FILE COPY

NO. 1008763

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| STATE OF TEXAS | § | IN THE DISTRICT COURT OF |
| | § | |
| vs. | § | HARRIS COUNTY, T E X A S |
| | § | |
| DAVID MARK TEMPLE | § | 178 228TH JUDICIAL DISTRICT |

MOTION FOR NEW TRIAL

COMES NOW, Defendant DAVID MARK TEMPLE, in the above entitled and numbered cause, by and through his attorneys Dick DeGuerin and Stanley G. Schneider and files this Motion for New Trial and would show this Court the following:

1. Preliminary statement

With no evidence to support the indictment, the prosecution embarked on a vicious campaign to assassinate defendant's character and that of his family, by taking a kernel of truth, his brief affair while his wife was pregnant, and emphasizing it beyond all proportion as providing a motive for killing his wife. The prosecution unfairly painted his family as liars and accomplices, continuing the prosecution's vicious campaign to inflame the jury with hatred for David Temple and thereby convict him not on evidence but on emotion. In carrying out this scheme, the prosecutors withheld favorable evidence tending to show that others were responsible for Belinda Temple's death until it was too late for the defense to effectively use such evidence on defendant's behalf; they used improper and false suggestions without basis in the evidence; they used improper assertions of fact with no admissible evidence to support them; they used improper and inflammatory cross-

examination of defendant's family and the defendant himself designed to paint defendant and his family as liars, even suggesting that his family had conspired to cover up Belinda's murder; and in final argument the prosecution repeatedly made improper prejudicial suggestions of fact beyond the record. In short, given the state of the evidence being legally and factually insufficient to support a finding of guilt, the prosecution sought to and successfully did convict David Temple on emotion rather than evidence.

2. Statutory grounds for new trial.

This motion for New Trial is brought under Rule 21.3, Tex. Rule App. Proc. subsections(b), (e) and (h) as follows:

> (b) when the court *** has committed *** material error likely to injure the defendant's rights,"
>
> (e) "***when evidence tending to establish the defendant's innocence has been intentionally *** withheld, thus preventing its production in trial;"
>
> (h) "***when the verdict is contrary to the law and evidence."

3. The evidence is insufficient to support the verdict.

Belinda Temple was shot in the head with double-aught buckshot from a 12 gauge shotgun. The shell used was a reloaded shell, the wadding not being of standard manufacture. Thus the killer had to have access to a 12 gauge shotgun and a reloaded shell with double-aught buckshot. There was no evidence that David Temple bought, owned, possessed, or borrowed a 12 gauge shotgun at any time near Belinda Temple's murder; there was no evidence that David Temple had fired a weapon at or near Belinda the time of the

murder; there was no evidence that David Temple had ever owned or possessed a 12 gauge double-aught buckshot shotgun shell; and there was no evidence that David Temple had ever had the capability of reloading a shotgun shell. Additionally, there was indisputable evidence that David Temple was 6 miles away from his home with his son shortly after 4:30 pm on the day she was murdered, while there was evidence from three school children who lived across the back fence from David Temple, that they heard a gunshot shortly after 4:30 pm, the precise time that David Temple was videotaped at the Brookshire Brothers grocery store six miles away.

The prosecution presented evidence of motive and opportunity, but motive and opportunity are not elements of any offense. Due process mandates that every conviction must be supported by evidence that a rational trier of fact could accept as sufficient to prove all of the *elements* of the offense charged beyond a reasonable doubt. *See In re Winship,* 397 U.S. 358, 364 (1970); *Fisher v. State,* 851 S.W.2d 298, 302 (Tex. Crim. App. 1993); *see also Jackson v. Virginia,* 433 U.S. 307, 319 (1979) (evidence should be viewed in the light most favorable to the prosecution); *Kutzner v. State,* 994 S.W.2d 180, 184 (Tex. Crim. App. 1999); Tex. Penal Code Ann. § 2.01. "If, based on all the evidence, a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt," a trial court should must direct a not-guilty verdict. *Fisher,* 851 S.W.2d at 302; *see also Guevara v. State,* 152 S.W.3d 45, 49 (Tex. Crim. App. 2004); *Mattiza v. State,* 801 S.W.2d 195, 197 (Tex.App.—Houston [14th Dist.] 1990, pet. ref'd); *Rohrscheib v. State,* 934 S.W.2d 909, 910 (Tex.App.—Houston

[1st Dist.] 1996, no pet.).

To correctly apply the *Jackson v. Virginia* standard, it is vital to differentiate "between a reasonable inference supported by the evidence at trial, speculation, and a presumption." *See Hooper v. State,* 214 S.W.3d 6, 15 (Tex. Crim. App. 2007).[1]

> A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. *See* Tex. Penal Code § 2.05. For example, the Penal Code states that a person who purchases or receives a used or secondhand motor vehicle is presumed to know on receipt that the vehicle has been previously stolen, if certain basic facts are established regarding his conduct after receiving the vehicle. Tex. Penal Code § 31.03(c)(7). A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. Tex. Penal Code § 2.05. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.
>
> *[J]uries are permitted to draw multiple reasonable inferences from the evidence (direct or circumstantial), but they are not permitted to draw conclusions based on speculation.*

*Id.* at 16 (emphasis added).

The prosecution theorized that Defendant's extramarital affair motivated him to kill his wife, and that Defendant committed the crime, "staged" the scene, and disposed of evidence all within a thirty-to-forty-minute window of opportunity during which he was caring for his three-year-old son. The sheer improbability of the State's theory alone should dictate setting aside the verdict. When the *Jackson* standard is applied, the same result must

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[1] The *Hooper* court dealt with a "presumption" because courts have used the terms "presumption" and "inference" interchangeably. *Hooper*, 214 S.W.3d at 16 n.5.

be reached, albeit through a more concrete analysis.

Motive and opportunity are not elements of any offense. *See, e.g., Garcia v. State*, 495 S.W.2d 257 (Tex.Cr.App.1973) (motive not an element of murder). Proof of motive and opportunity is insufficient to establish guilt. Cases addressing the sufficiency of corroboration of accomplice witness testimony plainly make this point. In an accomplice witness case, all that is required is that there be *some* non-accomplice evidence which *tends* to connect the accused to the commission of the offense alleged in the indictment. *Gosch v. State,* 829 S.W.2d 775, 777 (Tex. Crim. App. 1991). Courts have repeatedly stated that motive and opportunity do not connect a defendant, however remotely, to an offense. *See Gill v. State,* 873 S.W.2d 45, 49 (Tex. Crim. App. 1994); *Yost v. State,* 222 S.W.3d 865 (Tex. App. – Houston [14th Dist.] 2007, pet. dism'd); *Jeffery v. State,* 169 S.W.3d 439, 447 (Tex. App. – Texarkana 2005, pet. ref'd). If motive and opportunity do not connect a defendant to an offense in an accomplice witness case, they are far less meaningful in a case such as the one at hand.

The prosecution's "staging evidence" is similarly far less meaningful than the prosecution argued. Fundamentally untestable, lay-opinion testimony concerning the unrecognized field of "scene staging," properly viewed, relates to opportunity and nothing else. Such lay-opinion testimony is, therefore, hopelessly and uselessly circular. The scene could have been staged only if Defendant had the opportunity to stage it. But, as with the elements of an offense, the opportunity to commit an act does not establish that the person

who had the opportunity actually committed the act. To give weight to the State's staging evidence—indeed to call it staging at all—one must speculate that Defendant left the scene in the condition found by the investigators. The fact remains that anyone with the opportunity could have left the scene in exactly the same condition. Opportunity plus speculation is still just speculation. As stated above, "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper,* 214 S.W.3d at 16. It is not proof.[2]

The speculative nature of the prosecution's staging evidence is determinative of the proper outcome here. If a rational jury could not conclude beyond a reasonable doubt that the scene was staged—and no rational jury could—the prosecution's case necessarily fails.

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[2] A survey of cases from the last twenty years which mention "scene staging" is instructive. No court has used evidence of staging in the way the prosecution used it here—as the primary evidence to support its case. In *Lee v. State,* 2007 WL 1844436 (Tex. App. – Dallas 2007, no pet.) (not designated for publication), an investigator suspected that a murder scene had been staged to look like a burglary. *Id.* at *1. Lee specifically challenged the sufficiency of the evidence that he used a knife to commit the murder. *Id.* at *2. The court did not rely on the staging evidence in any way in finding sufficient evidence that a knife was used. *See id.* Evidence concerning the wounds was completely distinct from evidence concerning the scene. In *Morgan v. State*, 2004 WL 742895 (Tex. App. – Fort Worth 2004, pet. ref'd) (not designated for publication), Morgan contended that his guilty plea, which was entered after he confessed to staging the scene of an arson and murder, was involuntary and that the evidence was insufficient to support his guilty plea. *Id.* at *2. The court held that the signed plea papers and Morgan's confession were more than sufficient to sustain the conviction. *Id.* at *3-4. In *Trevino v. State*, 100 S.W.3d 232 (Tex. Crim. App. 2003), Trevino complained that the trial court improperly refused to instruct the jury on sudden passion. *Id.* at 236. The court agreed stating, "The defendant may have indeed killed the victim in sudden passion (a second-degree murder) and then staged the crime scene in an attempt to make it appear that the killing occurred in self-defense (a justifiable homicide). The jury was entitled to consider this scenario." *Id.* at 242. In other words, Trevino accepted the staging evidence and sought to benefit from it. In *Bellah v. State*, 2000 WL 567768 (Tex. App. – Dallas 2000, no pet.) (not designated for publication), the evidence of staging was that the investigator believed that the decedent was killed somewhere else, moved to where she was found, and made to look of though she had been sexually assaulted. *Id.* at *1. Bellah's conviction for conspiracy to commit capital murder was affirmed because she sought to fraudulently collect on a life insurance policy, not because she was suspected of staging the scene. *Id.* at 4-5. Indeed, the evidence suggested that someone else did the staging. *Id.* In *Miller v. State*, 1995 WL 569670 (Tex. App. – Houston [1st Dist.] 1995, no pet.) (not designated for publication), while Miller's former girlfriend testified that she saw Miller shoot the victim twice and then try to disguise the scene to make it look like a robbery, Miller only challenged the fact his letter to another inmate was used against him. *Id.* at *1. Scene staging had nothing to do with the court's resolution of Miller's challenge. *Id.*

The prosecution has presented evidence of matters that a jury may want to hear about, but the State has entirely failed to present evidence of what a jury must hear about—the elements of the offense alleged. The evidence is insufficient to support the verdict and the verdict should be set aside.

4. The prosecution withheld favorable evidence until late in the trial when it could not be effectively presented by the defense.

David and Belinda's next door neighbor, a teenage juvenile delinquent named Riley Joe Sanders, had access to a single shot 12 gauge shotgun which was found by the police after Belinda Temple's murder, and in it was a fired 12 gauge double-aught buckshot shell. It was found somewhere near Katy, Texas, wrapped in a towel that had blood on it. The State has still not divulged the circumstances of the findings of this shotgun, only that it was owned by Riley Joe Sander's father. Additionally, Riley Joe Sanders was in the neighborhood at the time of Belinda's murder, high on marijuana, with three of his juvenile delinquent friends who had recently burglarized the home of a man who was dating the mother of one of them, stealing, among other things, two 12 gauge shotguns. Riley Joe Sanders gave two statements of officers, twice failed polygraph tests, then refused to co-operate further. When subpoenaed to the grand jury, he was represented by counsel and was granted limited immunity: he was a juvenile probation and the State assured him his testimony would not be used to revoke his probation. Most of these facts were withheld from the defense until trial, when reports written by the various testifying detectives were turned over to the defense for review for the first time, thus preventing the defense from having

adequate time to investigate the facts and effectively present them in logical fashion.

5. There was prosecutorial misconduct that denied David Temple a fair trial.

A. The prosecution made repeated improper and false suggestions without evidentiary support, such as:

- that Belinda told others she was "devastated" by attending David's 10 year high school reunion;
- that Belinda told others that she was unhappy in the marriage;
- that Belinda told others she wanted a divorce;
- that David and the Temple family kept Belinda from visiting her family;
- that David didn't give Belinda a birthday present, a Christmas present, or an anniversary present in the three weeks preceding her murder.

B. The prosecution improperly cross-examined members of David Temple's family and portrayed them as liars and as co-conspirators in covering up the murder of Belinda Temple. This Court allowed the State to suggest that a witness told another person that she "thought that David killed Belinda." It has long been the law in this State that a person can not render an opinion regarding the ultimate question before a jury. *See Wilson v. State,* 116 Tex. Crim. 512, 31 S.W.2d 815( Tex. Crim. App. 1930), in which the Court of Criminal Appeals stated that the mere conclusions and opinions of witnesses are to be rejected.

C. The prosecution improperly cross-examined David Temple by falsely suggesting matters not in evidence by forcing him to comport his testimony with that of others and demanding that he characterize other witnesses as liars and by

> We have held that it is reversible error for a witness to testify over objection whether a previous witness was telling the truth. *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998). "It is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience." Id. (citation omitted). "Testimony regarding a witness' credibility is prohibited unless it is admissible as character evidence." Id. (citation omitted).

> A prosecutor's improper questioning is not in and of itself sufficient to warrant reversal. *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). It must also be determined whether the prosecutor's actions "seriously affected the fairness, integrity, or public reputation of judicial proceedings, or where failing to reverse a conviction would result in a miscarriage of justice." *United States v. Tanh Huu Lam*, 251 F.3d 852, 862 (9th Cir. 2001) (citation omitted). Under the circumstances of this case, we hold that improper questioning by the prosecution resulted in reversible error. In a case where witness credibility was paramount, it was plain error for the court to allow the prosecutor to persist in asking witnesses to make improper comments upon the testimony of other witnesses.

The State had no evidence linking David Temple to the commission of the offense. Rather, the prosecution emphasized his affair and suggested (without evidentiary support) marital discord as motive. The prosecutor attacked the defendant's veracity in a manner that violated every rule of procedure imaginable. For example, the prosecutor cross examined the Defendant concerning statements made by his family in front of the grand jury. (RR 68 -70). The prosecutor also accused the Defendant of fabricating his testimony. The record reflects that the following occurred:

> Q: No one has ever said [the dog was in the garage] until 2007, have they, Mr. Temple?

repeatedly ignoring rulings by the trial court. By overruling objections made by the Defendant, this Court allowed the State to cross examine the Defendant concerning his opinion about the credibility of investigating police officers and other witnesses. The Defendant's right to a fair and impartial trial was abrogated by the intentional misconduct of the prosecutor during her cross examination of the Defendant that was designed to injected hearsay, inadmissible evidence and attack the Defendant based on a comparison of his testimony with that of others and forcing him to support that the others witnesses were not being truthful.

In *Creech v. State*, 168 Tex.Cr.R. 422, 329 S.W.2d 290 (Tex.Cr.App. 1959), the defendant was asked on cross-examination whether "he would say that the officer was lying, and he answered in the affirmative." The Court noted that the prosecutor's question was improper, but harmless error.

In *Salcido v. State*, 170 Tex.Cr.R. 572, 342 S.W.2d 760 (Tex.Cr.App. 1961), the Court held that overruling the defendant's objection to a question asking him on cross-examination whether a witness to the contrary had told the truth was harmless error, even though the objection should have been sustained.

Every federal appellate court that has addressed this issue has determined that not only is such questioning improper but that the conduct constitutes a denial of due process and constitutes prosecutorial misconduct. In *United States v. Geston,* 299 F.3d 1130 (9th Cir. 2002) the Court of Appeals stated:

A: I have, yes.

Q: To who, sir? Who have you told?

MR. DEGUERIN: Excuse me. I object.

THE COURT: That's overruled.

Q: (BY MS. SIEGLER) Who have you ever told that Shaka was in the garage and that's how the burglar got past him?

MR. DEGUERIN: Is she asking what he said to me? I want to know what she's trying to -

THE COURT: That's overruled.

Q: (BY MS. SIEGLER) Mr. Temple, you just said you have. Well, who have you told?

A: I've told Mr. DeGuerin. It was not something that was dreamed up.

Q: No, it's just lied about.

MR. DEGUERIN: Excuse me. Now that's – Judge, you've got to stop that kind of stuff.

THE COURT: Members of the jury, remember your admonitions. Step to your jury room for a moment, please.

(Outside presence of the jury)

THE COURT: All right. Everyone be seated. Ms. Siegler, that last question was
uncalled for. We cannot have that type of conduct.

MS. SIEGLER: Yes, sir. Could you please instruct the witness to answer my questions?
THE COURT: I will do that also.

MR. DEGUERIN: Now –

THE COURT: Now just a minute, Mr. DeGuerin. Mr. Temple, I want you to listen to the questions that each lawyer asks you, answer the question, answer it directly. Most of them can be answered yes or no. You don't volunteer any additional information, but listen to the questions and answer them.

Now, Mr. DeGuerin.

MR. DEGUERIN: Judge, that last question by Ms. Siegler cannot be attributed to lack of experience, it can't be attributed to ignorance, it can't be attributed to negligence. She is one of the finest prosecutors in the state, and that was calculated, it's improper, it goes beyond the record, it is highly inflammatory, and we object to it.

THE COURT: Well, your objection was sustained, and I will certainly admonish the jury that they can't consider it in any way.

MR. DEGUERIN: Yes, sir. And I don't think any admonishment -- with all due respect, I don't think any admonishment can cure the horn. What we have is a prosecutor, who holds the office of assistant district attorney, making a statement about a lie in front of this jury. Now, the jury may put far more weight on that than it is due, far more than it deserves. It deserves absolutely no weight at all. She can holler and scream in argument, but it is improper and clearly improper and she knows better to do that in a cross-examination, and therefore we move for a mistrial.

THE COURT: Okay. And that's denied, sir.

(RR 70-72) (emphasis added)

Even after repeated admonishments by the trial court, the prosecutor repeatedly violated the court's instructions and injected an accusation that the Defendant's own family refused to speak him after his wife's death. (RR 126). This Court repeatedly

instructed the prosecutor not to inject hearsay or ask improper questions but the prosecutor continued to flaunt the Court's Instructions

In the instant case, the credibility of the Defendant and his family were paramount for the jury's consideration because there was no evidence linking the Defendant to the commission of the offense. The State's cross examination of the Defendant was designed to discredit him. The Defendant was forced to voice his opinion concerning the investigation of the Sheriff's department and whether scene photographs were staged and the veracity of at least four of the State's witnesses. In fact the prosecutor argued that:

> The ability to expose liars, that's circumstantial evidence. The truth. The Temples and what they tried in this courtroom to try and tell you and what they tried to tell the grand jury in 1999.

By overruling the Defendant's objections, this Court allowed the State to ask improper questions and improperly cross examine the Defendant and undermined his right to a fair trial.

D. the prosecutor used improper, false and inflammatory suggestions during final argument without evidentiary support.

- David Temple got rid of the murder weapon (no evidence).
- Belinda told her girlfriends other bad things about Belinda that were not allowed in evidence.

- "How do you think he treated Belinda when [friends] were not

around"?

- "What did he say to Belinda when they were alone"?

- David and Belinda had violent arguments.

- "Clint Stockdick [a witness] has more honor in his little finger than that family has in the whole mess of them."

- "Because if you think David Temple is not capable of it of it [murder] you underestimate him."

- "And you got a small glimpse into their marriage. You got a small glimpse, because, see, Belinda's not here to tell you, is she? And the rules of evidence prohibit Belinda's girlfriends from telling you anything Belinda ever told them.. That's the way – "

6. Exhibits

Counsel is filing contemporaneously herewith court reporter transcripts of the testimony of

Heather Temple
Kenneth Temple
Darren Temple
Rebecca Temple
Kevin Temple
Maureen Temple
David Temple
Closing arguments by prosecution

7. Conclusion

David Temple did not murder his wife. The evidence did not rise to the level of probable cause, but established only a possible motive, the affair. Rather the State prejudiced the jury with inflammatory emphasis on the affair and improper tactics designed to make the jury hate not only David Temple but his entire family. The conviction must be set aside.

## Prayer

Defendant, David Temple, requests a hearing on this motion for new trial and, upon hearing, that it be granted.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the attached and foregoing document has been served on the Kelly Siegler, Assistant District Attorney on this the ___ ____ day of _____, 2007.

_____

Dick DeGuerin