IN THE FOURTH COURT OF APPEALS
STATE OF TEXAS

JEFFREY THEISEN, Appellant,	)	
	)	Case No. 04-13-00637-CR
vs.	)	
THE STATE OF TEXAS, Appellee.	)	

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE 399TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS

APPELLANT'S OPENING BRIEF

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IDENTITY OF PARTIES AND COUNSEL

As required by Texas Rule of Appellate Procedure 38.1(a), the following are parties and counsel to the trial court's judgment:

1. Mr. Jeffrey Theisen: Defendant-Appellant, currently incarcerated in Garza West Transfer Facility, 4250 Highway 202, Beeville, TX 78102

2. Mr. Shawn C. Brown: Trial Counsel for Defendant-Appellant, 540 South St. Mary's Street, San Antonio, TX 78205

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6. The Honorable Ray J. Olivarri, Jr.: Trial judge

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PRELIMINARY STATEMENT

In this Opening Brief, the Appellant, Jeffrey Theisen, will be referred to as "Theisen" or "Appellant." The Appellee, the State of Texas, will be referred to as the "State" or the "Appellee." The presiding trial judge, the Honorable Ray J. Olivarri, Jr., will be referred to as the "Trial Court." Citations to the Clerk's Record will be abbreviated as "CR.," followed by the appropriate page number. Citations to the Reporter's Record will be abbreviated as "RR.," followed by the appropriate volume and page number.

This Court has jurisdiction over the instant appeal pursuant to Article V of the Texas Constitution, Texas Rule of Appellate Procedure 25.2(a)(2) and Texas Code of Criminal Procedure Annotated Article 44.02. Pursuant to Texas Rule of Appellate Procedure 26.2, the Notice of Appeal in this case was timely filed, on September 16, 2013, within thirty days of August 20, 2013 . CR. 98-99.

STATEMENT OF THE CASE

A. Nature of the Case

This is a direct appeal from a sentence imposed by the 399th Judicial District Court of Bexar County, Texas, after Theisen entered a plea of guilty to Intoxication Manslaughter and was sentenced by a jury to thirteen (13) years imprisonment. RR. Vol. 3 at 10. Theisen contested the aspect of the charge alleging he used his vehicle as a deadly weapon. RR. Vol. 3 at 10.

B. Course of Proceedings and Disposition Below

On or about March 21, 2012, a Grand Jury filed an Indictment, charging Theisen with Intoxication Manslaughter. CR. 6. Count I alleged Theisen operated a motor vehicle in a public place while intoxicated and, by reason of such intoxication, caused the death of Christina Flores. CR. 6. Count II alleged Theisen recklessly caused the death of Christina Flores by failing to take the necessary and proper evasive action, to avoid driving his vehicle into that occupied by Flores, failing to drive in the proper direction on a highway/roadway and driving on the wrong side of the road. CR. 6. Finally, the Indictment contained a Deadly Weapon Allegation, alleging Theisen "did use and exhibit a deadly weapon, to wit: a motor vehicle, that in the manner of its use and intended use was capable of causing death and serious bodily injury, during the commission of this offense." CR. 6.

Theisen pled guilty to the allegations set forth in Count I, but denied the Deadly Weapon Allegation. RR. Vol. 3 at 9-10; CR. 96. A trial on the punishment phase ensued from August 15, 2013 to August 20, 2013. During the State's case-in-chief, there was an outburst from a bystander, and as a result, the defense moved for a mistrial. RR. Vol. 4 at 41. The trial court denied the motion. RR. Vol. 4 at 43. At the conclusion of the proceedings, the jury assessed Theisen's punishment at thirteen (13) years imprisonment, with no fine. RR. Vol. 6 at 68-69. Finding no reason the sentence should not be imposed, the trial court sentenced Theisen to thirteen (13) years imprisonment. RR. Vol. 6 at 70.

STATEMENT REGARDING ORAL ARGUMENT

Theisen submits the issues are sufficiently clear such that oral argument is not necessary.

ISSUES PRESENTED

1. During Voir Dire, at least one juror explained she would likely become biased against Theisen if the victim's family was particularly emotional or reacted in a certain way during trial. She explained the emotions and reactions of the family could negatively affect her ability to consider the entire range of punishment in this case. Did the trial court abuse its discretion in denying Theisen's motion for mistrial where the victim's son screamed an obscenity at Theisen during trial, told Theisen to look at what he had done, charged at Theisen and had to be escorted out of the courtroom by deputies, all in front of the jury?

2. During the punishment phase of trial, after Theisen had pled guilty to Intoxication Manslaughter, the trial court admitted a close-up, in-color,

autopsy photograph of Ms. Flores' naked body. Her chest was covered only by a sign listing a number. When advocating for the admissibility of this photograph, the State admitted that it was offered for the sole purpose of showing the jury that a death occurred, because seeing that death is not the same as merely hearing about it. Did the trial court err in admitting the autopsy photograph, for the sole purpose of showing the jury that a death occurred, when Theisen had already admitted to causing Ms. Flores' death, and when her identity was not at issue?

STATEMENT OF FACTS

A. The Events Leading to Trial

On December 9, 2011, Theisen left Austin and travelled to downtown San Antonio for a 3-day heavy metal festival at a venue called Backstage Live. RR. Vol. 5 at 61-62. Theisen had only been to San Antonio once before, and at that time, he was driven by a friend. RR. Vol. 5 at 62. Theisen arrived at the festival around 6:00 P.M. that night and had his first drink around 8:00 P.M. RR. Vol. 5 at 63-64. Theisen had about three beers at Backstage Live and then went across the street to a bar called Tucker's, where he had a shot of Jameson. RR. Vol. 5 at 64. At that point, Theisen had already decided to stay in San Antonio for the night at the Red Roof Inn, which was walking distance from both Backstage Live and Tucker's. RR. Vol. 5 at 66-67.

Theisen eventually returned to Backstage Live. RR. Vol. 5 at 67. While there, he had a few more beers and a mixed drink. RR. Vol. 5 at 67. The show ended around 2:00 A.M. RR. Vol. 5 at 69. Theisen then returned to Tucker's, where he had another mixed drink. RR. Vol. 5 at 69. After Tucker's, Theisen went to the Red

Roof Inn. RR. Vol. 5 at 69. While Theisen remembers walking down the hallway at the Red Roof Inn, the next memory he has is waking up in the emergency room with a sheriff sitting to his left. RR. Vol. 5 at 70. The sheriff informed Theisen he was being charged with intoxication manslaughter. RR. Vol. 5 at 70. Theisen believes that conversation took place around 3:00 or 4:00 in the afternoon, the following day. RR. Vol. 5 at 72.

The sheriff informed Theisen that he was travelling the wrong way on I-37, hit an oncoming vehicle and killed its driver. RR. Vol. 5 at 73. Theisen learned the deceased's name was Christina Flores. RR. Vol. 5 at 73. Ms. Flores had received a telephone call early in the morning on December 10, 2011 from a friend, Juan Jose Gomez, Jr., who asked her to pick him up from his brother's house. RR. Vol. 3 at 36, 38. Mr. Gomez testified the two were travelling on I-37, around 4:15 A.M. RR. Vol. 3 at 38. Mr. Gomez stated they saw lights coming over a hill, and that Ms. Flores became nervous and scared. RR. Vol. 3 at 39. He stated he grabbed the wheel and jerked it to try to avoid the oncoming car. RR. Vol. 3 at 39. The two were hit head-on. RR. Vol. 3 at 39. Mr. Gomez exited the car and called 911. RR. Vol. 3 at 39. Ms. Flores could not get out of the car. RR. Vol. 3 at 40. The firefighters who arrived on the scene used the jaws of life to extract Ms. Flores from the vehicle. RR. Vol. 3 at 40. Ms. Flores passed away at approximately 5:11 A.M. that morning. RR. Vol. 3 at 12.

Theisen has no memory of the accident, or driving the wrong way down I-37 on December 10, 2011. RR. Vol. 5 at 71. Theisen has no memory of what transpired between 2:15 A.M., when he arrived at the Red Roof Inn, and 4:15 A.M., when he was involved in the accident. RR. Vol. 5 at 72. He has no memory of smoking marijuana that night, and had never before smoked marijuana. RR. Vol. 5 at 71-72. Theisen had never been in trouble before, had never before been charged with a crime and was not a drinker. RR. Vol. 4 at 56-57. In fact, Theisen rarely drank and when he did, he would normally drink one or two imported beers, or microbrews. RR. Vol. 5 at 29, 60, Vol. 4 at 58, 158.

As a result of the accident, Theisen spent two weeks in the hospital. RR. Vol. 5 at 74. He suffered from several fractures of his right ankle, a dislocated left hip, a shattered left pelvis, a broken left leg, about five broken ribs, lacerations and glass on his lungs. RR. Vol. 5 at 74. Theisen was put on life support. RR. Vol. 5 at 74. Theisen was then transported from the hospital to the jail, where he was confined to a wheelchair. RR. Vol. 5 at 74.

Immediately upon being released from the Bexar County jail, Theisen began taking classes. RR. Vol. 5 at 84. Theisen enrolled in a DWI class, which was designed to educate people about the dangers of DWI. RR. Vol. 5 at 85. Theisen also began attending AA meetings and completed the program, even though he was determined by a psychiatrist not to have an alcohol problem. RR. Vol. 5 at 85, 87-

89. Nonetheless, Theisen attended the program to learn about alcoholism and to share his story in an effort to help others. RR. Vol. 5 at 89. Theisen also contacted the sheriff's office about participating in the Shattered Dreams program, a drinking and driving deterrence program. RR. Vol. 5 at 92. Theisen participated in the program and told his story to children involved in a church youth group. RR. Vol. 5 at 94. Until the time of trial, Theisen consistently and voluntarily attended therapy sessions to address his depression, social anxiety, guilt and remorse for the accident. RR. Vol. 5 at 91.

B. The Trial

The Indictment charged Theisen with Intoxication Manslaughter and contained a Deadly Weapon Allegation. CR. 6. Theisen eventually entered a plea of guilty to Count 1 of the Indictment. Prior to his doing so, the parties engaged in the voir dire examination of prospective jurors. During voir dire, the assistant district attorney asked jurors whether they could consider the full range of punishment in this case - probation to twenty (20) years imprisonment. RR. Vol, 2 at 150-155.

Juror 31 responded that she would be particularly swayed by any statements made or emotions displayed by the victim's family in considering the full range of punishment. RR. Vol. 2 at 153. Juror 31 explained she would be biased if there

were pictures involved, or if the victim's family spoke. RR. Vol. 2 at 153. Juror 31 was chosen to sit on the jury and became Juror 10. RR. Vol. 2 at 214.

The trial on the punishment phase took place from August 15, 2013 to August 20, 2013. During the State's case-in-chief, it presented the testimony of the victim's daughter, Priscilla Flores. RR. Vol. 4 at 27. While Ms. Flores was testifying about her mother, there was an outburst in the courtroom from the victim's son, 14-year old Christian Flores. RR. Vol. 4 at 40. The outburst took place in front of the judge and the jury. Mr. Flores charged at Theisen while screaming, "Look what you did, mother fucker. Look at what you did." RR. Vol. 4 at 39-40; *see also* YouTube, *Boy Charges at Man Who Killed His Mom*, *available at* https://www.youtube.com/watch?v=YPzVsKGXgUg (last visited March 28, 2014). Mr. Flores added, while yelling, crying and grunting, "You took her away. You took her away. You took her away. You took her away. Away." RR. Vol. 4 at 40. Mr. Flores was escorted out of the courtroom by deputies. *See* YouTube, *Boy Charges at Man Who Killed His Mom*, *available at* https://www.youtube.com/watch?v=YPzVsKGXgUg (last visited March 28, 2014).

The trial court called for a five-minute break. RR. Vol. 4 at 40. The defense asked the trial court to admonish both families, so that further outbursts would be avoided. RR. Vol. 4 at 40. The defense also moved for a mistrial, outside the presence of the jury. The prosecutor argued a mistrial would be inappropriate. RR.

Vol. 4 at 41-42. The trial court denied the motion. RR. Vol. 4 at 43. When the jury returned to the courtroom, the trial court admonished them: "[…] You'll disregard the outburst by that 14-year-old boy and again remind you that you will consider only the evidence as it comes in by the witnesses and by the exhibits. Is that clear?" RR. Vol. 4 at 46. The prosecution proceeded with its case.

The State eventually presented the testimony of Reno Martinez, a friend of the victim. During his testimony, the State sought to introduce two photographs of the victim simultaneously. RR. Vol. 4 at 13-14. The first, State's Exhibit 25, was an autopsy photograph of the victim. RR. Vol. 4 at 14. The second, State's Exhibit 26, was her driver's license picture. RR. Vol. 4 at 14. The defense promptly objected to the autopsy photograph, arguing it was offered "[t]o play on [the jury's] emotions and sympathy and bias in this case." RR. Vol. 4 at 14. The defense continued: "I don't think it's necessary. 26 identifies who she is." RR. Vol. 4 at 14. The State responded, "this was a case involving a death. We are showing one picture of her from the autopsy, the identification photo. We had a CD full of photos from that autopsy. We selected one photo to represent death that occurred in this case. We're certainly allowed to show the jury that photo." RR. Vol. 4 at 14. The trial court refused to admit the photograph into evidence. RR. Vol. 4 at 15.

Moments later, the State asked the trial court to revisit its ruling:

> Judge, on the issue of State's Exhibit…25, being denied. Can we take that issue up outside the presence of the jury? I have a bunch of case

> law that I can grab upstairs showing that she has not been identified to this jury as who was involved in that crash other than by name. The State is entitled to do this. This is a death case.

RR. Vol. 4 at 16. The trial court called a recess. RR. Vol. 4 at 16-17.

As the jurors exited the courtroom, the autopsy photograph was lying on the table for each of them to see. The defense protested: "Judge, they had that photo on the table for the jury to walk by and look at. Every one of them, the first seven or eight, looked at that photo as they were walking out and then he covers it after eight people walk by, Judge." RR. Vol. 4 at 17. The State responded that the placement of the photograph was unintentional. RR. Vol. 4 at 17. The trial court then heard argument on the admissibility of the photograph. RR. Vol. 4 at 17.

The State argued, in part:

> I can say that the fact that someone died is entirely relevant to a case of intoxication manslaughter. And by keeping the photograph of the autopsy out, we are essentially left not letting the jury see that somebody was killed in this case. And just hearing about it isn't the same as seeing it sometimes.

RR. Vol. 4 at 19.

The defense responded that the admission of the photograph would be improper under Rule 403. RR. Vol. 4 at 19. It further stressed that Theisen had pled guilty in this case and that Ms. Flores was sufficiently identified by her driver's license picture. RR. Vol. 4 at 19-20. Therefore, the photograph was irrelevant. Moreover, the defense noted the problems stemming from the prosecutor's comment

that the ability to see the photograph would have more of an impact on the jury than simply hearing about the death: "They're trying to play on their emotion, their bias, their prejudices to get them enraged and inflamed, and that's the purpose of introducing this photo." RR. Vol. 4 at 20.

The trial court ultimately admitted the photograph into evidence. RR. Vol. 4 at 23. The defense renewed its objection and again noted that the photograph was published to the jury even before the court's ruling, due to the prosecution's placement of the photograph in plain sight. RR. Vol. 4 at 24.

After the close of all evidence, the jury returned its verdict, finding Theisen should be sentenced to thirteen (13) years imprisonment, with no fine. RR. Vol. 6 at 68-69. The trial court sentenced Theisen in accordance with the verdict. RR. Vol. 6 at 70. Theisen's timely appeal follows.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in denying the defense's motion for mistrial after the outburst from the victim's son. This outburst consisted of screaming an obscenity at Theisen and charging at Theisen through the gate which separates the parties to the proceeding from the audience. Worse yet, this occurred in front of the jury, and was so loud that the jury could understand exactly what the boy yelled. This outburst was reasonably likely to affect the jury's verdict.

This is particularly apparent when the outburst is considered in conjunction with two additional factors. First, the prosecutor capitalized on the outburst during his closing argument, when he reminded the jury of the emotions they witnessed from the victim's family, and asked them to remember who caused those emotions. In addition, the prosecutor stressed that Theisen had sentenced the victim's family to a lifetime without a mother and a friend, and advised the jury that its punishment had to account for that. Second, Juror 10 admitted during voir dire that she would be biased against the defendant and likely would not be able to consider the full range of punishment if she were to see particularly emotional reactions from the victim's family. Because the totality of these factors demonstrates a reasonable likelihood that Mr. Flores' outburst affected the verdict, Theisen is entitled to a new trial.

The trial court also committed reversible error in admitting the autopsy photograph of Ms. Flores. The State admitted that it offered the evidence for the sole purpose of showing the jury that a death occurred. Yet, the Court of Criminal Appeals has held that no crime scene or autopsy photograph may be admitted for this purpose alone.

Furthermore, the probative value of this photograph was substantially outweighed by the danger of unfair prejudice. Theisen had already pled guilty to the charge of Intoxication Manslaughter by the time the photograph was offered, thereby

admitting he caused Ms. Flores' death. There was no dispute as to his guilt, and no dispute as to her identity. Thus, this photograph served no relevant purpose and was only admitted to inflame the emotions of the jury. The admission of this photograph into evidence constitutes reversible error.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THEISEN'S MOTION FOR MISTRIAL BECAUSE THERE WAS A REASONABLE PROBABILITY THAT THE OUTBURST OF THE VICTIM'S SON AFFECTED THE JURY'S VERDICT.

A. Standard of Review

"A trial judge's denial of a motion for mistrial is reviewed under an abuse of discretion standard, and his ruling must be upheld if it was within the zone of reasonable disagreement." *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

B. Argument on the Merits

The trial court committed reversible error when it denied Theisen's motion for mistrial after an outburst from the victim's son. The denial of a motion for mistrial made after an outburst from a bystander constitutes reversible error if the defendant can demonstrate actual or inherent prejudice resulting from the external influence on the jury. *Moreno v. State*, 952 S.W.2d 44, 46 (Tex. App.—San Antonio 1997, no pet.) (citations omitted). While actual prejudice requires the jurors to

articulate "a consciousness of some prejudicial effect," inherent prejudice results when "an unacceptable risk is presented of impermissible factors coming into play." *Id*. (citation omitted). Stated another way, in order to demonstrate inherent prejudice, a defendant must demonstrate a reasonable probability that the conduct or outburst interfered with the verdict. *Coble*, 330 S.W.3d at 292.

In *Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988), the Court of Criminal Appeals considered whether the defendant established a reasonable probability that an outburst interfered with the verdict. *Stahl* was a murder case. During the trial proceedings, the court asked the deceased's mother whether she would be able to identify her son, using a photograph taken of him in the morgue, without showing any emotion. *Id*. at 828. The trial court inquired: "Can you assure me that if you come in here to identify your son's picture, that you can do it without any emotion?" *Id*. The mother responded that she would try, but that she could not say what was going to happen. *Id*. The trial court allowed her testimony. *Id*. When asked to identify the person depicted in a "full faced morgue" photograph produced by the state, the mother responded, "Oh, my God. My baby. My God." *Id*. She continued, "[m]ay he rest in hell. May he burn in hell. Oh, my baby." *Id*. Her statements were made in the presence of the jury. *Id*.

The defense moved for a mistrial. *Id*. The trial court denied the motion, but admonished the jury to disregard the outburst. *Id*. During the prosecution's closing

argument, however, the prosecutor stated: "You have an opportunity to tell them that we don't like them causing grief to good people like [the mother]. You have an opportunity to let Mrs. Newton know that her son did not die in vain." *Id*. at 830. The defense objected and moved for a mistrial, which was denied. *Id*. During the prosecution's closing argument in the punishment phase, it argued, "[i]f you want to make certain that justice is done, tell [the mother] and her family that you believe that Arthur's death –" *Id*. The defense objected again. *Id*. The prosecution continued, "[t]ell the family of the deceased –" *Id*. The defense then lodged another objection, which was overruled by the trial court. *Id*.

On review, the Court of Criminal Appeals found the cumulative effect of the outburst and the prosecutor's comments were not harmless beyond a reasonable doubt. *Id*. at 832. Regarding the outburst, the court took into account the "proximity of the witness…to the jury, the audibility of the witness's comments and the fact that all members of the jury could see and hear what transpired." *Id*. at 832. The court also found the prosecutor's comments amounted to misconduct. *Id*. at 831. Finally, the court was careful to note the defendant did not receive the minimum punishment under the law, but in fact, could have received two fewer years in prison, or a probated sentence. *Id*.

Stahl instructs that the series of events which transpired in this case warranted a mistrial. During Priscilla Flores' testimony, there was an outburst in the courtroom

from 14-year old Christian Flores. RR. Vol. 4 at 40. Mr. Flores charged at Theisen while screaming, "Look what you did, mother fucker. Look at what you did," in front of both the judge and jury. RR. Vol. 4 at 39-40. *See* YouTube, *Boy Charges at Man Who Killed His Mom*, *available at* https://www.youtube.com/watch?v=YPzVsKGXgUg (last visited March 28, 2014). Mr. Flores added, while yelling, crying and grunting: "You took her away. You took her away. You took her away. You took her away. Away." RR. Vol. 4 at 40. He was escorted out of the courtroom by sheriff's deputies. *See* YouTube, *Boy Charges at Man Who Killed His Mom*, *available at* https://www.youtube.com/watch?v=YPzVsKGXgUg (last visited March 28, 2014).

As a result, the defense argued a mistrial was warranted:

> […] We think that the actions of the victim's family busting through the door like that, attacking or coming to potentially attack my client, Jeffrey Theisen, in this case, has left an impression on this jury that I don't think anything that the Court, myself, or the prosecution can say that would ever be able to take that out of their minds.
>
> I think it's unfairly going to impact this jury. I think it's going to play a big part of their sympathy and their bias towards my client. And I think that we're entitled to a mistrial based on the actions of one of the victim's family members.

RR. Vol. 4 at 41. But the trial court denied the motion: "[…] I'm going to deny it … Because he's 14 years old and I'm going to tell them that he's already been admonished and we're going to continue." RR. Vol. 4 at 43.

Like the witness in *Stahl*, Mr. Flores was in close proximity to the jury when he screamed and charged at Theisen. In fact, Mr. Flores was able to break through the swinging door, which separates the parties to the proceeding from the members of the audience. He ran right up to Theisen and screamed at him, while the jurors watched. Further, like the mother's statements in *Stahl*, the video footage reveals Mr. Flores' statements were sufficiently clear and audible for the jurors to understand exactly what he was yelling. The *Stahl* court deemed these factors relevant in that case, and this Court should do the same.

Further, in *Stahl*, the prosecutor's arguments compounded the harm of the outburst. This case is no different. During closing arguments, the prosecutor urged the jury to consider the feelings and emotions of the victim's family, and to think of who caused such emotions:

> You've heard and seen a lot of big emotion over these past few days and I want you to remember who caused all of that big emotion, whose decisions and whose actions led to those feelings that you saw.

RR. Vol. 6 at 27.

Moreover, the *Stahl* court reiterated that a prosecutor's appeals to the expectations of the victim's family are improper. *Stahl*, 749 S.W.2d at 831 (citing *Brandley v. State*, 691 S.W.2d 699 (Tex.Cr.App.1985)). Nonetheless, the prosecutor here stated: "This defendant by his actions has sentenced the entire Flores family to

a lifetime without a mom, without a friend. And your punishment today has to account for that." RR. Vol. 6 at 28 (emphasis added).

While the prosecutor did not refer directly to Mr. Flores during his closing argument, there is an additional factor in this case, which demonstrates the outburst was inherently prejudicial, making the facts of this case even more egregious than those of *Stahl*. To wit, during voir dire, at least one juror made clear that a reaction like that of Mr. Flores would preclude her from being able to consider the full range of punishment in this case. During voir dire, the juror explained:

> […] I also feel like I'm a [sic] very emotional and I get very invested emotionally and I feel like if there were pictures involved or, you know, family spoke, I feel like it would make me feel a little biased. I would feel like my emotions are making me sway to one end or the other end.

RR Vol. 2 at 153, 214 (emphasis added).

Defense counsel inquired further on this point:

> [Defense Counsel]: Couple questions, ma'am. Throughout the voir dire process I believe you said that your emotions could potential [sic] sway you maybe being biased or maybe - - I hate to use the word unfair because that's not the right word, but unfortunately that's one of the words we use. Maybe unfair in this case to somebody who has been charged with a crime like this.
>
> If you found them guilty of intoxication manslaughter, that you wouldn't be able to consider the full range of punishment from bottom, probation, to the max of 20 years, and I think you said you couldn't consider the probation aspect of things. And because of your past experiences, you might have a bias towards Jeff because he's been charged with this and - - did I understand that right?

[…]

[Juror 31]: It was just the emotions for me.

[Defense Counsel]: Okay. And tell us a little bit about your emotions and why you wouldn't be the right juror.

[Juror 31]: Just have basically I think every situation, you know, like I always feel like I'm two sided on things but, you know, pictures or certain words or certain reactions, like I tend to sympathize with people's reactions to situations like this. And I think it could - - I find myself doing that all the time. And I find myself feeling emotionally involved in something that really has nothing to do with me but I just tend to do that, let my emotions …

RR. Vol. 2 at 201-202 (emphasis added). Juror 10's statements made clear that Mr. Flores's outburst was likely to impact her ability to consider the full range of punishment in this case. Therefore, there is a reasonable probability that the outburst affected the verdict.

In fact, like the defendant in *Stahl*, Theisen's sentence demonstrates that the outburst affected his sentence. At the time of his trial, Theisen had never before been charged with a crime or had any run-ins with the criminal justice system. RR. Vol. 4 at 56-57. The evidence consistently showed that he rarely drank and had never driven a car after drinking. RR. Vol. 5 at 29, 60, Vol. 4 at 58, 158. Theisen did not come from a culture of drinking, and his friend, David Pepple, noted Theisen had stopped him from drinking further on at least one occasion. RR. Vol. 4 at 158-159. Notwithstanding that he had no criminal record and no problem with alcohol,

the jury did not impose the minimum sentence in this case. Rather than sentencing Theisen to a term of probation, or even eleven (11) years imprisonment, the jury found a sentence of thirteen (13) years appropriate.

In this case, the synergistic effect of the prosecutor's statements, Juror 10's inability to consider the entire range of punishment in the face of emotional turmoil, the proximity of Mr. Flores to the jury, the audibility of Mr. Flores' statement, and the fact that all members of the jury could see and hear what transpired, yields a harm as great as, or greater than, that found in *Stahl*.

That said, Theisen acknowledges that the misconduct of bystanders, friends or relatives of the victim will not necessarily result in reversible error, even though an outburst might temporarily interfere with the trial proceedings. Nonetheless, Theisen submits this case is distinguishable from those cases where the reviewing court has found an outburst was not prejudicial. For example, in *Miller v. State*, 741 S.W.2d 382, 391 (Tex. Crim. App. 1987) the Court of Criminal Appeals found there was no prejudice resulting from the victim's relative attempting to "get to" the defendant "by going over the rail." *Id*. However, in that case, the record did not reflect that the jury ever saw or had any knowledge of the outburst. *Id*. In fact, the court noted it was "absolutely unclear just what, if anything, the jury might have seen or heard." *Id*.

Conversely, here, the transcripts, the defense's motion for mistrial and the video footage make clear that the outburst was made in front of the jury, that Mr. Flores charged at Theisen and that the jury clearly heard Mr. Flores scream an obscenity at Theisen. Thus, Theisen can demonstrate prejudice where other Texas defendants cannot.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING THE AUTOPSY PHOTOGRAPH OF THE VICTIM INTO EVIDENCE DURING THE PUNISHMENT PHASE BECAUSE THE SOLE PURPOSE OF ADMITTING THE PHOTOGRAPH WAS TO PROVE THAT A DEATH OCCURRED.

A. Standard of Review

A trial court's decision to admit a photograph into evidence because its probative value is substantially outweighed by the danger of unfair prejudice is within the sound discretion of the trial court and will not be disturbed unless the decision "falls outside the zone of reasonable disagreement." *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (citing *Jones v. State*, 944 S.W.2d 642, 651 (Tex.Cr.App.1996)).

B. Argument on the Merits

The Court of Criminal Appeals has made clear that an autopsy photograph is not admissible simply to show the death of an individual. *Erazo v. State*, 144 S.W.3d 487, 492 (Tex. Crim. App. 2004). Nonetheless, the State introduced the autopsy photograph of Ms. Flores' body for the sole purpose of showing the jury that a death

occurred in this case, because, as the State explained, "just hearing about it isn't the same as seeing it sometimes." RR. Vol. 4 at 19 (emphasis added). In light of the State's admission that it offered the photograph simply to show that Ms. Flores was killed, and in light of the fact that this photograph served no other relevant purpose and had no probative value, the trial court erred in admitting it into evidence.

"A photograph is inadmissible under Rule of Evidence 403 if it is substantially more prejudicial than probative." *Erazo*, 144 S.W.3d at 488. Moreover, the admissibility of evidence during the punishment phase of a non-capital trial is governed by Code of Criminal Procedure Article 37.07, Section 3(a). *Id*. at 491. During this phase, whether a piece of evidence, such as a photograph, is relevant is a "function of policy." *Id.* at 491. And, the following policies operate during the punishment phase of a non-capital trial:

1. Giving complete information to the jury to allow it to tailor an appropriate sentence for the defendant;

2. The rule of optional completeness; and

3. Whether the appellant admits the truth during the sentencing phase. As a result, we have explained that relevance during the punishment phase of a non-capital trial is determined by what is *helpful* to the jury.

Id. (emphasis in original). Regarding the third policy, "a photograph should add something that is relevant, legitimate, and logical to the testimony that accompanies it and that assists the jury in its decision-making duties." *Id.* (emphasis added).

In *Erazo*, the Court of Criminal Appeals analyzed the foregoing factors and determined the trial court erred in admitting a photograph of the murdered victim's unborn child. *Id*. at 488. That case involved the murder of a woman who was approximately 6 to 7 months pregnant. *Id*. at 488, 492. During the punishment phase of the trial, the state offered a "4–inch by 5–inch color photograph of the victim's unborn child that had been removed from the victim during the autopsy." *Id*. at 488. The defense objected, but the trial court overruled the objection and admitted the photograph. *Id*.

The *Erazo* court explained that a proper Rule 403 analysis, in the context of the admission of a photograph, includes, but is not limited to, a consideration of: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; (4) the proponent's need for the evidence; (4) the number of photographs, the size, whether they are in color or are black and white, whether they are gruesome, whether any bodies are clothed or naked, and whether the body has been altered by autopsy." *Id*. at 489.

First, the court found that the admission of the photograph of the fetus during the punishment phase of the trial had no probative value. *Id*. at 492. In this regard, the testimony had already revealed that the victim was pregnant, that the defendant knew she was pregnant, and that the fetus died with the mother. *Id*. Thus, the

photograph did not add anything relevant. *Id*. The court noted, "[a] crime-scene photograph or an autopsy photograph is not admissible simply to show the death of the individual." *Id*. (emphasis added). The court found the photograph was not helpful in assessing the defendant's punishment, and this factor weighed in favor of excluding the evidence. *Id*. at 494.

Second, the court found the ability to impress the jury in some irrational, yet indelible, way also weighed in favor of exclusion. *Id*. The court acknowledged the photograph was small, but it also noted that it was in color, that it was one of two photographs admitted during the punishment phase of trial, that the state's closing argument focused on the fetus, and that it showed a small and vulnerable child. *Id*. at 495. Thus, the court found the photograph appealed to the jury's emotional side and encouraged the jurors to make a decision on an emotional basis.

In contrast, the third factor weighed in favor of admissibility because it took very little time for the state to introduce the photograph. *Id*. Fourth, the court considered the state's need for the evidence and determined this factor weighed in favor of exclusion. *Id*. at 495-496. In so finding, the court answered the following questions: "Does the proponent have other available evidence to establish the fact of consequence that the [photograph] is relevant to show? If so, how strong is that other evidence? And is the fact of consequence related to an issue that is in dispute?" *Id.* The court concluded there was ample and adequate evidence produced during the

guilt phase to establish the victim was pregnant and the fetus died. *Id*. at 496. Furthermore, the fact of consequence that the photograph was admitted to prove was not in dispute. *Id.* No one disputed the victim was pregnant and that the fetus died. *Id.* Accordingly, the state did not need this photograph for any relevant purpose.

As in *Erazo*, this Court should find the trial court erred in admitting the autopsy photograph of the victim during the punishment phase of Theisen's trial. Indeed, the *Montgomery*[1] factors, as analyzed in *Erazo*, weigh in favor of exclusion.

First, the admission of this photograph during the punishment phase had no probative value. The State admitted that it offered the photograph to show only that a death occurred: "So when he says that we're only showing it to show that there was a death, that's exactly right. We can talk about their - - the fact that there was a death so that we can show the fact that there was a death. That's what we're doing. RR. Vol. 4 at 22-23 (emphasis added). Problematically for the State, an autopsy photograph "is not admissible simply to show the death of the individual." *Id*. at 492 (emphasis added). Yet, by the State's own admission, showing Ms. Flores' death was the sole reason it offered the photograph here.

Furthermore, Mr. Flores' death was not at issue during the punishment phase of Theisen's trial. Theisen had already pled guilty to intoxication manslaughter,

[1] *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990).

thereby admitting he caused her death. Nor was Ms. Flores' identity at issue. Several witnesses testified as to her identify, and the State admitted a photograph of her driver's license into evidence. RR. Vol. 7, State's Exhibit 26. Thus, neither Ms. Flores' death nor her identity was in dispute. Therefore, like the photograph in *Erazo*, the autopsy photograph was not helpful in assessing the punishment here, and this factor weighs in favor of exclusion.

The second *Montgomery* factor also weighs in favor of excluding the photograph. The picture is zoomed-in. RR. Vol. 7, State's Exhibit 25. It is a close-up photograph of Ms. Flores' face. RR. Vol. 7, State's Exhibit 25. The picture is in color. RR. Vol. 7, State's Exhibit 25. Ms. Flores is naked, covered only by a sign showing a number. RR. Vol. 7, State's Exhibit 25. In this regard, the photograph appealed to the jury's emotional side. The State admitted as much when it argued that the jury's ability to "see" Ms. Flores was killed would have more of an impact than their simply hearing about it: "And by keeping the photograph of the autopsy out, we are essentially left not letting the jury see that somebody was killed in this case. And just hearing about it isn't the same as seeing it sometimes." RR. Vol. 4 at 19 (emphasis added). Encouraging the jury to make a decision on an emotional basis weighed in favor of exclusion in *Erazo*, and it should do the same here.

The third factor - the time that it took to admit the photograph into evidence - may weigh in favor of admissibility here, as it only took a few moments for the State

to introduce it into evidence. RR. Vol. 4 at 25. Of course, this was after the jurors had already seen the photograph on their way out of the courtroom. Nonetheless, this factor also weighed in favor of admission in *Erazo*, but was deemed insufficient, in and of itself, to overcome the other factors.

Fourth and finally, the State did not have a need for this photograph during its case-in-chief. Indeed, the State had something even stronger than other relevant evidence to demonstrate Ms. Flores' death - it had Theisen's guilty plea to Count 1 of the Indictment, which charged him with Ms. Flores' death by way of Intoxication Manslaughter. Thus, during the punishment phase, the State had no burden to show either that a death occurred or that Ms. Flores was the person killed. Yet, by the State's own admission, it offered the photograph into evidence to establish that the death occurred. There was no other fact of consequence that the photograph was offered to prove. Accordingly, as in *Erazo*, the State did not need this photograph for any relevant purpose here.

In sum, the *Montogmery* factors weighed heavily in favor of excluding this photograph. It served no relevant purpose, but was extremely prejudicial to the defense. The close-up, color photograph of Ms. Flores' dead body was covered only by a sign listing a number. The State's inappropriate appeal to the emotions of the jury, during such an already emotionally charged trial, should not be countenanced by this Court.

PRAYER FOR RELIEF

Based upon the foregoing arguments and legal authority, the Appellant, Jeffrey Theisen, respectfully requests that this Honorable Court set aside the Sentence delivered in this cause, remand for a new trial at the punishment phase, and grant any such other and further relief as this Honorable Court deems just and proper.

DATED this 3rd day of April, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(1). Further, this brief complies with the type-face and type-style requirements of Texas Rule of Appellate Procedure 9.4 because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman Font.

/s/ Robert L. Sirianni, Jr.
Robert L. Sirianni, Jr., Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. First Class Mail, this 3rd day of April, 2014, to Susan D. Reed, Office of the District Attorney, Paul Elizondo Tower I, 101 W. Nueva Suite 370, San Antonio, TX 78205.

/s/ Robert L. Sirianni, Jr.
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