribute to Appellant's conviction.

Appellant's case is unique because the jury's verdicts on guilt and the special issue of the deadly weapon required findings concerning *the same conduct*. To convict Appellant of the charged offense, the jury simply needed to find beyond a reasonable doubt that he *possessed* a firearm. (CR 180). However, the jury was also asked to decide the special issue of whether, in addition to possessing a gun, Appellant *used* that gun to shoot at Jose Guardado during the offense. (CR 186).

Appellant necessarily concedes that the twelve petit jurors, without the alternate's participation or vote, found beyond a reasonable doubt that Appellant did, in fact, use the firearm to shoot at Guardado. (Appellant's Brief, p. 34). (3 RR 46); (CR 186). Appellant seeks to dismiss that finding's significance by claiming, "**the harm is whether the State met their Constitutional obligation to prove guilt, not the special issue decision on statutory based parole eligibility**." (Appellant's Brief, p. 34) (emphasis added).

In the context of this appeal, however, the importance of the deadly weapon finding is not its *legal consequence*, as Appellant claims. Rather, the deadly weapon finding's importance is the *substance of the finding itself*. Applying Appellant's own language, "the State's Constitutional obligation to prove guilt" merely required jurors to find beyond a reasonable doubt that Appellant exercised some degree of

care, custody, control, or management over a firearm. (CR 179); *see also* Tex. Penal Code §1.07(a)(39).

Appellant's entire appeal rests upon the premise that the alternate juror's inadvertent participation somehow tainted the petit jurors' ability to objectively and individually make that finding of guilt.

Yet, as Appellant himself concedes, following the alternate's removal and the Trial Court's instructions to disregard the alternate's participation, those twelve petit jurors found beyond a reasonable doubt that Appellant exercised *more control* over the gun than what was required to convict him. In other words, even if thirteen found Appellant guilty, twelve found him *really* guilty.

Thus, the deadly weapon finding demonstrates unequivocally that any error related to the alternate juror's participation, whether statutory or constitutional, was harmless. That alone supports the Trial Court's denial of Appellant's Motion for New Trial. Yet, even beyond the deadly weapon finding and the previously-discussed jury polling, the record establishes still further that Trial Court rightly denied Appellant's Motion for New Trial on the basis of harmless error.

Other Evidence the Alternate Juror's Participation was Harmless

Appellant complains that the Tenth Court of Appeals improperly used Tex. R. Evid. 606(b) to exclude the portion of Juror Marion's affidavit discussing what occurred after the alternate's removal. (Appellant's Brief, pp. 20-26). Specifically,

Appellant asserts that the excluded sentence in the affidavit is his only means of proving a violation of his right to a twelve-member jury. (*Id.*, pp. 25-26). Thus, according to Appellant, that portion of the affidavit should be admissible, even if technically inadmissible under Rule 606(b). (*Id.*).

Yet, a crucial fact which Appellant fails to acknowledge is that, if Juror Marion's statement that no revote occurred is admissible, then Marion's explanation of *why* no revote occurred is also admissible.

Specifically, the relevant portion of Juror Marion's affidavit states, "After the alternate juror was excused, the remaining 12 jurors did not revote on the issue of guilt **as the verdict vote taken while the alternate juror was present in the jury room was unanimous.**" (7 RR 5) (emphasis added).

Thus, the face of Marion's affidavit itself supports the Trial Court's finding that Appellant was not harmed in any way by the alternate's participation, especially when considered in conjunction with both the petit jury's subsequent finding that Appellant actually used the gun to shoot at Guardado, and the jury polling following the verdict.

A final factor to consider in whether the Trial Court acted within its discretion in finding harmless error is the fact that evidence of Appellant's guilt for Unlawful Possession of a Firearm by Felon was overwhelming.

Evidence of Appellant's Guilt of Possessing a Firearm was Overwhelming

Regardless of whether a reviewing court conducts a harm analysis pursuant to Tex. R. App. P. 44.2(a) or (b), overwhelming evidence of guilt is a factor to be considered. *Motilla*, 78 S.W.3d at 357-358.

At trial, the only contested issue was whether Appellant possessed a gun. The record contains overwhelming evidence that he did. The record in Appellant's case establishes the following facts, nearly all of which are undisputed:

- Jose Guardado was shot and killed with a firearm at his home on May 24, 2014; (3 RR 53-54, 60, 187);
- The small-caliber bullet which killed Guardado was recovered from his body. (3 RR 189, 192);
- Shortly before the shooting, Appellant became angry at Guardado and physically assaulted him. (3 RR 92-93);
- The only people present at Guardado's home at the time of the shooting were Guardado, Appellant, and "Guicho." (3 RR 94, 146-147);
- Moments after Guardado was shot, Appellant left the house without asking nearby neighbors for help; (3 RR 68-73, 147-152);
- Immediately after Appellant's departure from the scene, "Guicho" exited the house and asked neighbors for help because his friend had been shot, and the neighbors called 911; (3 RR 150); (6 RR 8 – 911 recording);
- "Guicho" remained on scene and cooperated with responding police officers; (3 RR 137, 151);
- No firearm was present at Guardado's house when police arrived. (3 RR 174-75, 178);

- Appellant was the only person to have left the scene prior to police arriving. (3 RR 147-149);

- Police found Appellant an hour after the shooting walking approximately half a mile from Guardado's house. (3 RR 62, 69, 70-72);

- Appellant was covered in dirt when police found him. (3 RR 70-71, 73) (State's Exhibits 8 & 9 – 6 RR 15-16 – Photographs of Appellant);

- When apprehended by police, Appellant had gunshot residue on his hands. (3 RR 125-127, 205);

- Appellant's sister and niece both testified that, before the shooting, Appellant asked his girlfriend, Sylvia, to retrieve his gun from the couple's car, and that Sylvia took what they believed was a gun from the car and gave it to Appellant. (3 RR 94-97, 160, 163-165);

- Sylvia herself confirmed to police that Appellant asked her for his gun, and said she retrieved a "little-bitty" gun from the couple's car and placed it in Appellant's hand before the shooting. (3 RR 124-125).

The combined trial evidence allows no rational conclusion other than that Appellant possessed a firearm. Even under Tex. R. App. P. 44.2(a)'s more stringent constitutional harm analysis, a reviewing court must take into account every circumstance in the record that logically informs a determination of whether, beyond a reasonable doubt, the error **did not contribute to the conviction**. *Snowden*, 353 S.W.3d at 822 (emphasis added).

Here, evidence which permits no rational conclusion other than guilt, combined with a separate and errorless jury finding that Appellant exercised more control over the gun than was needed to convict, along with twelve affirmations of individual verdicts at polling, and a juror affidavit confirming that the alternate's participation did not influence the outcome, collectively mean that the Trial Court acted well within its discretion by denying Appellant's Motion for New Trial on the basis that "**the error was harmless**" and the actions of the alternate juror did not have "**an adverse affect on the guilty verdict returned by the other 12 individuals.**" (5 RR 26) (emphasis added).

Thus, all three of Appellant's issues are without merit and should be overruled.

PRAYER

Wherefore, premises considered, the State of Texas respectfully prays that the judgment of the Trial Court be in all things affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing State's Brief was emailed to Lane Thibodeaux, Attorney for Appellant, at lanet1@msn.com on this the 24th day of October, 2022.

/s/ Ryan Calvert

Ryan Calvert
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I do hereby certify that the foregoing document has a word count of 11,214 based on the word count program in Word 2013.

/s/ Ryan Calvert

Ryan Calvert
Assistant District Attorney

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Doug Howell		dhowell@brazoscountytx.gov	10/24/2022 4:51:20 PM	SENT

Associated Case Party: JoeLuisBecerra

Name	BarNumber	Email	TimestampSubmitted	Status
Lane D.Thibodeaux		lanet1@msn.com	10/24/2022 4:51:20 PM	SENT