FIFTH COURT OF APPEALS

No. 05-19-01236-CR

Amber Renee Guyger, Appellant,

v.

State of Texas, Appellee

On Appeal from the 204th Dist. Ct. Dallas Co.
No. F18-00737

Guyger's Appellant's Brief

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Oral argument is requested

I. Identity of Parties, Counsel, and Judges

Amber Renee Guyger, Appellant

Michael Mowla, attorney for Guyger (appeal and trial)

Robert Rogers, attorney for Guyger (trial)

Toby Shook, attorney for Guyger (trial)

Shelley Shook, attorney for Guyger (trial)

Zachary Horn, attorney for Guyger (trial)

John Snider, attorney for Guyger (trial)

State of Texas, Appellee

John Creuzot, Dallas County District Attorney

Faith Johnson, Dallas County District Attorney (indictment)

Jason Hermus, Dallas County Assistant District Attorney

Douglas Gladden, Dallas County Assistant District Attorney

Jason Fine, Dallas County Assistant District Attorney

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Bryan Mitchell, Dallas County Assistant District Attorney

Judge Tammy Kemp, 204th Dist. Ct. Dallas Co.

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To the Honorable Justices of the Court of Appeals:

Appellant Guyger submits this Brief:

V. Statement of the Case, Procedural History, and Jurisdiction

This appeal seeks to overturn the *Judgment of Conviction by Jury* ("Judgment"), entered and sentence imposed on October 2, 2019 in *State v. Guyger*, No. F18-99737 (204th Dist. Ct. Dallas Co.) in which Guyger was convicted of Murder under Tex. Penal Code § 19.02(b)(1) & (2) (2018) and sentenced to 10 years in the Texas Department of Criminal Justice ("TDCJ"). (RR15.8; RR16.129; CR.2536-2539).[1]

On November 30, 2018, Guyger was indicted for Murder under Tex. Penal Code § 19.02(b)(1) & (2) (2018): on or about September 6, 2018, in Dallas County, Texas, Guyger: (1) intentionally and knowingly caused the death of Botham Jean by shooting him with a firearm—a deadly weapon—and (2) did unlawfully intend to cause serious bodily injury to Jean, and did commit an act clearly dangerous to human life by shooting

[1]The Clerk's Record is cited as "CR" or "CR-Sealed" followed by the page number. The Reporter's Record is cited as "RR" or "RR-Supp-Xs" (Supplemental Exhibits Volumes) or "RR-Supp-Sealed" (Supplemental Sealed Exhibits Volumes) followed by the volume and page or exhibit number.

Jean with a firearm—a deadly weapon—and caused Jean's death. (RR8.92-93; CR.18). Guyger pleaded "not guilty." (RR8.93).

Voir dire occurred on September 13 and 23, 2019. (RR6; RR8). The trial on guilt-innocence began on September 23, 2019. (RR8.91). After hearing the evidence, on October 1, 2019, the jury found Guyger guilty of Murder under Tex. Penal Code § 19.02(b)(1) & (2) (2018) as charged in the indictment. (RR15.8; CR.18).

On October 1, 2019, the trial on punishment began. (RR15.9). On October 2, 2019, after hearing evidence, the jury assessed a sentenced of 10 years in TDCJ. (RR16.129; CR.2536-2539).

A motion for new trial was **not** filed. On October 2 and 16, 2019, Guyger filed timely notices of appeal. (CR.2541, 2580-2581). The trial court certified that this is **not** a plea-bargain case and that Guyger has the right to an appeal. (CR. 2534). Thus, this Court has jurisdiction over this appeal.

VI. Statement Regarding Oral Argument

Attorney for Guyger requests oral argument. This case has complex facts and legal arguments, which are some criteria for oral argument. This case presents an issue of legal sufficiency that appears to be of first impression. Attorney for Guyger briefed the issues as thoroughly as possible within the confines of this Brief. However, if the Court believes that its decisional process will be aided by oral argument, Attorney for Guyger requests it. *See* Tex. Rule App. Proc. 39 (2020).

VII. Issues Presented

Issue 1: The evidence was legally insufficient to prove beyond reasonable doubt that Guyger committed Murder because (1) through mistake, Guyger formed a reasonable belief about a matter of fact—that she entered her apartment and there was an intruder inside—and (2) her mistaken belief negated the culpability for Murder because although she intentionally and knowingly caused Jean's death, she had the right to act in deadly force in self-defense since her belief that deadly force was immediately necessary was reasonable under the circumstances.

Issue 2: In the alternative, Guyger requests that this Court acquit her of Murder, convict her of Criminally Negligent Homicide, and remand for a new hearing on punishment.

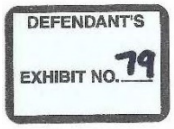
VIII. Facts

Southside Flats Apartments

Southside Flats Apartments in Dallas has four floors with an attached parking garage. (RR9.90; RR17.SX36). Guyger had lived in apartment 1378 on the third floor since July 2018—for 56 days—while Jean had lived since June 2017 in apartment 1478 on the fourth floor, immediately above Guyger's apartment. (RR9.90-91, 188-194; RR12.22; RR17.SX31-SX32, SX34-SX35; SX70-SX86). Apartments 1378 and 1478 had the same floor plan, and the kitchen, countertops, couches, and televisions were in the same places. (RR9.193; RR10.24-26, 29; RR17.SX33; DX32-DX38).

In the garage, the only indicator of the floor were signs in front of the reserved parking signs and small black placards on the inside frames of the elevators. (RR10.30-31, 224-225, 229; RR11.60, 66; RR17.SX68, SX83, SX261):

When one entered the apartments from the garage, there were **no** indicators of the floor. (RR10.31). The garage and hallway on the third and fourth floors are identical. (RR10.114-119; RR17.SX261). When one stood where Guyger parked on the fourth floor facing the entryway into the building, the view was indistinguishable from the same position on the third floor (RR12.174-175; RR17.SX251, DX79):



After the incident, Southside Flats affixed floor numbers to the entryways. (RR10.31-32).

The apartment locks open only with fobs that use RFID—radio frequency identification. (RR9.210-211, 287). If the lock did **not** recognize the fob, it blinks red. If it recognized it, it blinks green and allows entry. (RR9.210-211). One must turn the door-handles—which are passive and do **not** lock—to enter. (RR9.276, 285). Once inside, one must engage the deadbolt to lock the door because they do **not** lock by themselves. (RR9.276-277, 285).

Regional manager Hollie Gibralter was **not** aware of issues with the lock or door to apartment 1478. (RR9.214). It was **never** reported to her that when humidity was high, the door would **not** completely shut because of the strike plate's installation. (RR9.214-215).

Guyger worked with the Dallas Police Department's Crime Reduction Team

Guyger is 5'3" and is petite. (RR9.284; RR12.76; RR17.SX53-SX56). She started at the Dallas Police Department ("DPD") academy in November 2013. (RR12.30). Officers are trained at the firearms training center to shoot suspects in the torso. (RR8.202). Guyger soon began working with the Crime Response Team ("CRT"), which focuses on drug cases, assisting the DEA and FBI and apprehending fugitives. (RR8.156, RR12.36-37, 55).

Her supervisor Watson described Guyger as highly capable, competent, and qualified. (RR8.161, 198). Young officers like Guyger accumulate overtime by the nature of the work. (RR9.171-172). Overtime is approved by supervisors. (RR.172-173).

The days leading up to September 6, 2018

Between September 3-5, 2018, Guyger worked (RR9.166-168; RR17.SX.19):

- September 3: 8:00 a.m. to 8:00 p.m. (4.0 hours of overtime);
- September 4: 8:00 a.m. to 4:00 p.m.; and
- September 5: 8:00 a.m. to 6:15 p.m. (2.25 hours of overtime)

Jean entered his apartment at 9:34 p.m.

The last reading on September 6, 2018 for Jean's door prior to the incident was 9:34 p.m.—time-stamped 8:34 p.m. incorrectly. (RR9.218, 295; RR17.SX39, p.2).

Guyger's workday on September 6, 2018

On September 6, 2018, Guyger left for work at 7:23 a.m.—the timestamp of Guyger's door-lock—time-stamped 6:23 a.m. incorrectly. (RR9.289; RR17.SX40, p. 1). She arrived at work shortly before 7:47 a.m. and undocked her bodycam. (RR9.27; RR17.SX24, p.1, line 8). Guyger assisted SWAT in locating robbery suspects. (RR8.163; RR12.54-55). Later that day, Guyger helped SWAT serve warrants. (RR12.56-57). Guyger helped transport the suspects to DPD headquarters for interview

by detectives. (RR12.58-59). Guyger worked 5.8 hours of overtime—13.8 hours total.

Guyger left work at 9:33 p.m.

Guyger docked her bodycam at 9:26 p.m. and left at 9:33 p.m. She texted Rivera, "barely walking out." (RR9.27, 168; RR10.88; RR17.SX.19, SX24, p.3, line 61). At 9:38:37 p.m., Guyger received a call from Rivera, which lasted until 9:55:21 p.m. (RR10.89). They spoke about work and Rivera's Boy Scout activities with his children. (RR12.63-64).

Guyger arrived at Southside Flats at 9:46 p.m. and enters the garage

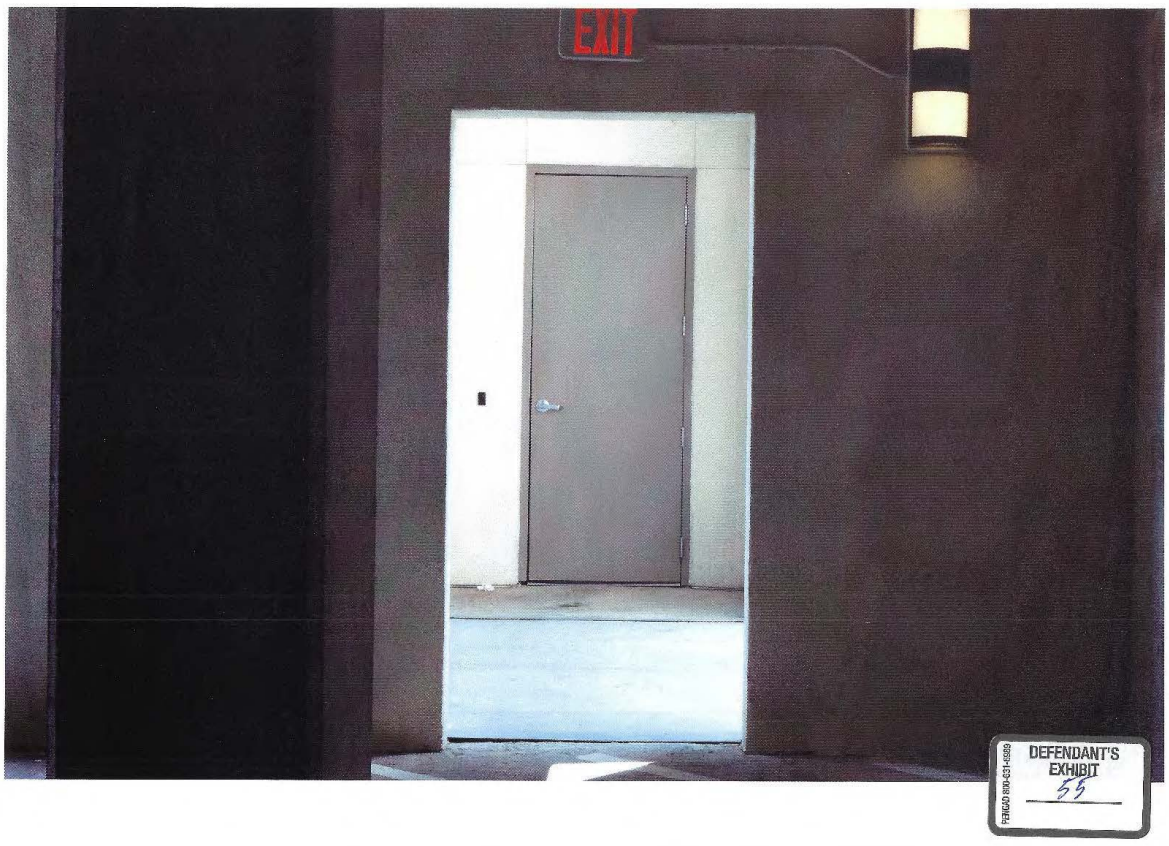
Because the gate was open, **no** entry registered into the garage with Guyger's fob. (RR9.220, 298-299; RR17.SX41, SX50). Guyger was on the phone with Rivera when she pulled into the parking garage. (RR12.65).

What Guyger would have seen had she driven to the third floor—the correct floor

Had Guyger driven to the third floor and parked, she would have seen this—minus the natural light (RR17.SX53-SX54):

As Guyger would have approached the entryway and elevator on the third floor, she would have seen this:

The entryway from the third floor of the garage had **no** indicators showing the floor (RR17.DX55):



Had Guyger entered the third floor and walked down the hallway, she would have seen this (RR17.DX56):


DEFENDANT'S
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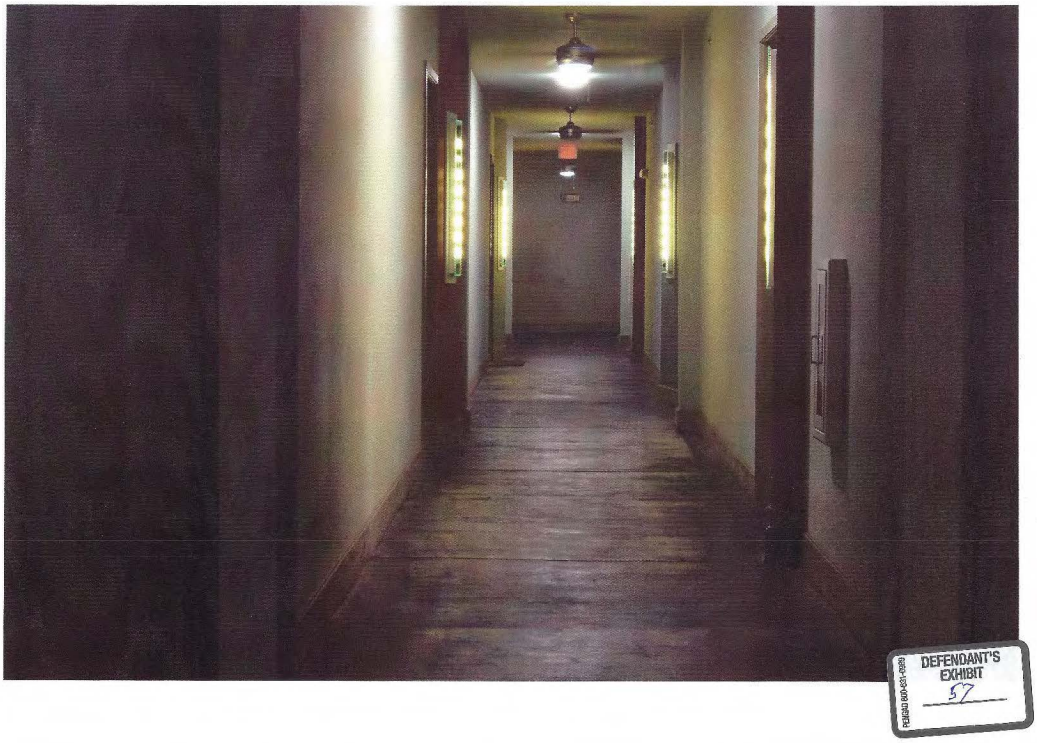
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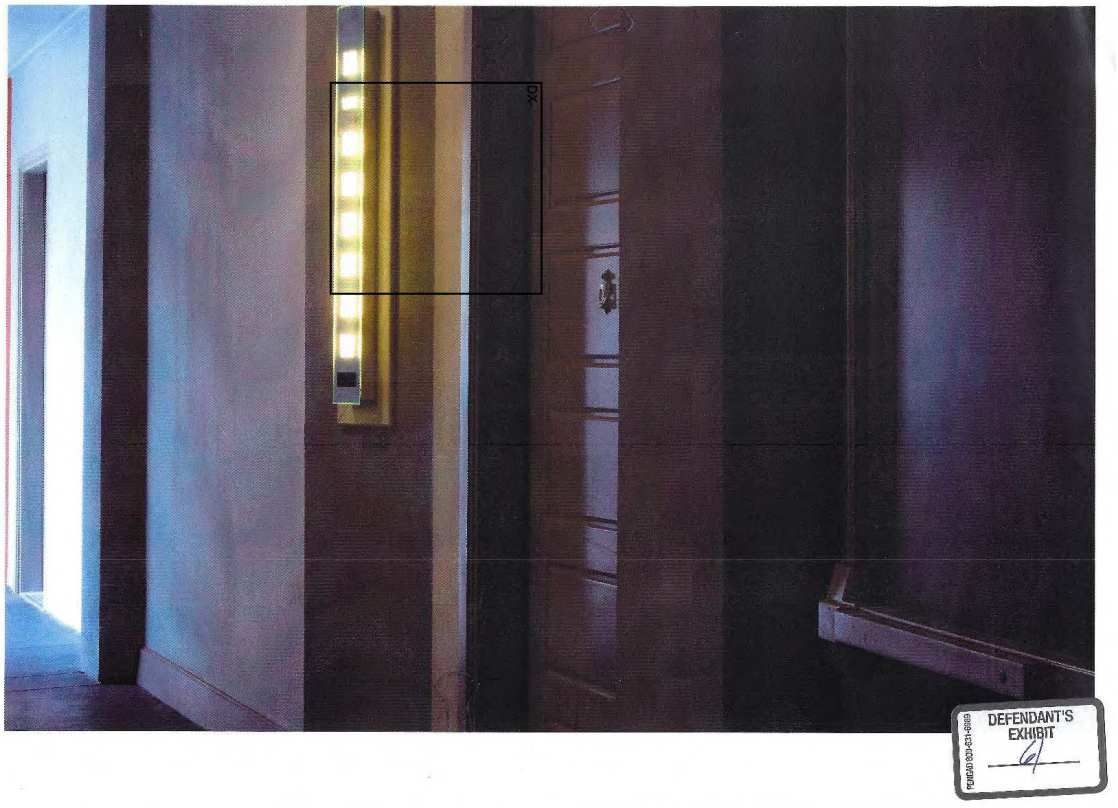
And Guyger would have arrived at her apartment 1378 and seen this (RR10.40; RR17.DX61):



In error, Guyger drove to the fourth floor

In error, Guyger drove to the fourth floor and parked her white Dodge truck by backing into a spot in the direct sight of the entryway into the building. (RR10.33; RR12.65-66; RR17.SX170, SX175-SX176). From where Guyger exited her truck, there was **nothing** obvious showing the floor. (RR10.33-34). Guyger would have seen this (RR17.SX175-SX176):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STATE'S
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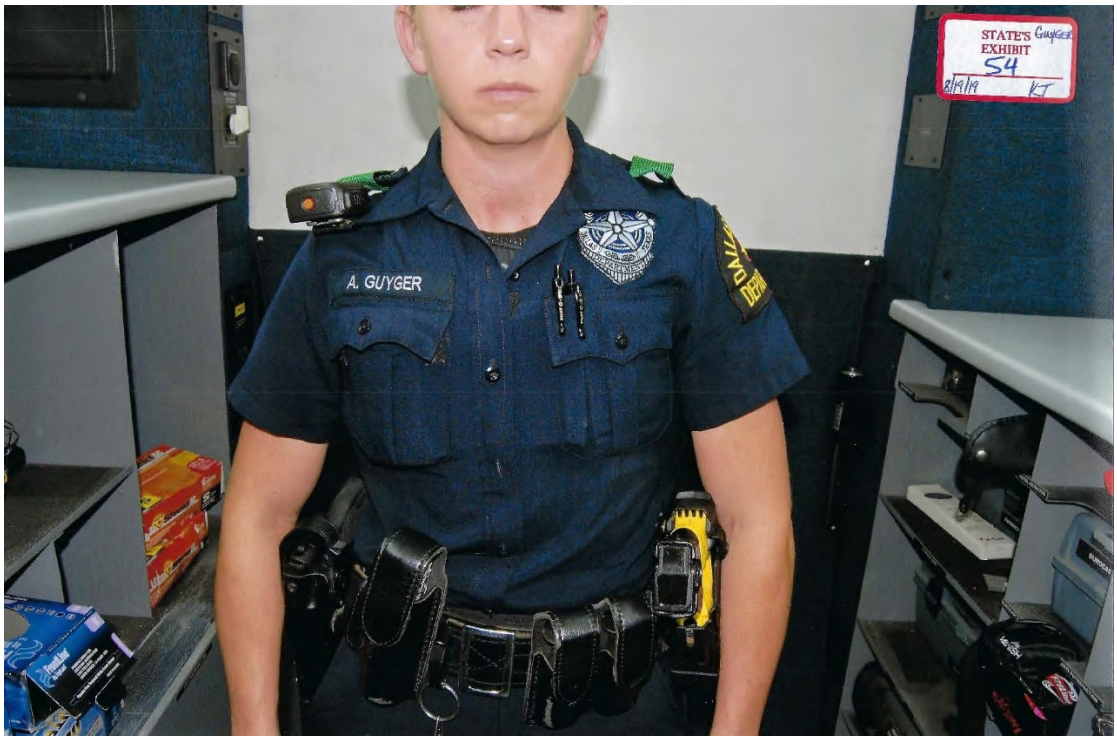
Guyger began walking towards what she thought was the third-floor apartments

Guyger began walking towards what she thought was the third-floor apartments—but was actually the fourth floor. (RR12.70-71). She was in full police uniform, carrying her heavy vest, lunchbox, and backpack in her left arm and using her left hand because she was taught through police training to always keep free the hand on the side her firearm is holstered. (RR9.257-258; RR12.70-71). Attached to her utility belt was a police radio, two handcuffs, her pistol (RR9.257-258; RR12.67-68; RR17.SX53, SX253, DX74-DX76), a taser, two additional pistol magazines, a knife, O.C. spray—oleoresin capsicum spray—and a flashlight. (RR10.219-224; RR11.99-102; RR17.SX53-SX57, SX74-SX76) (The bottom 1/3 of SX75—her lunchbox—is deleted since it shows only the surface on which the lunchbox was photographed):


POLICE


DEFENDANT'S
EXHIBIT NO.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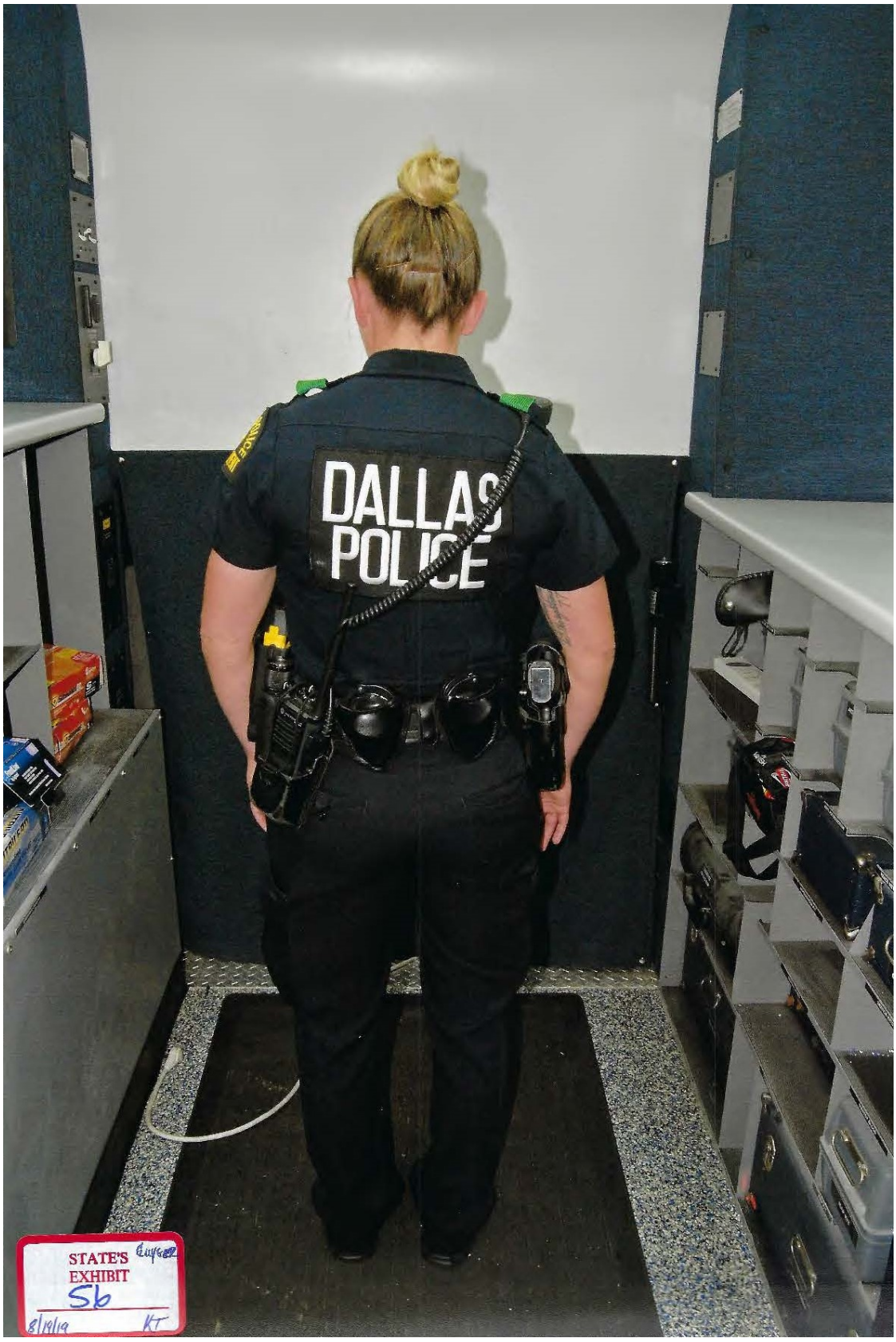
A. GUYGER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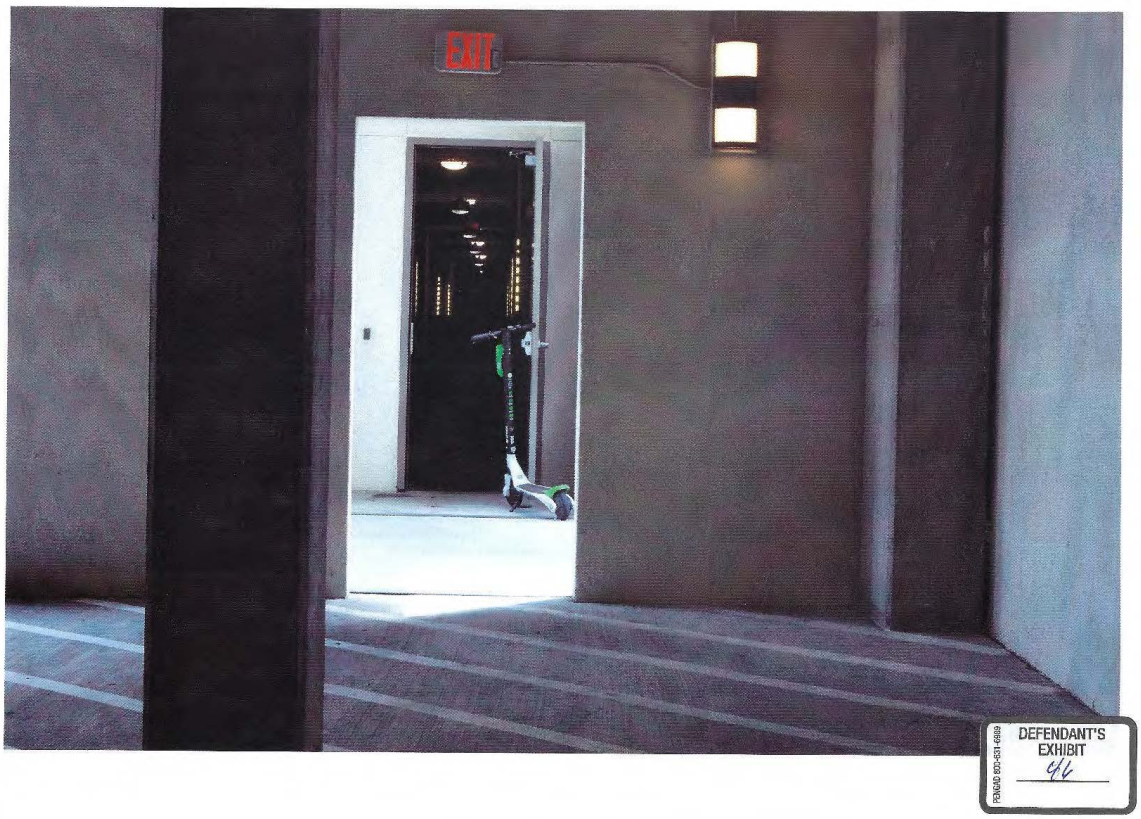
As Guyger approached the entryway on the fourth floor, she would have seen this—without daylight or the scooter (RR10.36; RR17.DX46):



Guyger walked down the hallway of the fourth floor towards what she thought was her apartment

As Guyger walked entered the hallway of the fourth floor, she would have seen apartment numbers on the mirrored glass to the left of each door frame just as they are on the third floor (RR10.38; RR17.DX47):

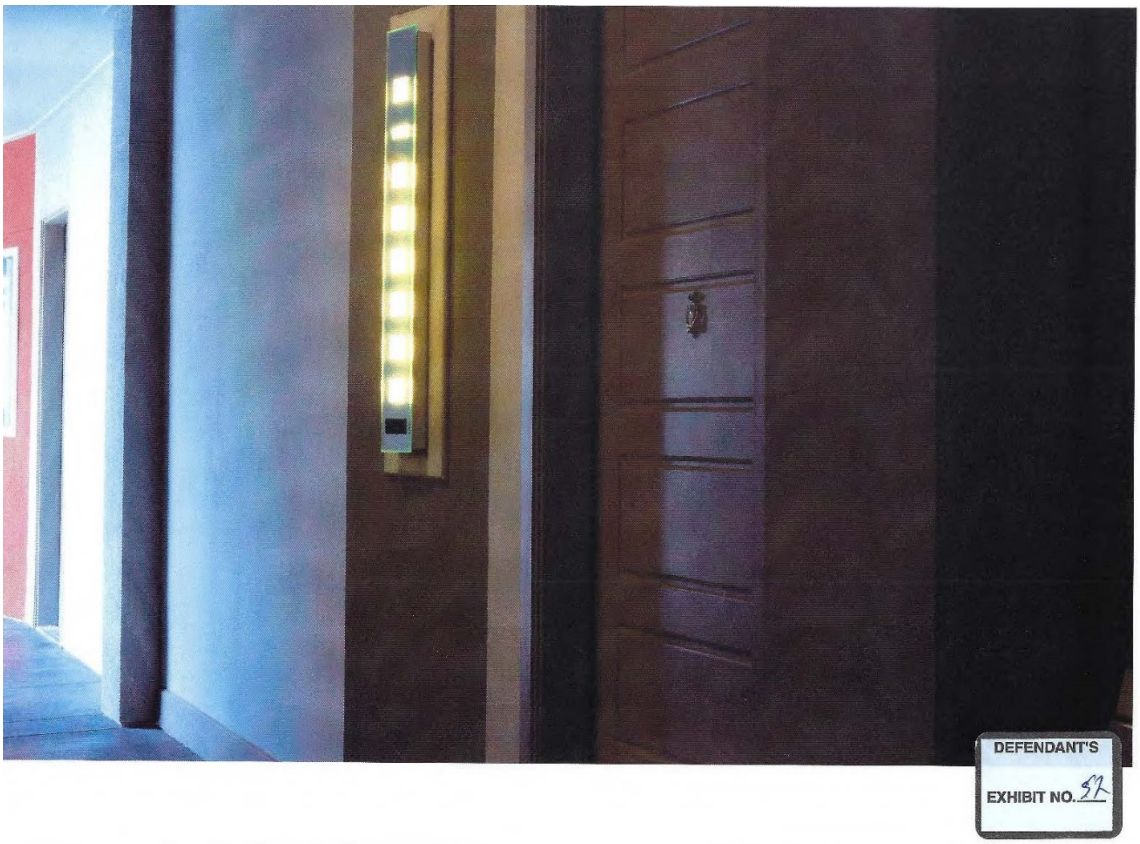
Guyger would have seen this as she continued down the hallway of the fourth floor (RR17.DX48-DX49, DX51):


DEFENDANT'S
EXHIBIT NO. 48


DEFENDANT'S
EXHIBIT NO. 49

Guyger arrived at Jean's apartment 1478, mistakenly believing that it is her apartment

Guyger would have arrived at apartment 1478 (RR10.40; RR17.DX52):

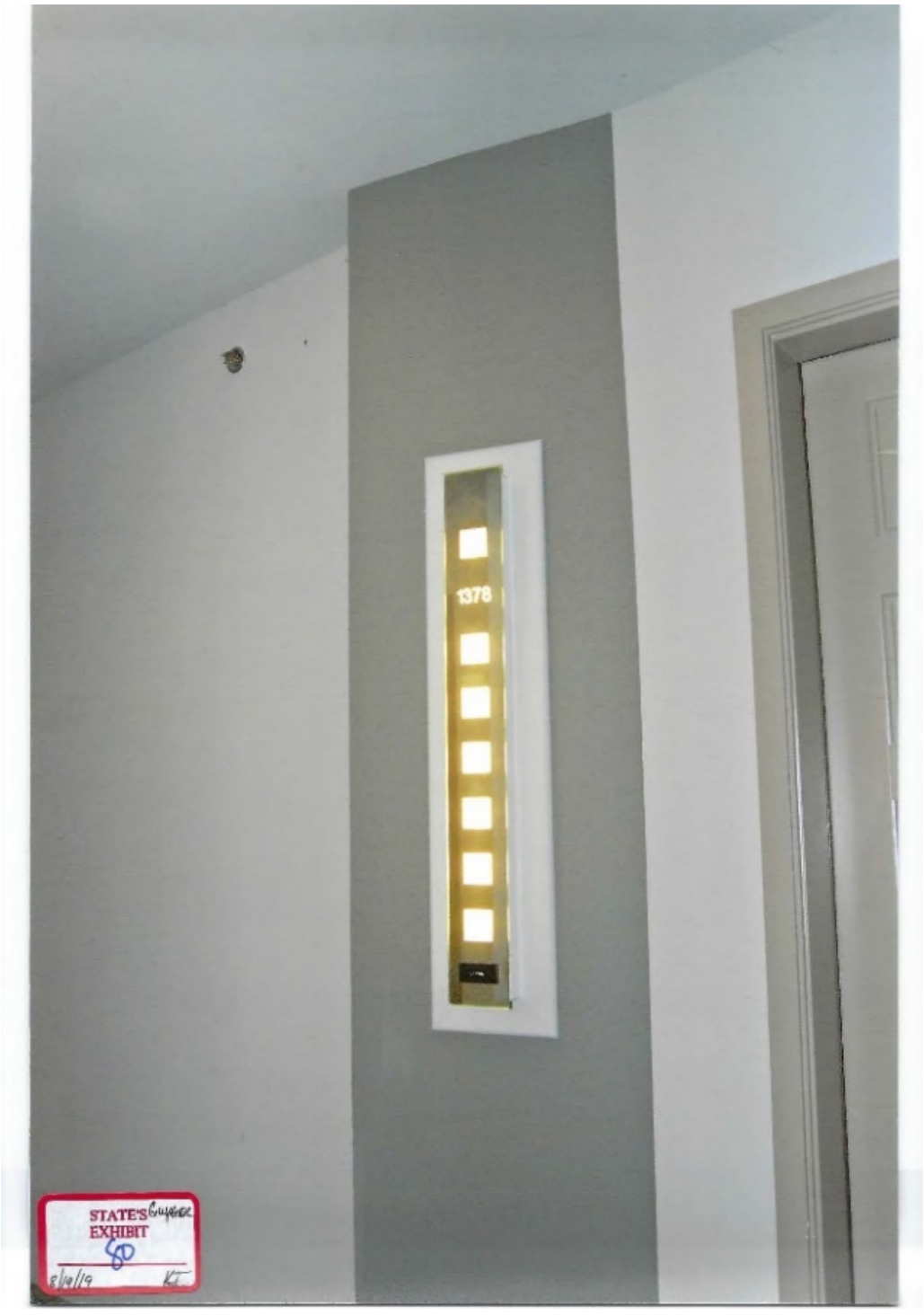


When the exterior of Jean's apartment 1478 is compared to Guyger's apartment 1378 (RR17.DX61), they are identical except for the red doormat. (RR10.40; RR11.135-137; RR17.SX95, SX97, SX267). Like all other apartments, the numbers are **not** on the doors or immediately next to them, but are on gold panels about a foot to the left of the doors, as Guyger (#1378) and Jean's (#1478) apartments show (RR9.215; RR10.216, 228, 232; RR17.SX80-SX81, SX95, SX97):

The outside of Jean's apartment while standing to the left of the door:

The outside of Jean's apartment while standing to the right of the door:

The outside of Guyger's apartment while standing in front of the door:



The outside of Guyger's apartment while standing to the left of the door:

The numbers are elevated and level with the top panel of the doorframe, over a foot to the left of the doorframe. A person who is 5'6" has to look up and to the left to see the apartment number. (RR12.178). Guyger is 5'3". (RR9.284; RR12.76).

Using her fob, Guyger attempted to enter what she thought was her apartment. She hears loud shuffling and someone walking inside. The door was <u>not</u> locked, so Guyger was able to to enter the dark apartment

When Guyger arrived to what she thought was her apartment 1378, she pulled out her keys and placed the fob into the lock and turned it. (RR12.73-74, 79-80). Guyger heard loud shuffling and someone walking inside. (RR12.81). The door was cracked open and her turning the fob caused the door to open more. (RR12.80, 82). While holding her equipment in her left arm, she used it to fully open the door. (RR12.85-86). This occurred in two seconds or less. Guyger was terrified, believing that someone was inside her apartment. (RR12.82-83). She did **not** see a light on inside. (RR12.84). Guyger dropped her equipment in front of the door to keep it propped open. (RR12.86).

Guyger saw a silhouette figure standing in the back of the apartment. Guyger pulled her pistol and yells "Let me see your hands. Let me see your hands" but she could <u>not</u> see the figure's hands. The figure walked

towards Guyger at a fast pace. Believing she was in mortal danger, Guyger fired two rounds at the figure

Guyger immediately saw a silhouette figure standing in the back of the apartment. (RR12.84-85). The distance between the front door and the back of the apartment is about 30 feet. (RR12.87-88). Guyger pulled her pistol and yelled at the figure, "Let me see your hands. Let me see your hands." (RR12.85, 88). Guyger could **not** see the figure's hands. (RR12.85). The person—who turned out to be Jean—walked towards Guyger at a fast pace, yelling "hey, hey, hey." (RR12.86, 88). Guyger believed she was in mortal danger because of the circumstances and because she could **not** see his hands. (RR12.86). Guyger's complete attention was on the figure. (RR12.90).

Guyger fired two rounds—one round struck the south wall of Jean's apartment, and the other struck Jean about half an inch above his left nipple. (RR10.174-179, 189, 196; (RR12.89; RR11.73; RR17.SX268-SX270). Jean fell to the ground, near the entryway into the bedroom, with his feet in front of the television. (RR10.27-28; RR17.DX36).

Guyger realized that she was <u>not</u> in her apartment and did not know the person

Guyger walked to the kitchen counter. (RR12.89). That is when she realized that she was **not** in her apartment because of the Ottoman in the middle of the floor. (RR12.89-90). She noticed the light from the television. (RR12.90). She did **not** know the person she had just shot. (RR12.90).

Guyger shot because she thought the figure was going to kill her. (RR12.89). Guyger shot two rounds—a "double tap"—because she was trained by DPD to do so. (RR12.118). Guyger intended to shoot to kill. (RR12.124).

At 9:59 p.m., Guyger called 9-1-1 and began performing chest-compressions on Jean

At 9:59 p.m., with the phone in her right hand, Guyger called 9-1-1. (RR9.14-18; RR12.91; RR17.SX4, SX4A, SX5, p. 3, SX20). Using her left hand, Guyger began performing chest-compressions. (RR12.91). Guyger did **not** know where Jean was shot. (RR12.91). Guyger had never performed CPR in an emergency situation. (RR12.90). During the call—while panicked—Guyger told the operator that she is an off-duty DPD officer, repeatedly said that she thought she was in her apartment, she

shot a guy thinking that she had entered her apartment and he was inside, she thought she had parked on the third floor, and thought she was on her floor. (RR17.SX4. SX4A). Officers were dispatched. (RR9.19).

During the 9-1-1 call, the dispatcher asked Guyger where she was, and Guyger did **not** know. (RR12.91). She had to go outside to look at the apartment number. (RR12.91). Guyger turned on a light. (RR12.92). She went back to Jean and began performing a sternum rub, which she had seen performed by paramedics. (RR12.92-93). She wanted Jean to keep breathing. (RR12.93).

At 10:02:25, Guyger sent a text to Officer Rivera, "I need you. Hurry." (RR10.90). At 10:03:03, Guyger sent another text to Rivera, "I fucked up." (RR10.90). Guyger sent these texts because she needed help, and the first person she thought of was her partner Rivera. (RR12.95).

The location of the shell-casings indicate that Guyger was just inside the doorway when she fired her pistol

The shell-casings from the two rounds fell in the kitchen-area, just inside the main walkway of the apartment as shown by the two yellow cones (RR10.65, 237; RR17.SX.106, SX140):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STATE'S
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STATE'S
EXHIBIT
106

Officers and paramedics arrived at Jean's apartment

Officers Lee and Blair responded to a "Signal 15"—officer assist—and arrived at Southside Flats just before 10:03 p.m.—the bodycam began at 10:02:06, and they arrived 37 seconds into the video. (RR9.31-33, 37-44; RR17.SX6). They were met outside the apartment by Guyger at about 10:05 p.m., who guided them inside. (RR9.69; RR17.SX6 at 3:12). Guyger was upset and very emotional. (RR9.69-70). Lee directed Guyger away from the scene because it is best to get the involved officer away. (RR9.70). Lee and Blair provided CPR to Jean, who was alive but **not** alert. (RR9.42-46, 58-59, 70; RR17.SX295-SX303). The State acknowledged that the photos in SX295-SX303 were brightened and did **not** depict the lighting conditions inside Jean's apartment. (RR9.47-49). Lee did **not** get blood on his hands while providing CPR. (RR9.71).

Officers Dugas and Guzman arrived. (RR9.80-82; RR17.SX8, SX25, SX27-SX30). Officers Nguyen and Lopez also arrived, and Nguyen tried to treat Jean—whose feet were immediately in front of the television—for shock by elevating his feet to circulate his blood. (RR11.18-23, 28-29; RR17.SX21, DX68-DX69).

Sergeant Valentine was next door at a 7-Eleven when she received the call from dispatch at about 10:01 p.m. (RR9.97-101; RR17.SX10). She arrived at Jean's apartment moments later. (RR9.104). Valentine and others saw Guyger's keys dangling in the doorway, with the fob inserted in the lock. (RR9.107-108; RR10.68; RR17.SX98):

There were **no** signs of forced entry. (RR9.108; RR10.214). Guyger was in the hallway on her cellphone. (RR9.105-106; RR17.SX14). When Valentine learned that Guyger was involved, Valentine took Guyger downstairs and placed her in her squad car to seclude her until a detective appeared. (RR9.108-111).

Fairleigh and other paramedics received the dispatch call at 10:02 p.m., arrived at Southside Flats at 10:03 p.m., entered the apartment, took over at 10:08 p.m., continued CPR, and carried Jean on a stretcher to the ambulance. (RR9.175-177, 183-184; RR17.SX20). It took Farleigh five minutes to get to the apartment because they were unable to locate access keys or fobs and had to be let in by tenants. (RR9.183). When Fairleigh began chest-compressions, blood came exited the wound. (RR9.181). Fairleigh left with Jean at 10:21 p.m. and took him to Baylor Hospital, where they arrived at 10:30 p.m. (RR9.179; RR17.SX20).

Jean's injury and cause of death

Dr. Chester Gwin—medical examiner for the Southwestern Institute of Forensic Sciences ("SWIFS")—conducted the autopsy. (RR10.165-170; RR17.SX268-SX273). Jean was well-developed, 6'1", and 247 pounds. (RR10.173). The gunshot—which caused his death—entered his left pectoral region 15.25 inches below the crown of his head and 5.5 inches left of his anterior midline, or about 0.5 inches above his left nipple—and struck his fifth rib. (RR10.174-179, 189, 196; RR17.SX268-SX270). The round was recovered from the psoas, a muscle that runs along each side of the lumbar spine. (RR10.199).

The round struck the left ventricle—the largest chamber of the heart that pumps the most blood to the body. (RR10.179-180). This injury causes heavy bleeding inside the body. (RR10.193). Chest compressions with this injury contribute to blood pushed through the vascular system. (RR10.193). The round was **not** redirected inside his body. (RR10.189). Tetrahydrocannabinol (THC) was present in his blood but **not** alcohol. (RR10.190; RR17.SX268).

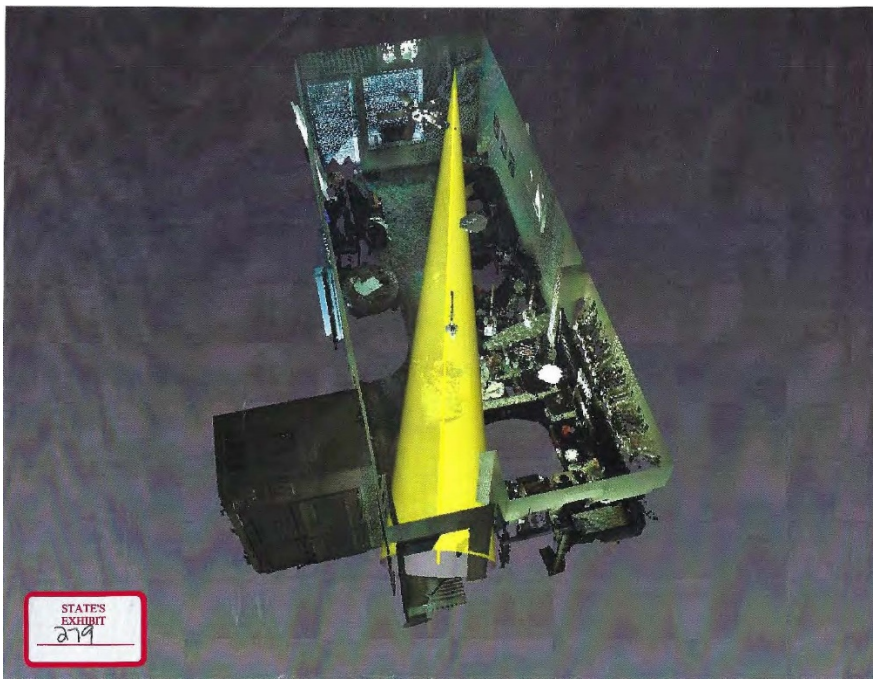
Ballistics evidence

April Kendrick—supervisor of the firearm and toolmark unit at SWIFS—confirmed that the casings were fired by Guyger's Sig 9mm pistol, but she was unable to confirm that the bullet came from that pistol. (RR11.112-113, 117, 121-122; RR17.SX247-SX250). Gwin admitted that the trajectory could have indicated that Jean was struck as he was bent over and getting off his couch. (RR10.203).

Dr. Castro—trace-evidence examiner for SWIFS—examined three gunshot residue ("GSR") kits and detected GSR on the "inside door face" of the "outside door right side" of Jean's door; on the stucco of the outside door, right side; on the inside of the door trim; and on the back of Jean's left hand, which Castro believes may have been transferred by another

person onto Jean's hand. (RR10.147-158; RR17.SX282). Castro could **not** state how far Guyger was from Jean when she fired. (RR10.159-160).

Ranger Adcock—who took scans using the Leica scanner, a 3D-device that rotates 360X290 degrees vertically over the top and is used to calculate line-of-sight distances—explained that one round struck the south wall at a 17-degree angle—plus-or-minus 5 degrees—traveling left-to-right—which is the azimuth, the angle formed between a reference direction and a line from the observer to a point of interest projected on the same plane. (RR11.69-75, 91, 106; RR-Supp-3-SX255, p. 90):



Adcock did **not** perform a trajectory analysis of the round that struck Jean. (RR11.77). Adcock measured the length from the center of the doorway to the area in the apartment where Jean's feet were to be 13-15 feet. (RR11.108-109).

Joshua Brown heard "two people meeting each other" as though they were surprised to see each other, and then heard two gunshots

Joshua Brown lived in apartment 1437 immediately across the hall from Jean and was the witness nearest to what occurred. (RR9.223-225, 227, 238). Brown met Jean for the first time earlier that day and they discussed how management came to their doors because they both were smoking marijuana. (RR9.226-227).

Brown explained that after he arrived home that evening and as he rounded the corner down the hall from his apartment—although he could **not** make out exactly what was said—he heard "two people meeting each other" as though they were surprised to see each other, and then heard two gunshots. (RR9.232-233, 240-241). He entered his apartment, and 2-3 minutes later he looked through his peephole and saw Guyger on her cellphone crying, saying that she "came into the wrong apartment." (RR9.236). Brown had **never** met Guyger; **nor** had he ever seen Guyger in the building then. (RR9.238, 242).

Brown had lived in the building for about four months. (RR9.244). Brown had entered the wrong floor "on a few occasions" and one time while on the wrong floor—the third floor—walked to the wrong door—apartment 1337—and inserted his fob into its lock. (RR9.244-245).

Guyger had <u>no</u> drugs or alcohol in her system

Detective Ibarra confirmed that the toxicology report of Guyger's blood that was drawn shortly after 3:00 a.m. on September 7, 2018 showed negative for drugs and alcohol. (RR9.149-151; RR17.SX16).

Corporal Richardson's investigation

Corporal Richardson obtained the warrant for the search of Jean's apartment. (RR9.153-155). Richardson saw Guyger's keys dangling in with her fob inside the lock. (RR9.156). When Richardson inserted Guyger's fob into the lock, the light turned red. (RR.9.158). When he inserted Jean's fob, the indicator light turned green. (RR.9.158-159).

Ranger Armstrong's investigation and the problem with doors and locks to Jean's and other apartments

Ranger David Armstrong was the lead investigator. (RR10.18, 21; RR11.65). He became involved on September 7, 2018 by the request of the chief of the Dallas Police Department. (RR10.21). Armstrong joined DPS in 2002. (RR10.16). In 2007, Armstrong joined SWAT. (RR10.18). He became a Ranger in 2011 and is a sergeant. (RR10.20). He has assisted or was lead investigator in many officer-involved shootings. (RR10.20).

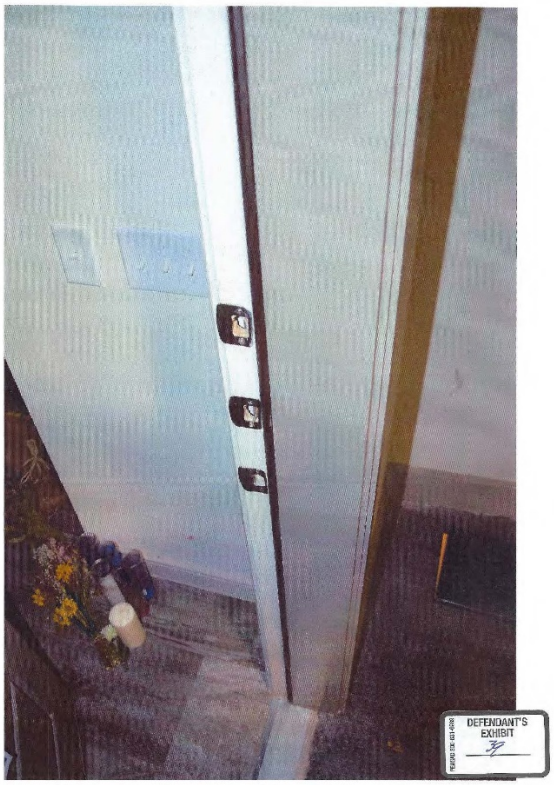
Ranger Armstrong is a member of the Special Response Team, which conducts operations similar to SWAT. (RR13.48). Armstrong described the sensations that a person may experience when confronted with a quickly evolving, tense, dynamic confrontation with a suspect, which include: (1) auditory exclusion—where one may not hear at the normal volume because of stress; (2) tunnel vision, when means that one

is focused only on what is directly in front of her and not on her periphery; (3) short-term memory loss, which may be regained over time because one's mind is prioritizing tasks at that instant; and (4) a rapid heartrate due to stress. (RR13.48-49).

Ranger Armstrong knew that Guyger had tried to open Jean's door because her keys were dangling from the lock. (RR9.290). There was **no** forced entry. (RR9.309). During the investigation, Armstrong had unintentionally parked on the wrong floor of the garage. (RR10.31).

Armstrong returned on September 8 with Rangers Daniel and Matlock and DA Investigator LeNoir. (RR9.303; RR17.SX51). The investigation revealed that the light sources inside Jean's apartment when the incident occurred were from a 50-inch television and a laptop that was on the ottoman in front of the couch. (RR9.306-307).

In investigating the door and lock to Jean's apartment, Armstrong discovered that the strikeplate—where the throw for the deadbolt enters to catch and secure the door—was bowed out, indicating that when the strikeplate was installed, its screws had been overtorqued, causing the strikeplate to bow (RR10.43-44; RR17.DX39-DX43):


DEFENDANT'S
EXHIBIT
39


DEFENDANT'S
EXHIBIT
40


DEFENDANT'S
EXHIBIT
41


DEFENDANT'S
EXHIBIT
42

The overtorqued strikeplate caused a crack inside the doorframe. (RR10.45-46; RR17.SX26, DX40-DX41). Because the bottom of the strikeplate was driven in too far, the gap between the wood and strikeplate was exposed and the screws were torqued into the wood to the point that the strikeplate was bowed into the area where the door throw would sweep. (RR10.46).

On September 6, 2018, it had rained so there was humidity. (RR10.47-49). In an experiment conducted in October 2018 when the weather conditions were similar to September 6, 2018, Armstrong and his team opened the door to Jean's apartment numerous times, and each time it did **not** completely close depending on the distance that the door had been open before they let it go. (RR10.47, 50; RR17.SX26). The door would "close" but **not** fully latch. (RR10.48; RR17.SX26).

On September 20, 2018, while assisting Armstrong, DPS Special Agent Wallace interviewed resident George Lucas of apartment 1123, who showed Wallace how the door to his apartment would **not** close unless he pushed it for the latch to catch. (RR12.166-168).

On September 20, 2018, while assisting Armstrong, DPS Special Agent Estes interviewed the resident of apartment 1226, who was

holding the door open with her foot but walked away to check on her child. (RR12.169-171). The door did **not** close because it was not "square" with frame and the latch did **not** catch, which would have enabled Estes to open it from the hallway. (RR12.170).

Residents regularly parked on the wrong floor, walked to the wrong apartment, attempted to enter the wrong apartment, or entered the wrong apartment, or a combination of these

Ranger Armstrong and his team interviewed 297 of the 349 residents of Southside Flats. (RR10.41). Armstrong discovered that:

- 71 tenants—44% of them—on floors three and four had walked to the wrong apartment on the wrong floor (RR10.43);
- 23% of the tenants on floors three and four had gone to the wrong door and inserted their fobs into the locks. (RR9.292-293; RR10.42);
- 76 tenants—47% of them—on floors three and four had unintentionally parked on the wrong floor (RR10.43);
- 93 tenants—32% of them—on all floors had unintentionally parked on the wrong floor (RR10.43); and

- 15% of all residents had gone to the wrong door and inserted their fobs into the locks. (RR9.293; RR10.42).

Marc Lipscomb—an attorney who worked for Kirkland & Ellis—lived with a roommate on the third floor in apartment 1300, a two-bed, two-bath unit. (RR12.172-173, 181; RR17.DX80). Lipscomb had **never** met Guyger or Jean. (RR12.173). Lipscomb had unintentionally parked on the fourth floor 10-12 times. (RR12.173-174). Lipscomb described how the entryway into the apartment building from the parking garage when he was on the third floor was virtually identical to the same position when he was on the fourth floor. (RR12.174-176; RR17.SX251, DX79). Lipscomb **never** noticed the roofline of the apartment building from the fourth-floor garage. (RR12.176). **Nor** did he recall anything that distinguishes the third floor from the fourth floor. (RR12.177)

One time after walking his dog, Lipscomb used the stairwell, and in error ascended one flight of stairs to the second floor rather than two flights to the third floor. (RR12.180). He had **not** consumed any alcohol. (RR12.185). Lipscomb walked to what he thought was his apartment 1300—but instead walked to apartment 1200, one floor directly beneath his. (RR12.181-182, 188). He had **not** locked his door when he took his

dog for a walk. When he attempted to open the door to apartment 1200, it was unlocked, so he gained entry. (RR12.182). Believing that he entered his apartment, he proceeded past the kitchen countertop and saw a purse, so he thought his roommate had a guest. (RR12.183). A woman was sitting on the couch and looked surprised to see him. (RR12.183-184). It was then that he realized he had walked into the wrong apartment. (RR12.184).

Jessica Martinez—a teacher at Dallas ISD—had lived on the third floor in apartment 1352 for about two years. (RR12.190-191). Once or twice she unintentionally parked on the fourth floor. (RR12.196). She could not differentiate between the third and fourth floors unless she recognized vehicles as "markers" next to which she normally parked. (RR12.196). She had unintentionally entered the wrong hall. (RR12.198). Several times, Martinez's fob would **not** work, and she had to complain to management. (RR12.191-192). One time when she was home, a smelly, toothless man who had a fob entered her apartment. (RR12.193).

Amy Rose had lived on the third floor in apartment 1380 for about one year. (RR12.201). Once she unintentionally parked on the fourth

floor. (RR12.201). She walked all the way to what she thought was her apartment before she realized she was on the wrong floor. (RR12.202).

On a burglary call, officers take a position of cover and concealment, but if they entered their own homes and saw an intruder, they would use deadly force. When faced with a deadly threat, officers use their firearms

The DPD operating procedures for responding to a burglary call instructs to maintain a perimeter, contain, cover—in case the suspect has a weapon, and concealment—which is to hide behind something and watch for an attempted escape. (RR8.170-175; RR17.SX312-SX313). Officer Lee confirmed that if he received a dispatch-call that a burglary may be in progress and he arrives alone, he is to take a position of cover and concealment and give the burglar a chance to surrender. (RR9.62-65, 76). However, Lee explained that if he entered his **own home** and believed that there was an intruder inside, he would **not** treat it like a burglary call but would use deadly force if he perceived a deadly threat. (RR9.76). Lee confirmed that in his experience living in an apartment, maintenance men have **never** rummaged through his apartment late at night with the lights turned off. (RR9.76-77).

Ranger Adcock confirmed that when faced with a deadly threat, officers are trained to use their firearms. (RR11.109-110). Officers would **not** use a taser when faced with a deadly situation because tasers are a less-lethal option. (RR11.109). Further, OC spray is **not** used in a deadly-force situation or in an enclosed area because the spray does **not** have enough room to disperse. (RR11.110).

When DPD Officer Blair arrived and saw Guyger—who identified herself—he made sure that he could see her hands because "hands are what's gonna hurt you." (RR12.206-210). Guyger was very emotional, hysterical, and crying, and kept repeating that she thought she had entered her apartment. (RR12.211). Blair entered Jean's apartment and began performing CPR. (RR12.211). Blair did **not** get blood on his hands while performing CPR. (RR12.213). Blood got on Blair's hands only when he looked for the wound and touched its area. (RR12.213).

Blair described that his mind-set is different while off-duty versus on-duty. (RR12.214). If Blair is dispatched to a possible burglary, he will follow operating procedures, has time to formulate a plan with other officers, and would seek cover and concealment unless confronted the suspect. (RR12.216-217, 222). But if he arrived home, enters, and

discovers an intruder, he would immediately confront the intruder. (RR12.217). Only if he had **not** entered his residence would he wait for cover. (RR12.222-223).

Other witnesses heard the gunshots or saw Guyger, or both

Ronald Jones entered the garage at 9:53 p.m.—9:50 p.m. time-stamped. (RR10.69-74). The gate was open. (RR9.249-251; RR17.SX258-SX260). Jones drove to the fourth floor and parked. (RR9.252). Jones saw Guyger drive her white truck fast around the corner and park on the fourth floor. (RR9.253, 260). Jones had **never** seen a uniformed officer on the fourth floor. (RR9.253-255). A few minutes after Jones entered his apartment, he heard two gunshots in quick succession. (RR9.257, 265). Ronald Jones heard Guyger repeatedly saying "there was someone in my apartment." (RR9.258).

Madamanchi—a software engineer—had lived for about five months in apartment 1474—two doors from Jean's apartment. (RR9.269-272, 279-280). On September 6, while he was on a Skype call, he heard two gunshots in quick succession. (RR9.273). Madamanchi's wife parked on the wrong floor once. (RR9.280).

Taydra Jones had lived in apartment 1482 for about four months, two doors down from Jean. (RR10.95-96; RR17.SX34B). While watching television and speaking on the phone, she heard two gunshots in quick succession. (RR10.97). She peered through the peephole of her door and saw Guyger walking in a panicked mode. (RR10.99-100). She had **never** seen Guyger before. (RR10.100-101).

Whitney Hughes had lived in apartment 1439 for about two months, across the hall and one door down from Jean. (RR10.105-106, 112-113; RR17.SX34B). While watching television, she heard two gunshots in quick succession. (RR10.107). Hughes peered through her peephole and saw Guyger speaking on a cellphone upset and crying. (RR10.108-109). Hughes had **never** seen Guyger before. (RR10.110).

Hughes had a problem with her door because when it was humid due to rain, the deadbolt would **not** enter the socket because the strikeplate was installed unevenly with the deadbolt. (RR10.110-111, 124-127). This forced her to pull the door to lock it. (RR10.124, 127).

Hughes had parked on the wrong floor two times. (RR10.113). Once she parked on the third floor by mistake and walked to apartment 1339—directly below her apartment 1439—and did **not** notice a distinctive

"river rocks" colored doormat near her apartment and believed that the vase in front of apartment 1384 was added recently. (RR9.244-245; RR10.120-121, 145; RR17.SX76). Hughes put her fob into the lock of apartment 1339, and only when it flashed "red" did she realize that she was on the wrong floor. (RR10.123, 128). Hughes did **not** look at the apartment number on the glass to the left of the door before she inserted her fob. (RR10.124).

Alyssa Kinsey had lived in apartment 1480 next door to Jean for about four months. (RR10.129, 132; RR17.SX34B). While chatting via Facetime, she heard "a very loud sort of metallic sound...like two parts to one noise...," which she realized were two gunshots in quick succession. (RR10.133-134). Kinsey looked through her peephole and could **not** see anything but heard a female call 9-1-1. (RR10.133). Once when Kinsey was on the phone, she parked in error on the third floor, believing she was on the fourth floor. (RR10.137-138).

Shanel Bly had lived in apartment 1384 for about two years, three doors down from Guyger. (RR10.141-143; RR17.SX34B). That night, she heard what she thought was a gunshot. (RR10.143).

IX. Summary of the Arguments

In Issue 1, Guyger argues that the evidence was legally insufficient to prove beyond reasonable doubt that she committed Murder. In the alternative, Guyger argues in Issue 2 that the evidence was legally insufficient to prove that she committed Murder but was sufficient to prove that she committed Criminally Negligent Homicide. Guyger asks this Court to reverse the Judgment and sentence and: (1) per Issue 1, acquit her of Murder; or (2) in the alternative per Issue 2, acquit her of Murder, convict her of Criminally Negligent Homicide, and remand for a new trial on punishment.

X. Argument

Issue 1: The evidence was legally insufficient to prove beyond reasonable doubt that Guyger committed Murder because (1) through mistake, Guyger formed a reasonable belief about a matter of fact—that she entered her apartment and there was an intruder inside—and (2) her mistaken belief negated the culpability for Murder because although she intentionally and knowingly caused Jean's death, she had the right to act in deadly force in self-defense since her belief that deadly force was immediately necessary was reasonable under the circumstances.

Introduction

Mark Twain wrote that "[T]ruth is stranger than fiction, but it is because Fiction is obliged to stick to possibilities; Truth isn't." Mark Twain, *Following the Equator: A Journey Around the World*, ch. 15, p. 156, AMS Press (1897). What happened to Mr. Jean was awful and could **not** have been written in a fictional setting because what occurred leading up to and at about 9:59 p.m. on September 6, 2018 is implausible.

But it happened because of a malfunction in the lock to Jean's door, the absurd design of the building and its attached garage, and the incompetent management of Southside Flats. Amber Guyger—a well-regarded police officer returning home after working nearly 14 hours that day—entered Jean's apartment 1478 believing it was her apartment and opened fire on Jean, believing that he was an intruder. Had Guyger

entered **her apartment** 1378, she would have been justified in shooting the intruder. She would **not** have even had to yell at the intruder to show his hands as she did here.

But Guyger did **not** enter her apartment. She entered Jean's apartment and shot who she thought was an intruder based on a reasonable mistake of fact that it was her apartment and an intruder was inside. What happened to Jean was awful. But it was **not** Murder under any theory of Tex. Penal Code § 19.02(b). Guyger asks this Court to render reverse the Judgment and sentence and render a judgment of acquittal.

Standard of review for legal sufficiency

Due process requires that a conviction be supported by proof beyond a reasonable doubt regarding each essential element of the alleged offense as determined by a rational trier of fact. *Laster v. State*, 275 S.W.3d 512, 517 (Tex.Crim.App. 2009); *Jackson v. Virginia*, 443 U.S. 307, 316-319 (1979); *Wise v. State*, 364 S.W.3d 900, 903 (Tex.Crim.App. 2012) (same); U.S. Const. Amend. V; U.S. Const. Amend. XIV. When measuring legal sufficiency, rather than use the charge given to the jury, "[t]he elements of the offense defined by a hypothetically correct jury charge

are used..." *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997); *Musacchio v. United States*, 136 S.Ct. 709, 715 (2016) (When a jury instruction sets forth the elements of the charged crime but incorrectly adds an element, a sufficiency challenge should be assessed against the elements of the charged-crime).

After giving "proper deference"—and **not** total deference—to the trier of fact, an appellate court must "uphold the verdict unless a rational factfinder had reasonable doubt as to any essential element." *Laster*, 275 S.W.3d at 518. A reviewing court "must presume...that the trier of fact resolved...conflicts in favor of the prosecution and must defer to that resolution." *Jackson*, 443 U.S. at 326. However, a "mere modicum" of incriminating evidence cannot "by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Padilla v. State*, 326 S.W.3d 195, 200 (Tex.Crim.App. 2010) (same). Should an appellate court find that the evidence is insufficient, the court should reverse the conviction and enter a judgment of acquittal. Tex. Code Crim. Proc. Art. 44.25 (2020); Tex. Rule App. Proc. 43.2(c) (2020).

The reviewing court considers all evidence in the record whether admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767

(Tex.Crim.App. 2013) (regardless of whether dog-scent lineup evidence was properly admitted, it is properly considered in a review of the sufficiency of the evidence); *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex.Crim.App. 1999) (inadmissible hearsay evidence that may have been improperly admitted is considered in a legal sufficiency review).

The standard of proof when considering legal sufficiency of circumstantial evidence is the same as with "direct evidence," and a reviewing court may consider the existence of all alternative reasonable hypotheses. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). A reviewing court considers whether the inferences necessary to establish guilt are reasonable based on the cumulative force of all the evidence in the light most favorable to the jury's verdict. *Hooper*, 214 S.W.3d at 13. A factfinder may draw **reasonable** inferences supported by the evidence, but "[t]heorizing or guessing as to the meaning of the evidence is never adequate to uphold a conviction because it is insufficiently based on the evidence to support a belief beyond a reasonable doubt." *Cary v. State*, 507 S.W.3d 761, 766 (Tex.Crim.App. 2016). (emphasis supplied).

Standard of review for legal insufficiency when a defensive claim is asserted

When a defensive claim like self-defense is asserted, the standard of review for legal sufficiency is the same except that the defendant bears the burden to produce evidence supporting the claimed defense, while the State bears the burden of persuasion to disprove it and prove beyond a reasonable doubt that the defendant committed each essential element of the offense. *Saxton v. State*, 804 S.W.2d 910, 913-914 (Tex.Crim.App. 1991), *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex.Crim.App. 2003), and *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex.Crim.App. 2013). As explained in *Saxton*, 804 S.W.2d at 913-914,

> "In resolving the sufficiency-of-the-evidence issue, we look not to whether the State presented evidence (that) refuted (a defendant's) self-defense testimony, but rather...whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of (the charged offense) beyond a reasonable doubt and also would have found against (the defendant) on the self-defense issue beyond a reasonable doubt.").

To decide under *Saxton* whether the jury would have found: (1) the essential elements of the charged offense beyond a reasonable doubt, and (2) against the defendant on the self-defense issue beyond a reasonable

doubt, a court examines the totality of the evidence. *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex.Crim.App. 2005).

The hypothetically correct jury instructions

There are a few material differences between the instructions submitted to the jury (CR.2557-2571) and the hypothetically correct jury instructions. First, the contained the definitions for the mens rea of intent and knowledge (CR.2557-2558) per Tex. Penal Code § 6.03(a) & (b) (2018) but were missing the definition for the mens rea of Criminal Negligence per Tex. Penal Code § 6.03(d). The instructions should also define the lesser-included offense of Criminally Negligent Homicide per Tex. Penal Code § 19.05 (2018).

Third, the instructions contained the definition for the mens rea of recklessness per Tex. Penal Code § 6.03(c) in error. (CR.2560). This will be explained in Issue 2, but only the mens rea for criminal negligence should have been submitted.

Fourth, the mistake-of-fact instruction (CR2565-2566) should **not** have included "Manslaughter" and should have contained "Criminally Negligent Homicide" per Tex. Penal Code § 19.05 (2018).

When deadly force in self-defense is justified

A person is justified in using **nondeadly** force "when and to the degree" the person "reasonably believes the force is immediately necessary" for protection against the complainant's use or attempted use of unlawful force. Tex. Penal Code § 9.31(a) (2018). "Reasonable belief" is the belief held by an ordinary and prudent person in the same circumstances as the defendant. Tex. Penal Code § 1.07(a)(42) (2018); *Werner v. State*, 711 S.W.2d 639, 645 (Tex.Crim.App. 1986) (discussion of the "reasonable person"). A jury must view the reasonableness of the person's actions from her standpoint. *Ex parte Drinkert*, 821 S.W.2d 953, 955 (Tex.Crim.App. 1991). "Unlawful" means criminal or tortious. Tex. Penal Code § 1.07(a)(48) (2018).

If a person's **belief is reasonable, *actual danger* is not required**, and the person may use force to protect against an ***apparent danger***. *Jones v. State*, 544 S.W.2d 139, 142 (Tex.Crim.App. 1976) (emphasis supplied) (the TCCA consistently held that if the evidence raises the issue of apparent danger, in instructing the jury on the law of self-defense a court must tell it that a person has a right to defend from apparent danger to the same extent as he would had the danger been

real—provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time); *see also* Torres v. State, 7 S.W.3d 712, 715 (Tex.App.-Houston [14th Dist.] 1999) (same); *Hamel v. State*, 916 S.W.2d 491, 493 (Tex.Crim.App. 1996) (same); *Broussard v. State*, 809 S.W.2d 556, 559 (Tex.App.-Dallas 1991) (A person has the right to defend herself if acting on the reasonable apprehension of danger as it appeared at the time).

If the person reasonably believed that the complainant's use of force was unlawful, it is irrelevant whether the complainant's use of force was unlawful or even real. *Dyson v. State*, 672 S.W.2d 460, 462-463 (Tex.Crim.App. 1984). In *Dyson*, the TCCA held that since the defendant used deadly force, there must be some evidence to satisfy Tex. Penal Code §§ 9.31 and 9.32, so the evidence must show that the defendant reasonably believed that deadly force was immediately necessary to protect himself against another's use or attempted use of unlawful force. *Id.* at 463. That the defendant was **not** in fact attacked by his brother is **immaterial**. *Id.* (emphasis supplied): "A person has a right to defend from apparent danger to the same extent as he would (have) had the

danger been real; provided he acted upon a reasonable apprehension of danger as it appeared to him at the time." *Id*.

A person who claims a defense must admit to committing an intentional act against the complainant and assert that the act was justified under the circumstances—or at least **not** challenge that the act occurred. *Sanders v. State*, 707 S.W.2d 78, 81 (Tex.Crim.App. 1986); (Evidence that is a defense requires the accused to admit the commission of the offense—but to justify or excuse his actions so as to absolve him of criminal responsibility for engaging in conduct which otherwise constitutes a crime.); *Ford v. State*, 112 S.W.3d 788, 794 (Tex.App.-Houston [14th Dist.] 2003, no pet.) (To raise self-defense, the defendant must admit the offense and offer self-defense as a justification).

Under Tex. Penal Code § 9.01(3) (2018), deadly force is force intended or known by the person to cause—or in the manner of its use or intended use—is capable of causing death or serious bodily injury. Under Tex. Penal Code § 9.32(a) (2018), a person is justified in using **deadly force**:

(1) if she would be justified in using force against the complainant under Tex. Penal Code § 9.31(a); and

(2) when and to the degree the person reasonably believes the deadly force is immediately necessary: (A) to protect the person against the complainant's use or attempted use of unlawful deadly force, or (B) to prevent the complainant's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Under Tex. Penal Code § 9.32(b) and *Braughton v. State*, 569 S.W.3d 592, 606-607 (Tex.Crim.App. 2018), the person's belief under Tex. Penal Code § 9.32(a)(2) that deadly force was immediately necessary is presumed reasonable if the person:

(1) knew or had reason to believe that the complainant: (A) unlawfully and with force entered—or was attempting to enter unlawfully and with force—the person's occupied habitation, vehicle, or place of business or employment; (B) unlawfully and with force removed—or was attempting to remove unlawfully and with force—the complainant from her habitation, vehicle, or place of business or employment; or (C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;

(2) did **not** provoke the complainant; and

(3) was **not** engaged in criminal activity other than a Class C misdemeanor or ordinance regulating traffic when the force was used.

The use of force is **not** justified: (1) in response to verbal provocation alone; (2) to resist an arrest or search that the person knows is being made by a peace officer; (3) if the person consented to the exact force used or attempted by the complainant; (4) if the person provoked the complainant's use or attempted use of unlawful force unless the person abandons the encounter or clearly communicates to the complainant her intent to do so, reasonably believing she cannot safely abandon the encounter, and the complainant continues or attempts to use unlawful force against the person; or (5) if the person sought an explanation from or discussion with the complainant their differences with the complainant while the person was unlawfully carrying a weapon or transporting a prohibited weapon. Tex. Penal Code § 9.31(b); *Miranda v. State*, 350 S.W.3d 141, 148-149 (Tex.App.-San Antonio 2011) (use of force in self-defense); *Contreras v. State*, 73 S.W.3d 314, 319 (Tex.App.-Amarillo 2001) (the threat must be immediate).

Through mistake, Guyger formed a reasonable belief about a matter of fact—that she entered her apartment and there was an intruder inside—and her mistaken belief negated the culpability for Murder because although she intentionally and knowingly caused Jean's death, she had the right to act in deadly force in self-defense since her belief that deadly force was immediately necessary was reasonable under the circumstances

If Guyger had entered **her** apartment 1378 on the third floor, she would have been justified shooting who she reasonably believed was an intruder. Guyger's belief that her use of deadly force was immediately necessary would have been **presumed reasonable** under Tex. Penal Code § 9.32(b), *Braughton*, 569 S.W.3d at 606-607, and Tex. Penal Code § 9.32(a)(2) because Guyger:

(1) knew or had reason to believe that the intruder: (A) unlawfully and with force entered—or was attempting to enter unlawfully and with force—Guyger's habitation...(C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;

(2) did **not** provoke the intruder; and

(3) was **not** otherwise engaged in criminal activity.

Guyger's use of force had she entered **her** apartment would have **not** been: (1) in response to verbal provocation alone; (2) to resist an arrest/search; (3) by consent; (4) due to her provocation; or (5) due to Guyger seeking an explanation concerning differences. Tex. Penal Code § 9.31(b); *Miranda*, 350 S.W.3d at 148-149. And threat to Guyger would have been immediate. *Contreras*, 73 S.W.3d at 319.

However, Guyger did **not** enter her apartment. By a **clear** mistake of fact, she entered Jean's apartment 1478 on the fourth floor—reasonably believing that she was entering **her apartment**. This fits squarely within the defense of mistake of fact under Tex. Penal Code § 8.02 (2018) since:

(1) through mistake, Guyger formed a reasonable belief about a matter of fact—that she entered her apartment and there was an intruder inside—and

(2) her mistaken belief negated the culpability for Murder because although she intentionally and knowingly caused Jean's death, she had the right to act in deadly force in self-defense under Tex. Penal Code § 9.32(b) and *Braughton* , 569 S.W.3d at 606-607, and deadly force was immediately necessary and reasonable under the circumstances.

A rational jury would have concluded that Guyger was reasonable in her belief that she entered her apartment, saw an intruder who did not show his hands, and was justified in using deadly force in self-defense

The mistake-of-fact defense must be based on a reasonable belief about a matter of fact. The hypothetically correct mistake-of-fact instructions would have caused a rational jury to conclude that Guyger was reasonable in her belief that she entered her apartment and was justified in using deadly force in self-defense. Guyger's belief that she entered her apartment and saw what she believed was an intruder—was reasonable. *Thompson v. State*, 236 S.W.3d 787, 800 (Tex.Crim.App. 2007) (The mistake of fact must be reasonable for it to exculpate the defendant of the offense charged, and the defendant would still be guilty of any lesser-included offense that is applicable if the facts were as the defendant believed).

Despite the tragic consequences, considering all the evidence—whether admissible or inadmissible, *see* *Winfrey*, 393 S.W.3d at 767—Guyger acted reasonably. Because her belief was reasonable, **actual danger** was **not** required, and Guyger was entitled to use deadly force to protect against the **apparent danger**. *Jones*, 544 S.W.2d at 142.

Guyger was entitled to the mistake-of-fact instruction since it was raised by the evidence—and although she would have been entitled to it even if the evidence were weak or controverted—here the evidence was strong and uncontroverted. *Allen v. State*, 253 S.W.3d 260, 267 (Tex.Crim.App. 2008).

The evidence shows **48 distinct factual points** proving that what occurred was a clear mistake of fact and Guyger acted reasonably under the circumstances:

1. Guyger was a highly capable, competent, and qualified police officer. (RR8.161, 198). Between September 3-5, 2018, she worked 30.25 hours. (RR9.166-168; RR17.SX.19). On September 6, 2018, Guyger worked 13.8 hours (RR9.289; RR17.SX40, p. 1), assisting SWAT in locating robbery suspects. (RR8.163; RR12.54-55). From September 3-6, she had worked 44 hours, which reasonably caused fatigue;

2. Shortly after she left work at 9:38 p.m., Guyger received a call from Rivera, which lasted until 9:55 p.m. (RR10.89). They spoke about work and Rivera's Boy Scout activities with his children. (RR12.63-64). Guyger was on the phone with Rivera when she pulled into the parking

garage (RR12.65). Speaking on the phone while driving is an everyday distraction for tens of millions of Americans;

3. In the parking garage, the only indicator of what floor one is on are signs in front of the reserved parking signs and small black placards with floor numbers on the inside frames of the elevators. (RR10.30-31, 224-225, 229; RR11.60, 66; RR17.SX68, SX83, SX261). The third and fourth floor of the garage approaching the entry into the building are indistinguishable (RR12.174-175; RR17.SX251, DX79). This caused confusion for many residents;

4. In error, Guyger drove to the fourth floor and parked her truck by backing into a spot that was in the direct line of sight of the entryway into the building. (RR9.253, 260; RR10.33; RR12.65-66; RR17.SX170, SX175-SX176);

5. These problems were glaring and obvious. After the incident, Southside Flats labeled the entryways with floor numbers (RR10.31-32), showing that they recognized this problem;

6. Guyger exited her truck and began walking towards what she thought was the third floor (RR12.70-71), which was the result of her **not** realizing the floor because of the lack of indicators;

7. Guyger was in full police uniform (RR9.257-258), carrying in her left hand and arm her heavy vest, lunchbox, and backpack because she was trained to keep her right hand—on the side where her firearm is holstered—free. (RR12.70-71). Attached to her utility belt was a police radio, two handcuffs, her pistol, a taser, two additional magazines for her pistol, a knife, OC spray, and a flashlight. (RR9.257-258; RR10.219-224; RR11.99-102; RR12.67-68; RR17.SX53-SX57, SX253, SX74-SX76, DX74-DX76). Guyger was carrying a lot of equipment for a woman with a small frame. Carrying things that obscure vision is an everyday occurrence for many people;

8. As Guyger walked down the hallway of the fourth floor, the only clues distinguishing it from the third floor were the vase by apartment 1384 (RR9.244-245; RR10.145; RR17.SX76) and in front of Jean's apartment, a half-circle red doormat. (RR11.135-137; RR17.SX95, SX97, SX267). Guyger simply missed these clues. Otherwise, the hallways look alike, and the apartment numbers are on mirrored glass to the left of each door frame, out of one's direct line of sight while looking at the doors. (RR10.38; RR17.DX47-DX49, DX51);

9. Except for the doormat, the outsides of apartments 1378 and 1478 are identical. (RR10.40). Like all the apartments, the numbers are **not** on the doors or immediately next to the doors but are on an elevated gold panel about a foot to the left of the doors. (RR9.215; RR10.216, 228, 232; RR17.SX80-SX81, SX95, SX97). A person who is 5'6" must look up and to the left to see the number, and Guyger is 5'3". (RR9.284; RR12.76, 178). Guyger simply missed this like many other residents;

10. Guyger had **no** drugs or alcohol in her system so she was not inattentive due to intoxicants. (RR9.150-151; RR17.SX16);

11. Guyger walked to what she thought was her apartment based on the door's location in the hallway, which was reasonable since Jean lived immediately above Guyger. (RR9.90-91, 189-194; RR17.SX31, SX34-SX35; SX70-SX86). This happened to many other residents;

12. When Guyger arrived to what she thought was her apartment 1378, she inserted her fob into the lock and turned it left. (RR9.107-108, 156, 290; RR10.68; RR12.73-74, 79-80; RR17.SX98). The light blinked "red" because the lock did **not** recognize the fob. (RR9.158, 210-211). However, the door was cracked open and her turning the fob caused the door to open more. (RR12.80, 82). This is critical because had Jean's lock

been installed properly or the door had been locked, Guyger would **not** have gained entrance;

13. Guyger's description of how the door opened and was **not** locked was corroborated by:

- (1) **no** signs of forced entry (RR9.108; RR10.214);
- (2) Ranger Armstrong discovered that the strikeplate was bowed out, so when it was installed, its screws were overtorqued, causing the strikeplate to bow (RR10.43-44; RR17.DX39-DX43);
- (3) the overtorqued strikeplate caused a crack inside the doorframe (RR10.45-46; RR17.SX26, DX40-DX41);
- (4) Because the bottom of the strikeplate was driven too far into the doorframe, the gap between the wood and strikeplate was exposed and the screws were torqued into the wood to the point where the strikeplate was bowed into the area where the door throw would sweep (RR10.46); and
- (5) on September 6, 2018, it had rained so there was humidity (RR10.47-49). In October 2018 when the weather conditions were similar to September 6, 2018, Armstrong and his team opened the door to Jean's apartment numerous times. Each time it did **not**

completely close depending on the distance that the door had been open before they let it go (RR10.47, 50; RR17.SX26), causing it to be "closed" but **not** latched. (RR10.48; RR17.SX26);

14. Guyger heard loud shuffling and someone walking inside the apartment. (RR12.81). Guyger believed that there was an intruder in what she reasonably believed was her apartment;

15. While holding her equipment in her left arm, she used it to fully open the door. (RR12.85-86). This occurred in two seconds or less. Guyger was terrified, believing that someone was inside her apartment. (RR12.82-83). This shows how little time Guyger had to react while entering what she reasonably thought was her apartment, believing there was an intruder inside;

16. She did **not** see a light on inside and it was dark inside. (RR12.84). The photos in SX295-SX303 were brightened and did **not** depict the lighting conditions inside. (RR9.47-49). The only sources of light were from the 50-inch television and a laptop on the ottoman in front of the couch. (RR9.306-307);

17. Guyger dropped her equipment in front of the door to keep it propped open. (RR12.86). She entered, believing it was her apartment.

Once inside, her belief that she was in her apartment was still reasonable since 1378 and 1478 had the same floor plan, and the kitchen, countertops, couches, and televisions were in the same places. (RR9.193; RR10.24-26, 29; RR17.SX33, DX32-DX38). She immediately saw a silhouette figure of a well-developed 6'1" and 247-pound man—far larger than her 5'3" petite frame—standing in the back of the apartment. (RR9.284; RR10.173; RR12.76, 84-85; RR17.SX53-SX56). Thus, the person Guyger thought was an intruder was 10 inches taller than her and nearly twice her size, which would terrify any reasonable person;

18. The distance between the front door and the back of the apartment is about 30 feet. (RR12.87-88). Standing just inside, Guyger pulled her pistol and yelled at the figure, "Let me see your hands. Let me see your hands." (RR12.85, 88). Guyger could **not** see the figure's hands. (RR12.85). The figure—who unbeknownst to Guyger was Jean—walked towards Guyger at a fast pace, yelling "hey, hey, hey." (RR12.86, 88). Jean was clearly as surprised to see Guyger as she was to see Jean;

19. As Officer Blair confirmed, police training required them to see a suspect's hands since "hands are what's gonna hurt you."

(RR12.206-210). Guyger thus reacted based on her training and common sense;

20. The interaction between Guyger and Jean was corroborated by Brown, who heard "two people meeting each other" as though they were surprised to see each other. (RR9.232-233, 240-241);

21. Guyger believed she was in mortal danger because: (1) of the circumstances, and (2) she could **not** see his hands. (RR12.86). Her complete attention was on him. (RR12.90). Guyger fired two rounds—a "double tap" as she was trained—one struck the south wall, and the other struck Jean about 0.5 inches above his left nipple. (RR10.174-179, 189, 196; RR12.89, 118; RR11.73; RR17.SX268-SX270);

22. Guyger fired because she thought an intruder was inside what she thought was her apartment was going to kill her. (RR12.89). Guyger intended to shoot to kill and was trained to shoot suspects in the torso (RR8.202; RR12.124);

23. Jean fell near the entryway into the bedroom, his feet in front of the television (RR10.27-28; RR17.DX36), so he had walked toward Guyger as she asserted;

24. GSR was detected on the "inside door face" of the "outside door right side" of Jean's door; on the stucco of the outside door, right side; and on the inside of the door trim. (RR10.147-158; RR17.SX282). The shell-casings fell in the kitchen-area, just inside the main walkway. (RR10.65, 237; RR17.SX.106, SX140). This confirms that Guyger fired from where she said;

25. Guyger walked to the kitchen counter and realized that she was **not** in her apartment because of the Ottoman in the middle of the floor. (RR12.89-90). She noticed the light from the television. (RR12.90). She realized that she did **not** know the person. (RR12.90). This prompted her to immediately take emergency measures;

26. At 9:59 p.m., while holding her cellphone in her right hand, Guyger called 9-1-1. (RR9.14-18; RR12.91; RR17.SX4, SX4A, SX5, p. 3, SX20). Using her left hand, Guyger began performing chest-compressions on Jean. (RR12.91). Guyger had never performed CPR in an emergency situation. (RR12.90). During the call—while panicked—Guyger told the operator that she is an off-duty DPD officer, repeatedly stated that she thought she was in her apartment, she shot a guy thinking that he was

an intruder, she thought she had parked on the third floor, and she thought she was on her floor. (RR17.SX4. SX4A);

27. Numerous residents heard the gunshots and saw or heard Guyger in a panicked mode calling 9-1-1 or exclaiming that she entered the wrong apartment. (RR9.236, 273; RR10.97-100, 108-109, 133-134, 142-143; RR17.SX34B). This confirms Guyger's description of what occurred and that she reasonably believed that she was entering her apartment and that there was an intruder inside;

28. **No** residents had seen Guyger or a police officer before on the fourth floor (RR9.238, 242, 253-255; RR10.100-101, 110). This supports the conclusion that Guyger walked to the fourth floor in error;

29. There was **no** blood visible on Guyger's hands, and Officer Lee—who performed CPR—did **not** get blood on his hands. (RR9.71). Officer Blair—who also performed CPR—got blood on his hands only when he looked for the wound and touched it. (RR12.211-213). This eliminates speculation that Guyger had **not** taken emergency measures;

30. When paramedic Fairleigh performed chest-compressions, blood came out of the wound. (RR9.181);

31. During the 9-1-1 call, the dispatcher asked Guyger where she was, and Guyger did **not** know. (RR12.91). Guyger had to go outside to look at the apartment's number. (RR12.91). She turned on a light. (RR12.92). She went back to Jean and began performing a sternum rub, which she had seen performed by paramedics. (RR12.92-93). She wanted Jean to keep breathing. (RR12.93). This shows that continued emergency measures, did **not** know where she was, and entered Jean's apartment by mistake;

32. At 10:02, Guyger texted Officer Rivera, "I need you. Hurry." (RR10.90). At 10:03, Guyger texted Rivera, "I fucked up." (RR10.90). These texts show her panicked state of mind and confirm that she mistakenly believed that she had entered her apartment;

33. Responding officers saw Guyger upset and emotional. (RR9.69-70; RR12.211; RR17.SX6 at 3:12). Guyger was removed from the scene per protocol and taken downstairs to Valentine's squad car. (RR9.70; 108-111);

34. Guyger's use of force was reasonable because when faced with a deadly threat, officers are trained to use their firearms. (RR11.109-110). Although Guyger had a taser, officers are trained to **not** use them

when faced with a deadly situation. (RR11.109). Although Guyger had OC spray, officers are trained to **not** use it in a deadly-force situation or in an enclosed area because the spray does **not** have enough room to disperse. (RR11.110);

35. Guyger's entering the apartment—rather than cover-and-concealment and calling for backup—was reasonable. She was **not** responding to a burglary call but was entering what she thought was her apartment. DPD procedures for responding to a burglary requires officers to cover-and-conceal and call for backup. (RR8.170-175; RR9.62-65, 76; RR12.214-217, 222; RR17.SX312-SX313). But as Officer Lee explained, if he entered **his home** and believed that there was an intruder inside, he would **not** treat it like a burglary call but would use deadly force if he perceived a deadly threat. (RR9.76). Officer Blair confirmed the same, explaining that if he arrived home, entered, and discovered an intruder, he would immediately confront him. (RR12.217);

36. Officer Lee confirmed that in his experience living in an apartment, maintenance men never rummaged through his apartment late at night with the lights turned off. (RR9.76-77). This eliminates speculation that the person Guyger thought was an intruder may have

been an employee. Further, employees do **not** appear unannounced late at night and work with the lights turned off;

37. Guyger's reaction in the few seconds between hearing and seeing what she reasonably believed was an intruder in her apartment and her firing was explained by Ranger Armstrong's descriptions of the sensations that a person may experience when confronted with a quickly evolving, tense, dynamic confrontation with a suspect: (1) auditory exclusion—where one may not hear at the normal volume because of stress; (2) tunnel vision, when means that one is focused only on what is directly in front of her and not on her periphery; (3) short-term memory loss, which may be regained over time because one's mind is prioritizing tasks at that instant; and (4) a rapid heartrate due to stress (RR13.48-49);

38. It is **not** clear whether Jean knew there was a problem with his lock and door. But he had **not** reported this security issue to management since regional manager Gibralter was **not** aware of them. (RR9.214). **Nor** was it reported to Gibralter that when humidity was high, the door would **not** completely shut because of the way the strike plate was installed. (RR9.214-215);

39. Other tenants had problems with their doors **not** closing, like Lucas of apartment 1123 (RR12.166-168), the door to apartment 1226, which did **not** close because it was not "square" with frame and the latch did **not** catch, which would have enabled one to open it from the hallway (RR12.169-171), and Hughes's door, whose deadbolt would **not** enter the socket because the strikeplate was installed unevenly with the deadbolt, which forced her pull the door to lock it. (RR10.110-111; 124-127);

40. Due to the garages, entryways, and hallways being indistinguishable between floors, numerous residents had parked on the wrong floor or went to the wrong apartment at least once. Some had done so multiple times. (RR9.244-245, 280);

41. Of the 297 out of 349 residents interviewed by Armstrong and his team (RR10.41):

- 71 tenants—44% of them—on floors three and four had walked to the wrong apartment on the wrong floor (RR10.41-43);
- 23% of the tenants on floors three and four had gone to the wrong door and inserted their fobs into the locks. (RR9.292-293; RR10.42);

- 76 tenants—47% of them—on floors three and four had unintentionally parked on the wrong floor (RR10.43);
- 93 tenants—32% of them—on all floors had unintentionally parked on the wrong floor (RR10.43); and
- 15% of the residents in the entire building had gone to the wrong door and inserted their fobs into the locks. (RR9.293; RR10.42).

42. Kinsey parked on the wrong floor once while speaking on her phone. (RR10.137-138);

43. Brown had entered the wrong floor "on a few occasions" and one time while on the wrong floor—the third floor—walked to the wrong door—apartment 1337—and inserted his fob into the lock of apartment 1337. (RR9.244-245);

44. Hughes had parked on the wrong floor of the garage two times. (RR10.113). Once she parked on the third floor by mistake and walked to apartment 1339—directly below her apartment 1439—and did **not** notice a distinctive "river rocks" colored doormat near her apartment and believed that the vase was added recently. (RR10.120-121). Hughes put her fob into the lock to apartment 1339, and only when it flashed

"red" did she realize that she was on the wrong floor. (RR10.123, 128). Hughes did **not** look at the apartment number on the glass next to the door before she inserted her fob. (RR10.124);

45. Once or twice, Jessica Martinez unintentionally parked on the fourth floor. (RR12.196). She could **not** differentiate between the third and fourth floors unless she recognized vehicles as "markers" next to which she normally parked. (RR12.196). She unintentionally entered the wrong hall on the wrong floor. (RR12.198). Several times, her fob would **not** work. (RR12.191-192). One time when she was home, a smelly, toothless man with a fob entered her apartment. (RR12.193);

46. Amy Rose once unintentionally parked on the fourth floor. (RR12.201). She walked to what she thought was her apartment door before she realized she was on the wrong floor. (RR12.202).

47. Lipscomb lived with a roommate in apartment 1300. (RR12.172-173, 181; RR17.DX80), and:

- had **never** met Guyger or Jean. (RR12.173);
- unintentionally parked on the fourth floor 10-12 times. (RR12.173-174);

- described how the entryway into the building on the third floor was virtually identical to the fourth floor. (RR12.174-177; RR17.SX251, DX79);
- **never** noticed the roofline of the building from the fourth-floor garage. (RR12.176);
- Once in error ascended one flight of stairs to the second floor rather than two flights to the third floor. (RR12.180). He had **not** consumed alcohol. (RR12.185). He walked to what he thought was his apartment—1300—but instead walked to 1200, one floor directly beneath his. (RR12.181-182, 188). He had **not** locked his door when he had left, and when he attempted to open the door to 1200, it was unlocked so he entered. (RR12.182). Believing that he entered his apartment, he walked past the kitchen countertop and saw a purse, so he thought his roommate had a guest. (RR12.183). A woman sitting on the couch looked surprised to see him. (RR12.183-184). It was only then that Lipscomb realized he had walked into the wrong apartment. (RR12.184); and

48. Even Ranger Armstrong unintentionally parked on the wrong floor of the garage. (RR10.31). Armstrong—a highly competent and

experienced law enforcement officer—was investigating, knew what had happened to Guyger, and yet the layout of Southside Flats was so confusing that even Armstrong made the same mistake as Guyger and many other tenants.

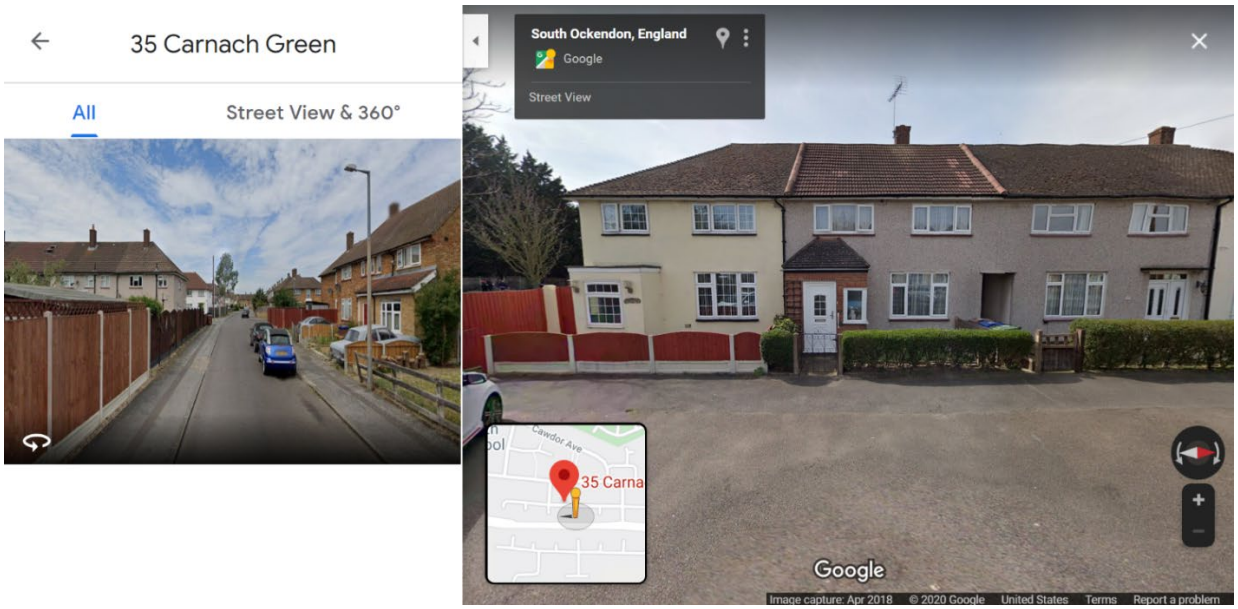
The facts of this case appear to be unprecedented, but *Jaggard v. Dickinson*—a case based on the mistake-of-fact defense with remarkable similarities to Guyger's case—provides persuasive authority

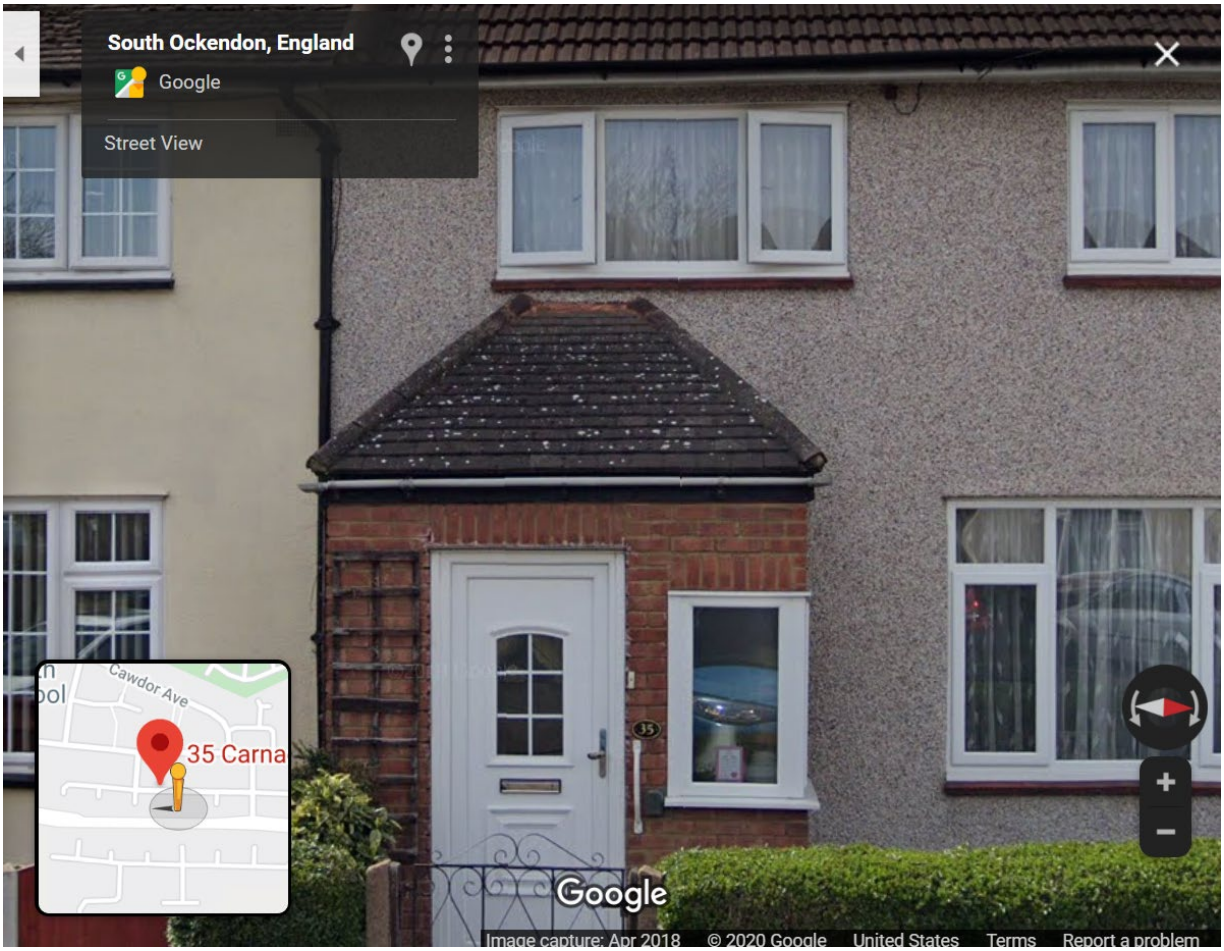
The evidence showing a mistake-of-fact is overwhelming. Guyger missed a few signals—the vase on the third floor that was **not** on the fourth floor, the red doormat in front of Jean's apartment, and the one-digit-off apartment number—but this does **not** make Guyger's mistaken beliefs fact unreasonable. When Hughes entered the third floor by mistake, she believed that the vase in was added recently. (RR10.120-121). On her petite 5'3" frame, Guyger was carrying lots of equipment. Guyger simply missed the vase, doormat, and the one-digit-off apartment number. A rational jury **cannot** base its decision on these minor clues—which any reasonable person could have missed—and disregard the **48 distinct factual points** that prove that what occurred was a clear mistake of fact and that Guyger acted reasonably.

Apparently, the precise factual situation here has **never** occurred. *Jaggard v. Dickinson*, 3 All ER 716 (1980), 1981 (QB) 527 is presented as persuasive authority to show that a person—through a mistake of fact—can enter the wrong home, commit a crime believing that that her actions are **not** a crime, and use mistake-of-fact as a defense to prosecution. *See* Appendix. *Jaggard* was decided by the Queen's Bench Division, one of the three divisions of the United Kingdom's High Court of Justice. *See Queen's Bench Division of the High Court*, https://www.gov.uk/courts-tribunals/queens-bench-division-of-the-high-court, last accessed August 2, 2020.

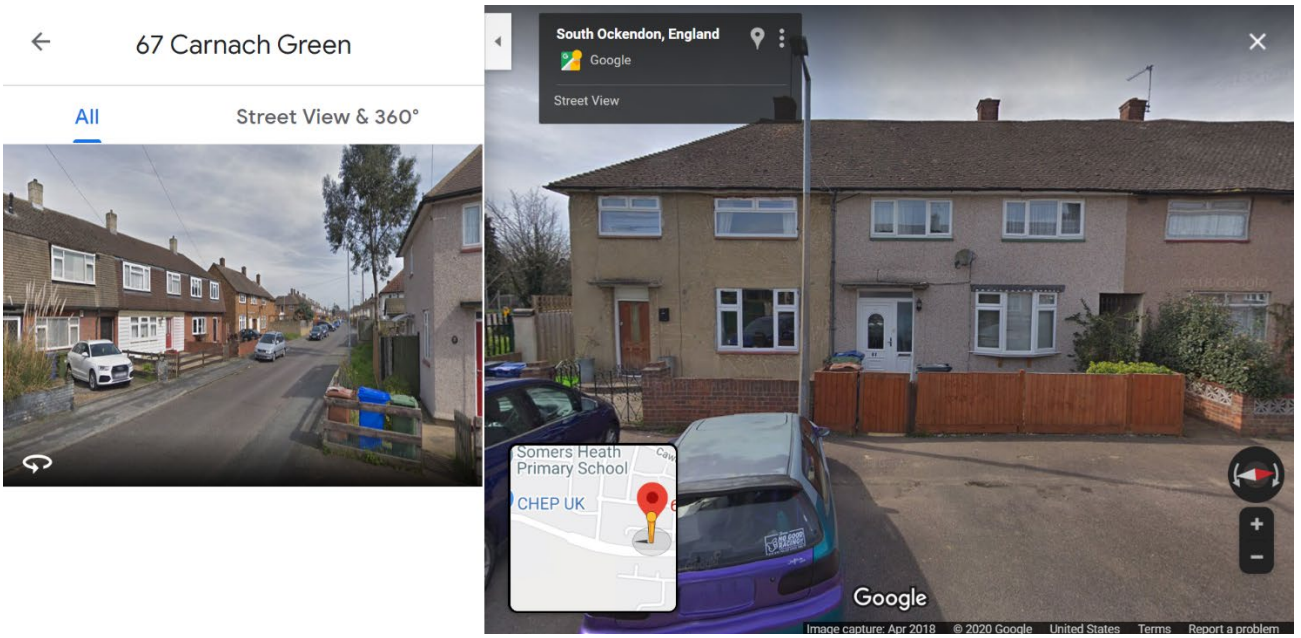
In *Jaggard*, the defendant was charged with damaging property in Raven's home, located at **35 Carnach Green** in South Ockendon, England. *Id*. at 717. Jaggard's friend Heyfron lived at **67 Carnach Green**. *Id*. The homes were "externally identical properties." *Id*. Nearly 40 years later, the homes remain "externally identical properties":

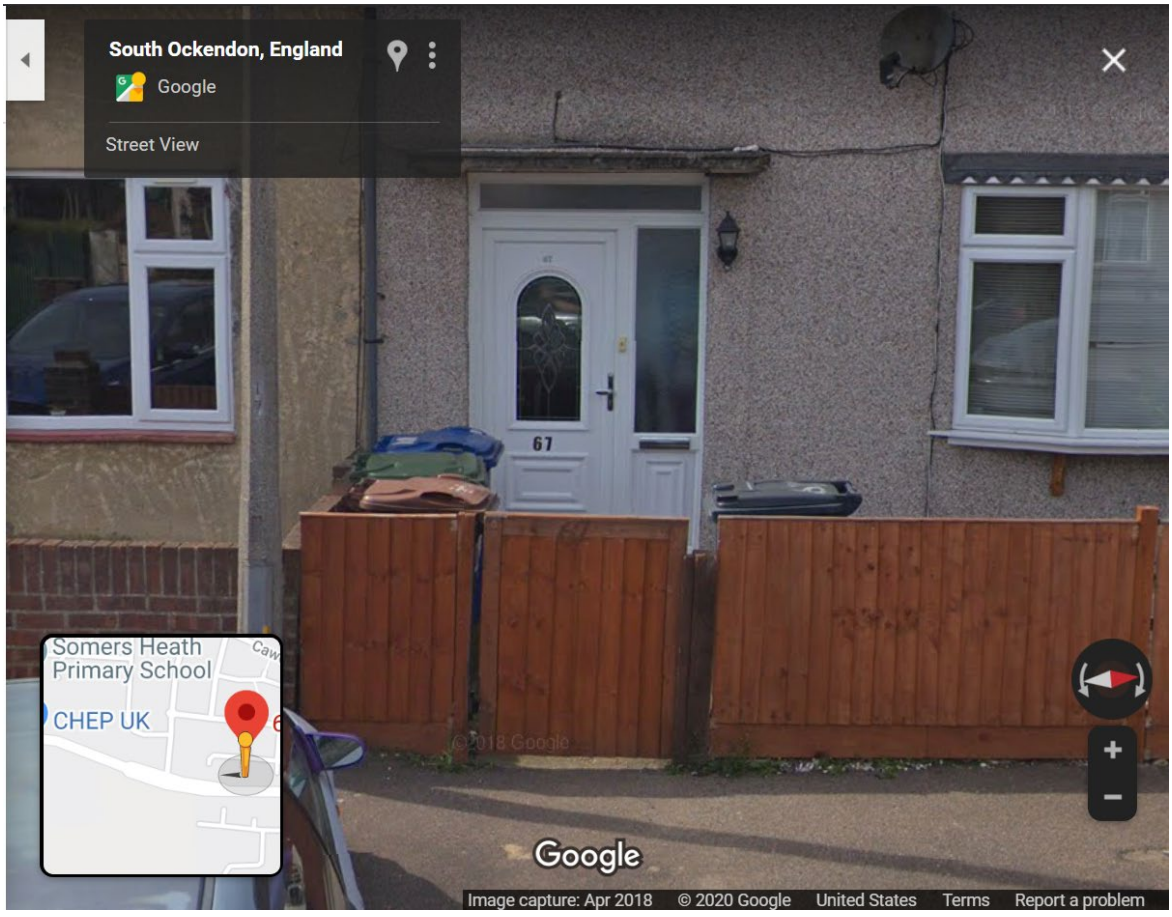
Google images of **35 Carnach Green**—regular and zoomed:





Google images of **67 Carnach Green**—regular and zoomed:





Guyger asks this Court to take judicial notice of these Google maps. Tex. Rule Evid. 201(b) & (d) (2020); *Bradley v. State*, 564 S.W.2d 727, 732 (Tex.Crim.App. 1978) (Appellate courts have the same power as trial courts to take judicial notice of matters that are **not** disputed and are subject of ready verification, including for the first time on appeal). A court may take judicial notice of maps. *International-Great N. R. Co. v. Reagan*, 49 S.W.2d 414, 416 (Tex. 1932). A court may also take judicial notice of maps on Google. *City of Austin v. Leggett*, 257 S.W.3d 456, 466, fn.5 (Tex.App.-Austin 2008, pet. denied) (the court of appeals consulted maps available on Google).

Jaggard did **not** know Raven and had **no** prior contact with her. *Jaggard*, *Id*. at 717. Heyfron told Jaggard that she had his "consent at any time to treat his property as if it was her own." *Id*. By entering what she believed to be Heyfron's home, Jaggard was effectively entering **her own home**. One evening at 10.45 p.m., Jaggard was intoxicated, so she ordered a taxi to take her to **67 Carnach Green**—Heyfron's property—but was delivered to **35 Carnach Green**—Raven's property. *Id*. Jaggard entered the garden and was ordered by Raven to remove herself. *Id*.

Jaggard broke the window in the hallway and the window in the back door, damaged a curtain, and gained entry to **35 Carnach Green**. *Id.*

Jaggard argued that she had a genuine belief she was breaking into **67 Carnach Green** and that her relationship with Heyfron was such that she had his consent to do so. *Id.* The trial court concluded that although believed she was breaking into **67 Carnach Green**, this belief was "**not** a genuine and honest mistake because it was induced by a state of intoxication." *Id.* Jaggard was convicted. *Id.*

The High Court determined that Jaggard was entitled to rely on the mistake-of-fact defense, which in this context provides a defense for believing that the owner of the property Jaggard thought she broke into would have consented to the entry—and consequently, her mistake was reasonable. *Id.* This mistake-of-fact defense applies regardless of voluntary intoxication. *Id.* at 719.

As the High Court explained, "[a] belief could be just as much honestly held if it is induced by intoxication as if it stemmed from stupidity, forgetfulness or inattention." *Id.* Parliament "...specifically isolated one subjective element, in the shape of honest belief, and has given it separate treatment" (in the statute). *Id.* Thus, it is the honesty

of the mistaken belief that matters—rather than its reasonableness—since the Court must consider the defendant's "...actual state of belief, **not** the state of belief (that) ought to have existed." *Id*. Thus, the issue is whether the belief was honest and **not** its "intellectual soundness." *Id*. Even one who is voluntarily intoxicated can have an "honest belief" of a mistake of fact.

Jaggard is **not** a murder case. However, the issue is the mistake-of-fact defense. In *Jaggard*, the High Court found that although Jaggard was intoxicated, she had an honest—albeit unreasonable—belief about the identity of the home she broke into since they were "externally identical properties." And Jaggard—like Guyger with Jean—had **never** met Raven.

Here, Guyger entered an apartment that was **not** hers—but she reasonably believed it was because she mistakenly entered the wrong floor and apartment as other residents of the building had done, and reasonably believe an intruder was inside her home. Unlike Jaggard, Guyger was **not** intoxicated, so the standard here is higher than in *Jaggard*, and Guyger met the standard.

The evidence was legally insufficient to prove Murder under Tex. Penal Code § 19.02(b)(1)

Murder under Tex. Penal Code § 19.02(b)(1) requires evidence beyond a reasonable doubt that the defendant intentionally or knowingly caused the death of the complainant. A defendant acts intentionally if it was her "conscious objective or desire to engage in the conduct or cause the result." Tex. Penal Code § 6.03(a) (2018). A defendant acts knowingly if she was "aware that her conduct was reasonably certain to cause the result." Tex. Penal Code § 6.03(b) (2018).

The issue is Guyger's mental state. Proof of a mental state will almost always depend on circumstantial evidence. *Dillon v. State*, 574 S.W.2d 92, 94-95 (Tex.Crim.App. 1978); *Lincoln v. State*, 307 S.W.3d 921, 924 (Tex.App.-Dallas 2010, no pet.) (same). Mental culpability generally must be inferred from the circumstances under which an act or omission occurs, so it is inferred from a defendant's words, acts, and conduct. *Moore v. State*, 969 S.W.2d 4, 10 (Tex.Crim.App. 1996).

In a legal sufficiency review, this Court looks at "events occurring before, during and after the commission of the offense and may rely on actions of the defendant, which show an understanding and common

design to do the prohibited act." *Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004). Each fact need **not** point directly and independently to guilt as long as the cumulative effect of all the incriminating facts are sufficient to support the conviction. *Id.*; *see Russell v. State*, 665 S.W.2d 771, 776 (Tex.Crim.App. 1983) (The evidence is sufficient "if the conclusion [of guilt] is warranted by the combined and cumulative force of all the incriminating circumstances."). Motive is a significant circumstance indicating guilt. *Guevara*, 152 S.W.3d at 50. Intent may be inferred from circumstantial evidence like acts, words, and the conduct of the defendant. *Id.*; *see also Patrick v. State*, 906 S.W.2d 481, 487 (Tex.Crim.App. 1995) (Intent may be inferred from the acts, words, and conduct of the defendant, or the extent of the injuries and the relative size and strength of the parties. It may also be inferred by the evidence.); *see also Manrique v. State*, 994 S.W.2d 640, 649 (Tex.Crim.App. 1999) (same).

When this Court considers all the events occurring before, during and after the shooting, the evidence is overwhelming that Guyger reasonably but mistakenly believed she entered her apartment and an intruder was inside. She intended to shoot to kill, but that was how she

was trained, and shooting to kill is reasonable if an intruder is in one's home. Guyger's motive—a significant circumstance—clearly was that she thought she was shooting an intruder in her apartment. *Guevara*, 152 S.W.3d at 50. She was frightened and reasonably believed that her life was in danger. **No** other conclusion is rational. Considering all the evidence in the record—whether admissible or inadmissible, *see Winfrey*, 393 S.W.3d at 767—Guyger acted reasonably.

Although Guyger was **not** in actual danger, there was **apparent danger** from her standpoint, and she was entitled to use deadly force to protect against this **apparent danger**. *Jones*, 544 S.W.2d at 142; *Hamel*, 916 S.W.2d at 493. Guyger acted on the **reasonable apprehension** of danger as it appeared to her at that instant. *Broussard*, 809 S.W.2d at 559. Any other conclusion is mere theorizing or guessing about the meaning of the evidence and is **not** adequate. *Cary*, 507 S.W.3d at 766.

Under *Saxton*, 804 S.W.2d at 913-914, Guyger met her burden of producing evidence supporting self-defense, and the State failed in its burden of persuasion to disprove it and prove beyond a reasonable doubt that Guyger committed Murder under Tex. Penal Code § 19.02(b)(1). The totality of the evidence supports this conclusion. *Vodochodsky*, 158

S.W.3d at 509; *Jackson*, 443 U.S. at 316-319; *Laster*, 275 S.W.3d at 517. Guyger asks this Court to reverse the Judgment and sentence and enter a judgment of acquittal. Tex. Code Crim. Proc. Art. 44.25; Tex. Rule App. Proc. 43.2(c).

The evidence was legally insufficient to prove Murder under Tex. Penal Code § 19.02(b)(2)

Murder under Tex. Penal Code § 19.02(b)(2) requires evidence beyond a reasonable doubt that the defendant intended to cause serious bodily injury and committed an act "clearly dangerous to human life" that cause the death of the complainant. So long as the act alleged is within the range of acts that a jury could reasonably conclude were clearly dangerous to human life, the State will prove the element of "clearly dangerous to human life." *Bowen v. State*, 640 S.W.2d 929, 931 (Tex.Crim.App. 1982); *see also Nevarez v. State*, 847 S.W.2d 637, 642 (Tex.App.-El Paso 1993) (same).

The following acts have been deemed to be "clearly dangerous to human life":

- The operation of a motor vehicle at a high rate of speed with knowledge that a person was clinging to the door. *Nevarez*, 847 S.W.2d at 642;

- A 200-pound man who uses his fists to beat a two-year-old child in the head and stomach. *Bowen*, 640 S.W.2d at 931-932;

- Beating and burning a nine-month-old child with cigarettes. *Smith v. State*, 268 S.W.2d 144, 146-147 (Tex.Crim.App. 1954);

- Striking another in the head with a blunt instrument. *Depauw v. State*, 658 S.W.2d 628, 633 (Tex.App.-Amarillo 1983, pet. ref.);

- Striking another in the head with a sharp eight-pound instrument. *Teague v. State*, No. 03-10-00434-CR, 2012 Tex.App.LEXIS 1304 (Tex.App.-Houston [1st Dist.] Feb. 16, 2012) (unpublished);

- Shooting numerous times at another vehicle with passengers and killing one because the shooter wanted to show "who was boss." *Edwards v. State*, No. 05-10-00559-CR, 2011 Tex.App.LEXIS 9512 (Tex.App.-Dallas, December 6, 2011) (mem. opinion);

- Holding the victim down while another person hits him with a stick, then kicks and stomps him. *Smith v. State*, No. 05-10-01555-CR,

2012 Tex.App.LEXIS 2323 (Tex.App.-Dallas, March 23, 2012) (mem. opinion); and

- While wearing large, heavy boots, kicking the victim numerous times in the head and abdomen. *Amis v. State*, 87 S.W.3d 582, 587-588 (Tex.App.-San Antonio 2002, no pet.);

An act "clearly dangerous to human life" means there is **no** explanation other than that the defendant intended to kill or intentionally inflict severe bodily injury or death without legal cause, defense, or justification. *Hignett v. State*, 341 S.W.2d 166, 169 (Tex.Crim.App. 1960). (an act "clearly dangerous to human life" is one where **no** adequate cause can explain the action other than a malicious act that is intended to inflict such severe injuries on the target person that death would most likely result). This is **not** what occurred here.

Guyger cites above only a few cases she found, but in none of them was the defendant found guilty of Murder under Tex. Penal Code § 19.02(b)(2) and also acted in a defensive manner as Guyer did. Guyger had more than adequate cause that justified her actions. Shooting at an intruder who is in your home is **not** murder because one has legal

justification to do so. The fact that she was reasonably mistaken about the apartment and the intruder does **not** change this legal conclusion.

When this Court considers all events occurring before, during and after the shooting, the evidence is overwhelming that Guyger reasonably believed she entered her apartment and an intruder was inside. Guyger's motive—a significant circumstance—clearly was that she thought she was shooting an intruder in her home. *Guevara*, 152 S.W.3d at 50. She was frightened and reasonably believed that her life was in danger. **No** other conclusion is rational. Considering all the evidence in the record—whether admissible or inadmissible, *see* *Winfrey*, 393 S.W.3d at 767—Guyger acted reasonably.

Although Guyger was **not** in actual danger, there was **apparent danger** from her standpoint, and Guyger was entitled to use deadly force to protect against this **apparent danger**. *Jones*, 544 S.W.2d at 142; *Hamel*, 916 S.W.2d at 493. Guyger acted on the **reasonable apprehension** of danger as it appeared to her. *Broussard*, 809 S.W.2d at 559. Any other conclusion is mere theorizing or guessing about the meaning of the evidence and is **not** adequate. *Cary*, 507 S.W.3d at 766.

Under *Saxton*, 804 S.W.2d at 913-914, Guyger met her burden of producing evidence supporting self-defense, and the State failed in its burden of persuasion to disprove it and prove beyond a reasonable doubt that Guyger committed Murder under Tex. Penal Code § 19.02(b)(2). The totality of the evidence supports this conclusion. *Vodochodsky*, 158 S.W.3d at 509; *Jackson*, 443 U.S. at 316-319; *Laster*, 275 S.W.3d at 517. Guyger asks this Court to reverse the Judgment and sentence and enter a judgment of acquittal. Tex. Code Crim. Proc. Art. 44.25; Tex. Rule App. Proc. 43.2(c).

Issue 2: In the alternative, Guyger requests that this Court acquit her of Murder, convict her of Criminally Negligent Homicide, and remand for a new hearing on punishment.

Introduction

Guyger incorporates here the arguments in Issue 1. The State never disputed that Guyger approached and entered Jean's apartment in error. The State's arguments—repeated numerous times with little variation—were that Guyger's error was **not** reasonable. Because Guyger was **not** paying attention, the State asserted that she did **not** act reasonably. (RR14.65-66, 72, 117-120, 126, 129, 131-134). Even if correct—and Guyger argues this only in the alternative—at most Guyger was criminally negligent and thus guilty of Criminally Negligent Homicide.

Criminally Negligent Homicide is a lesser-included offense of Murder

Manslaughter and Criminally Negligent Homicide are lesser-included offenses of Murder because they meet the two-part test for an instruction on a lesser-included offense. *Feldman v. State*, 71 S.W.3d 738, 750 (Tex.Crim.App. 2002) (two-part test); Tex. Code Crim. Proc. Art. 37.09 (2018) (statutory test for lesser-included offenses); *Girdy v. State*, 213 S.W.3d 315, 318-319 (Tex.Crim.App. 2006) (Manslaughter is a lesser-

included offense of Murder); *Burnett v. State*, 865 S.W.2d 223, 228 (Tex.Crim.App. 1993) (Criminally Negligent Homicide is a lesser-included offense of Murder).

Guyger did not commit Manslaughter because she did not consciously create the risk

A person commits Manslaughter if she recklessly causes the death of an individual. Tex. Penal Code § 19.04 (2018). Manslaughter is a result-oriented offense, so a defendant's culpable mental state must relate to the result of her conduct. *Schroeder v. State*, 123 S.W.3d 398, 399-401 (Tex.Crim.App. 2003) (It is "difficult to understand how a person may 'consciously disregard' a risk of which he is unaware.").

Reckless conduct requires a person to **consciously disregard** a **substantial and unjustifiable risk** that certain circumstances exist, or the result will occur. Tex. Penal Code § 6.03(c) (2018) (emphasis added). This conscious disregard must be of such a nature and degree that it constitutes a **gross deviation** from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint. *Id.*; *see* *Bowden v. State*, 166 S.W.3d 466, 473-478 (Tex.App.-Fort Worth 2005) [The defendant acted recklessly

because leaving young children alone at night in a room with a blocked window with a burning candle inside a home with only one door and no means of extinguishing a fire was a gross deviation from the standard of care per Tex. Penal Code § 6.03(c)]. As explained in *Lewis v. State*, 529 S.W.2d 550, 553 (Tex.Crim.App. 1975) (emphasis added), reckless and criminally negligent differ because:

> (**reckless conduct** involves) **conscious risk creation**, that is, the actor is aware of the risk surrounding his conduct or the results thereof, but consciously disregards that risk...**criminally negligent conduct**...involves **inattentive risk creation**, that is, the actor ought to be aware of the risk surrounding his conduct or the results thereof. At the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct; the key to criminal negligence is found in the failure of the actor to perceive the risk.

See also *Aliff v. State*, 627 S.W.2d 166, 171 (Tex.Crim.App. 1982) (same) and *Stadt v. State*, 182 S.W.3d 360, 364 (Tex.Crim.App. 2005) (same).

For instance, if a person holds a pistol with a round chambered and without a legitimate reason shoots and kills another, the person acted recklessly because she **consciously created the risk** and was aware of the risk surrounding the conduct—that a person may be shot and killed. *Salinas v. State*, 644 S.W.2d 744, 746 (Tex.Crim.App. 1983);

See also *Robertson v. State*, 109 S.W.3d 13, 14, 21 (Tex.App.-El Paso 2003, no pet.) (defendant had a grand mal seizure and crashed his vehicle into a house, crushing a nine-year-old child. The defendant knew he should **not** have been driving because of his history of past automobile accidents caused by seizures and he misrepresented his medical condition on his driver's license application. He acted recklessly and consciously created the risk of danger); and

Payne v. State, 710 S.W.2d 193, 194 (Tex.App.-Beaumont 1986, no pet.) (defendant was weaving from lane-to-lane while intoxicated and struck and killed a bicyclist on the grassy section. The defendant acted recklessly and consciously created the risk of danger.).

Guyger did **not consciously create the risk** that Jean would be shot and killed. To conclude that she did is **implausible**. Guyger did **not** design the absurd layout of Southside Flats with **no** indicators of what floor one is on—causing many to park on the wrong floor, including even Ranger Armstrong—walk to the wrong apartments, and sometimes enter the wrong apartments. **Nor** did Guyger run the clown-show management that was too incompetent to install strikeplates properly (RR10.43-44, 110-111, 124-127; RR17.DX39-DX43, RR10.110-111, 124-127) and

allowed smelly, toothless men to obtain fobs and enter the apartments of women. (RR12.193).

At most, Guyger was **inattentive** and missed three clues: the vase, Jean's doormat, and a one-off-digit apartment number far above and to the left of the door. As the TCCA observed in *Schroeder*, 123 S.W.3d at 401, it is "difficult to understand how a person may 'consciously disregard' a risk of which he is unaware." Guyger could **not** have been aware of the risk any more than other tenants. Even the State did **not** claim that she was **aware** of this risk. The State merely claimed that her actions leading to Jean's door and after she entered his apartment were "unreasonable" since she was **not** paying attention to her surroundings and should have noticed the clues. Thus, Guyger **cannot** be guilty of Manslaughter.

Guyger at most is guilty of Criminally Negligent Homicide for inattentive risk creation or the failure to perceive the risk

Criminally Negligent Homicide requires **inattentive risk creation** or the **failure to perceive the risk**. Tex. Penal Code § 19.05 (2018); Tex. Penal Code § 6.03(d) (2018) (emphasis added); *Montgomery v. State*, 369 S.W.3d 188, 192-193 (Tex.Crim.App. 2012) (elements of

criminal negligence). The risk must be of a nature and degree that the failure to perceive it is a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's viewpoint. Tex. Penal Code § 6.03(d); *Montgomery*, 369 S.W.3d at 192-193; *Ybarra v. State*, 890 S.W.2d 98, 110 (Tex.App.-San Antonio 1994, pet. ref.) (same).

At most, Guyger committed Criminally Negligent Homicide because the evidence showed beyond a reasonable doubt that: (1) Guyger's shooting Jean caused his death; (2) Guyger should have been aware that there was a substantial and unjustifiable risk of death from her conduct since she did **not** paying close enough attention to her surroundings and missed the clues of the vase, red doormat, and one-digit-off apartment number; and (3) Guyger's failure to perceive the risk was a gross deviation from the standard of care an ordinary person would have exercised under like circumstances. *Montgomery*, 369 S.W.3d at 192-193. Per *Nash v. State*, 664 S.W.2d 343, 344 (Tex.Crim.App. 1984), whether one ought to perceive the risk is based on its character, so Guyger should have been more attentive to her surroundings.

The Court should reverse the Judgment and sentence, acquit Guyger of Murder, convict her of Criminally Negligent, and remand for a new trial on punishment

Criminally Negligent Homicide is a state jail felony [Tex. Penal Code § 19.05(b)] normally punishable by confinement in state jail for **not** more than two years or less than 180 days. Tex. Penal Code § 12.35(a) (2018). If it is shown that "a deadly weapon was used or exhibited during the offense...," the defendant "shall be punished for a third-degree felony." Tex. Penal Code § 12.35(c) (2018). A third-degree felony is punishable by 2-10 years in TDCJ. Tex. Penal Code § 12.34 (2018).

Because Guyger received 10 years in TDCJ, her sentence is at the top of the range for a third-degree felony. However, Guyger is eligible for probation from the jury for Criminally Negligent Homicide per Tex. Code Crim. Proc. Art. 42A.055 (2018) (jury recommended community supervision), and Tex. Code Crim. Proc. Art. 42A.056 (2018), the limitation on jury-recommended community supervision, does **not** apply to Guyger. Thus, this Court should reverse the Judgment and sentence, acquit Guyger of Murder, convict her of Criminally Negligent Homicide, and remand for a new trial on punishment.

XI. Conclusion

Guyger prays that this Court reverse the Judgment and sentence and: (1) per Issue 1, acquit her of Murder; or (2) in the alternative, per Issue 2, acquit her of Murder, convict her of Criminally Negligent Homicide, and remand for a new trial on punishment.

Respectfully submitted,

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XII. Certificate of Service

I certify that on August 4, 2020, this document was served by efile on the Dallas County DA's Office.

/s/ Michael Mowla
Michael Mowla

XIII. Certificate of Compliance

I certify that this document complies with the: (1) type-volume limitations because it is computer-generated and does **not** exceed 15,000 words. The word-count feature of Microsoft Word shows this document contains **14,975** words **except** in the: caption; identity of parties, counsel, and judges; table of contents; table of authorities; statement regarding oral argument; statement of the case, procedural history, and jurisdiction; issues presented; signature; certificate of service; certificate of compliance, and appendix; and (2) typeface requirements because it was prepared using Microsoft Word in 14-point font.

/s/ Michael Mowla
Michael Mowla

Appendix

Overview | [1981] QB 527, | **[1980] 3 All ER 716**, | [1981] 2 WLR 118, 72 Cr App Rep 33, [1980] Crim LR 717, 124 Sol Jo 847

Jaggard v Dickinson [1980] 3 All ER 716

QUEEN'S BENCH DIVISION

DONALDSON LJ AND MUSTILL J

15, 25 JULY 1980

Criminal law — Damage to property — Property belonging to another — Belief of accused — Belief that owner would have consented to damage to property — Belief honestly held but induced by drunkenness — Whether belief induced by drunkenness a defence to charge of damage to property — Criminal Damage Act 1971, s 5(2)(3) .

The appellant, late at night and while drunk, broke two windows and damaged a curtain in another person's house while attempting to break into the house believing it to be the house of a friend in the same street. The two houses were identical and the appellant's relationship with the friend was such that she had his consent to treat his house as if it was her own. The appellant was charged with damaging property belonging to another without lawful excuse, contrary to s 1(1)[a] of the Criminal Damage Act 1971. At the hearing in the magistrates' court she relied on the defence afforded by s 5(2) and (3)[b] of the 1971 Act, namely that she honestly believed that she had a lawful excuse for damaging the property in question because, as a result of her drunkenness, she believed that she was breaking into her friend's house and that he would have consented to her breaking in and causing the damage. The magistrates held that she was not entitled to rely on the defence in s 5(2) because her belief that she had a lawful excuse was induced by her drunkenness. Accordingly they convicted her. She appealed. On the appeal the prosecutor contended that since drunkenness did not negative the mens rea required for an offence under s 1(1), because it was an offence of basic intent, and absence of lawful excuse was an element of that offence, drunkenness could not be relied on to support a defence under s 5(2).

[a] Section 1(1) is set out at p 718 *c d*, post

[b] Section 5, so far as material, is set out at p 718 *e f*, post

Held – Section 5(2) and (3) of the 1971 Act specifically required the court, when deciding whether there was an honest belief that there was lawful excuse to damage property, to consider a defendant's actual state of belief, and that belief could be honestly held within s 5(3) even though it was induced by intoxication. The magistrates were therefore in error in deciding that the appellant could not rely on the defence under s 5(2) because she was drunk. The appeal would therefore be allowed and the conviction quashed (see p 719 *a b e j* and p 720 *a* and *d* to *f*, post). *Director of Public Prosecutions v Majewski*[1976] 2 All ER 142 distinguished.

NotesFor lawful excuse as a defence to a charge of damaging property, see 11 *Halsbury's Laws* (4th Edn) para 1310, and for cases on destroying or damaging property, see 15 *Digest* (Reissue) 1439–1440, *12,690–12,693*.
For the effect of drink as a defence for crime, see 11 *Halsbury's Laws* (4th Edn) para 28, and for cases on the subject, see 14(1) *Digest* (Reissue) 49–54, *232–259*.
For the *Criminal Damage Act 1971, ss 1*, *5*, see 41 *Halsbury's Statutes* (3rd Edn) 409, 412.

Cases referred to in judgments*Director of Public Prosecutions v Majewski*[1976] 2 All ER 142, [1977] AC 443, [1976] 2 WLR 623, 140 JP 315, 62 Cr App R 262, HL, 14(1) *Digest* (Reissue) 54, *258*.
Director of Public Prosecutions v Morgan[1975] 2 All ER 922, [1976] AC 182, [1975] 2 WLR 913, 139 JP 476, 61 Cr App R 136, HL, 15 *Digest* (Reissue) 1212, *10,398*.

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R v O'Driscoll (1977) 65 Cr App R 50, CA, *Digest* (Cont Vol E) 126, *251a*.
R v Smith (David Raymond)[1974] 1 All ER 632, [1974] QB 354, [1974] 2 WLR 20, 138 JP 236, 58 Crim App R 320, CA, 15 *Digest* (Reissue) 1439, *12,690*.
R v Stephenson[1979] 2 All ER 1198, [1979] QB 695, [1979] 3 WLR 193, 143 JP 592, CA, *Digest* (Cont Vol E) 161, *12,692a*.

Case statedThis was a case stated by justices for the County of Essex acting in and for the petty sessional division of Thurrock in respect of their adjudication as a magistrates' court sitting at Grays, Essex.
On 12 October 1978 an information was preferred by the respondent, Detective Chief Inspector James Alexander Dickinson, against the appellant, Beverley Anne Jaggard, that on 11 October 1978 at South Ockendon, Essex, she, without lawful excuse, damaged two window panes and a length of net curtain belonging to Patricia Ann Reven intending to damage them or being reckless whether they would be damaged, contrary to s 1(1) of the Criminal Damage Act 1971.
The magistrates found the following facts. 35 Carnach Green, South Ockendon, which was occupied by Mrs Raven, and 67 Carnach Green, South Ockendon, which was occupied by Ronald Frederick Heyfron, were externally identical properties. The appellant did not know Mrs Raven and had no contact with her prior to the events giving rise to the charge against the appellant. The appellant did know Mr Heyfron and their relationship was such that she had his consent at any time to treat his property as if it was her own. At 10.45 pm on the day of the offence the appellant was in state of self-induced intoxication and ordered a taxi to take her to 67 Carnach Green, Mr Heyfron's property, but the taxi delivered her to 35 Carnach Green, Mrs Raven's property. She entered the garden of 35 Carnach Green and was ordered by Mrs Raven to remove herself. The appellant then broke the window in the hallway of 35 Carnach Green and then broke the window in the back door of the premises, damaging a net curtain, and gained entry to 35 Carnach Green.
The appellant contended that at the time she broke into 35 Carnach Green she had a genuine belief she was breaking into 67 Carnach Green and that her relationship with Mr Heyfron was such that she had his consent to break into 67 Carnach Green, and she relied on s 5(2) of the 1971 Act as affording her a defence to the charge.
The prosecutor contended that she could not rely on the defence in s 5(2) because the damaged property belonged to someone other than Mr Heyfron and because the appellant was in a state of self-induced intoxication.
The magistrates were of the opinion that the appellant believed she was breaking into 67 Carnach Green but that this belief was not a genuine and honest mistake because it was induced by a state of intoxication. Accordingly, they convicted the appellant, fined her £20 and ordered her to pay costs of £10·4355 to the prosecutor.
The question for the opinion of the High Court was whether the magistrates were right in deciding that a defendant charged with an offence under s 1 of the 1971 Act could not rely on the defence afforded by s 5 of that Act if the belief relied on was brought about by a state of self-induced intoxication.

Nigel Lithman for the appellant.

Andrew Collins for the respondent.

Cur adv vult

25 July 1980. The following judgments were delivered.
MUSTILL J
(delivering the first judgment at the invitation of Donaldson LJ). On 21 March 1979 the appellant was convicted by the justices for the County of Essex on a charge of damaging property contrary to s 1(1) of the Criminal Damage Act 1971. She now appeals to this court by way of case stated.

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The facts set out in the case are short but striking. On the evening of 12 October 1978 the appellant had been drinking. At 10.45 pm she engaged a taxi to take her to 67 Carnach Green, South Ockendon, a house occupied by Mr R F Heyfron, a gentleman with whom she had a relationship such that, in the words of the magistrates, she had his consent at any time to treat his property as if it was her own. Alighting from the taxi, she entered the garden but was asked to leave by a Mrs Raven who was a stranger to her. Persisting, she broke the glass in the hallway of the house. She then went to the back door where she broke another window and gained entry to the house, damaging a net curtain in the process. At some time thereafter, in circumstances not described by the magistrates, it became clear that the house was not 67 Carnach Green but 35 Carnach Green, a house of identical outward appearance, occupied by Mrs Raven. The magistrates have found that the appellant did believe that she was breaking into the property of Mr Heyfron but that this mistake was induced by a state of self-induced intoxication.
In these circumstances, the respondent prosecuted the appellant for an offence under s 1(1) of the 1971 Act which reads as follows:

> 'A person who without lawful excuse destroys or damages any property belonging to another intending to destroy of damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.'

At the hearing before the magistrates the appellant relied on the following provisions of s 5 of the Act:

> '(2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—*(a)* if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances …
> '(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held … '

It is convenient to refer to the exculpatory provisions of s 5(2) as if they created a defence whilst recognising that the burden of disproving the facts referred to by the subsection remains on the prosecution. The magistrates held that the appellant was not entitled to rely on s 5(2) since the belief relied on was brought about by a state of self-induced intoxication.
In support of the conviction counsel for the respondent advanced an argument which may be summarised as follows. (i) Where an offence is one of 'basic intent', in contrast to one of 'specific intent', the fact that the accused was in a state of self-induced intoxication at the time when he did the acts constituting the actus reus does not prevent him from possessing the mens rea necessary to constitute the offence: see *Director of Public Prosecutions v Morgan*[1975] 2 All ER 922, [1976] AC 182, *Director of Public Prosecutions v Majewski*[1976] 2 All ER 142, [1977] AC 443. (ii) Section 1(1) of the 1971 Act creates an offence of basic intent: see *R v Stephenson*[1979] 2 All ER 1198, [1979] QB 695. (iii) Section 5(3) has no bearing on the present issue. It does not create a separate defence, but is no more than a partial definition of the expression 'without lawful excuse' in s 1(1). The absence of lawful excuse forms an element in the mens rea: see *R v Smith*[1974] 1 All ER 632 at 636, [1974] QB 354 at 360. Accordingly, since drunkenness does not negative mens rea in crimes of basic intent, it cannot be relied on as part of a defence based on s 5(2).
Whilst this is an attractive submission, we consider it to be unsound, for the following reasons. In the first place, the argument transfers the distinction between offences of specific and of basic intent to a context in which it has no place. The distinction is

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material where the defendant relies on his own drunkenness as a ground for denying that he had the degree of intention or reclessness required in order to constitute the offence. Here, by contrast, the appellant does not rely on her drunkenness to displace an inference of intent or recklessness; indeed she does not rely on it at all. Her defence is founded on the state of belief called for by s 5(2). True, the fact of the appellant's intoxication was relevant to the defence under s 5(2) for it helped to explain what would otherwise have been inexplicable, and hence lent colour to her evidence about the state of her belief. This is not the same as using drunkenness to rebut an inference of intention or recklessness. Belief, like intention or recklessness, is a state of mind; but they are not the same states of mind.
Can it nevertheless be said that, even if the context is different, the principles established by *Majewski* ought to be applied to this new situation? If the basis of the decision in *Majewski* had been that drunkenness does not prevent a

person from having an intent or being reckless, then there would be grounds for saying that it should equally be left out of account when deciding on his state of belief. But this is not in our view what *Majewski* decided. The House of Lords did not conclude that intoxication was irrelevant to the fact of the defendant's state of mind, but rather that, whatever might have been his actual state of mind, he should for reasons of policy be precluded from relying on any alteration in that state brought about by self-induced intoxication. The same considerations of policy apply to the intent or recklessness which is the mens rea of the offence created by s 1(1) and that offence is accordingly regarded as one of basic intent (see *R v Stephenson)*. It is indeed essential that this should be so, for drink so often plays a part in offences of criminal damage, and to admit drunkenness as a potential means of escaping liability would provide much too ready a means of avoiding conviction. But these considerations do not apply to a case where Parliament has specifically required the court to consider the defendant's actual state of belief, not the state of belief which ought to have existed. This seems to us to show that the court is required by s 5(3) to focus on the existence of the belief, not its intellectual soundness; and a belief can be just as much honestly held if it is induced by intoxication as if it stems from stupidity, forgetfulness or inattention.

It was, however, urged that we could not properly read s 5(2) in isolation from s 1(1), which forms the context of the words 'without lawful excuse' partially defined by s 5(2). Once the words are put in context, so it is maintained, it can be seen that the law must treat drunkenness in the same way in relation to lawful excuse (and hence belief) as it does to intention and recklessness, for they are all part of the mens rea of the offence. To fragment the mens rea, so as to treat one part of it as affected by drunkenness in one way and the remainder as affected in a different way, would make the law impossibly complicated to enforce.

If it had been necessary to decide whether, for all purposes, the mens rea of an offence under s 1(1) extends as far as an intent (or recklessness) as to the existence of a lawful excuse, I should have wished to consider the observations of James LJ, delivering thejudgment of the Court of Appeal in *R v Smith*[1974] 1 All ER 632 at 636, [1974] QB 354 at 360. I do not however find it necessary to reach a conclusion on this matter and will only say that I am not at present convinced that, when these observations are read in the context of the judgment as a whole, they have the meaning which the respondent has sought to put on them. In my view, however, the answer to the argument lies in the fact that any distinctions which have to be drawn as to the relevance of drunkenness to the two subsections arises from the scheme of the 1971 Act itself. No doubt the mens rea is in general indivisible, with no distinction being possible as regards the effect of drunkenness. But Parliament has specifically isolated one subjective element, in the shape of honest belief, and has given it separate treatment and its own special gloss in s 5(3). This being so, there is nothing objectionable in giving it special treatment as regards drunkenness, in accordance with the natural meaning of its words.

In these circumstances, I would hold that the magistrates were in error when they decided that the defence furnished to the appellant by s 5(2) was lost because she was drunk at the time. I would therefore allow the appeal.

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DONALDSON LJ.

I agree, but in deference to the very careful arguments with which we have been assisted in this case, I would like to express my own view, albeit briefly.

As I understand the law as expounded in *R v Majewski*[1976] 2 All ER 142, [1977] AC 443, where self-induced intoxication in fact deprives an accused person of the mental ability to form a relevant intent but otherwise the essential ingredients of the offence are proved, his liability to conviction will depend on whether the relevant intent was a general, or basic, intent or a specific intent. If only a general or basic intent is required, the effects of the intoxication cannot be relied on. Aliter, if a specific intent is required. The distinction between a general, or basic, intent and a specific intent is that, whereas the former extends only to the actus reus, a specific intent extends beyond it.

The actus reus in s 1(1) of the Criminal Damage Act 1971 consists of destroying or damaging the property of another and the mens rea, consisting of an intent or recklessness and absence of lawful excuse, is co-extensive (see *R v Smith*[1974] 1 All ER 632 at 636, [1974] QB 354 at 360 per James LJ). Accordingly this is a crime of basic intent and was so held in *R v O'Driscoll* (1977) 65 Cr App R 50 at 55, where Waller LJ also pointed to the contrast between s 1(1) and s 1(2), where a further and specific intent was required, namely an intent by the criminal damage to endanger the life of another.

If, therefore, the 1971 Act had not contained s 5 there would be no problem. The appellant would have been rightly convicted. The question for us, and so far as I know it is a completely novel question, is whether s 5 makes any difference.

The law in relation to self-induced intoxication and crimes of basic intent is without doubt an exception to the general rule that the prosecution must prove the actual existence of the relevant intent, be it basic or specific (see *R v Stephenson*[1979] 2 All ER 1198 at 1204, [1979] QB 695 at 704 per Geoffrey Lane LJ). And in s 5 Parliament has

very secifically extended what would otherwise be regarded as 'lawful excuse' by providing that it is immaterial whether the relevant belief is justified or not provided that it is honestly held. The justification for what I may call the *Majewski* exception, although it is much older than that decision, is said to be that the course of conduct inducing the intoxication supplies the evidence of mens rea (see *[1976] 2 All ER 142* at *150*–151, [1977] AC 443 at 474–475) per Lord Elwyn-Jones LC. It seems to me that to hold that this substituted mens rea overrides so specific a statutory provision involves reading s 5(2) as if it provided that 'for the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held provided that the honesty of the belief is not attributable only to self-induced intoxication'. I cannot so construe the section and I too would therefore allow the appeal.

Appeal allowed. Conviction quashed.

The court refused leave to appeal to the House of Lords but certified under *s 1(2)* of the Administration of Justice Act 1960 that the following point of law of general public importance was involved in the decision: whether it is a defence to a charge under *s 1(1)* of the Criminal Damage Act 1971 that a defendant, as a result of self-induced intoxication, has an honest belief that a state of affairs exists that in all other respects constitutes a lawful excuse within s 5(2)*(a)* and (3) of that Act.

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