The State requests oral argument

No. 72,795

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

AT AUSTIN

DARLIE LYNN ROUTIER,

APPELLANT

v.

THE STATE OF TEXAS,

APPELLEE

On appeal from the Criminal District Court No. 3 of Dallas County, Texas

In Cause No. F96-39973-J,

on change of venue to Kerr County, Texas

In Cause No. A-96-253

STATE'S BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas submits this brief in reply to the brief of Appellant.

STATEMENT OF THE CASE

Appellant was indicted for the capital murder of her son Damon Routier, a child under six years of age, in cause no. F96-39973-J. On Appellant's motion, venue of the trial was changed to Kerr County under cause no. A-96-253. Appellant was convicted of the charged offense after a jury trial. (CR: 4). The trial court assessed punishment at death in accordance with the jury's answers to the special issues submitted under article 37.071 of the Code of Criminal Procedure. (CR: 220-21). Direct appeal to this Court was automatic.

STATEMENT OF FACTS

Appellant does not challenge the sufficiency of the evidence to sustain the conviction. The evidence and inferences, viewed in the light most favorable to the verdict, show that in the early morning hours of June 6, 1996, police and fire units were dispatched in response to a stabbing call at 5801 Eagle Drive in Rowlett, Dallas County, Texas. (RR.29: 294-95; 296-97; 299). The initial responders found Appellant's oldest two children, Damon and Devon, stabbed and bloodied in the living room of her home. (RR.29: 308-310; 314). Appellant had wounds to her neck and arms. (RR.28: 125-26; 129; RR.32: 1480). Appellant's husband, Darin, was trying to assist one of his sons, Damon. (RR.28: 311-12). Devon was already dead. (RR.32: 1477-78). Damon was transferred to Baylor Hospital of Dallas where he was pronounced dead. (RR.32: 1433-37; RR.30: 716-19; RR.31: 848). Appellant was also transferred to Baylor where she underwent exploratory surgery for her neck wound. (RR.30: 719). The treating surgeons found that Appellant's neck wound was superficial, but she was transferred to the Intensive Care Unit because of the deaths of her children and to protect her from the news media. (RR.30: 723-26; 737-38; R.31: 854).

While Appellant was at the hospital, the Rowlett Police Department began its investigation of the offense. Appellant initially reported that a man had stabbed her and her children, she had chased him from the house into the garage, and that the man dropped the knife in the house. (RR.29: 316-20; 323). The responding officers checked the house for intruders and secured the crime scene. (RR.29: 326-32; 471-79). The officers noticed broken glass and blood on the kitchen floor and found a cut screen on an open window in the garage. (RR.29: 330; 478-479). A search of the surrounding neighborhood uncovered a bloodstained sock in the alley three houses down from the crime scene, but no other evidence of the offense. (RR.32: 1260; 1265; 1271; 1387).

James Cron, an expert crime scene investigator, walked through the crime scene with Rowlett officers later on the morning of the offense. (RR.34: 2143-49; 2156-83; RR.33: 1603; RR.32: 1391). Cron's initial impression of the crime scene was that there was no intruder. (RR.34: 2196-97; RR.35: 2420-28). Fragile items in the living room were relatively undisturbed, undamaged, and unbloodied. (RR.34: 2159-68). There was no blood in the garage, and the dust on the windowsill was undisturbed where the intruder allegedly escaped into the back yard. (RR.34: 2172-80). The mulch outside the window appeared undisturbed, and there was no blood or evidence of forced entry or exit on the gate leading from the back yard. (RR.34: 2190; 2192; 2187-89). A vacuum cleaner and broken glass lay atop bloody footprints in the kitchen. (RR.34: 2167; 2217-18). Moreover, it appeared that someone had rolled the vacuum cleaner through the blood on the floor. (RR.34: 2218-19). Finally, blood found in the utility room—one of the locations where Appellant claimed she found the knife—was inconsistent

with blood deposited from a dropped knife or by a running person. (RR.35: 2279-82).

A neighbor mentioned the Routier's financial situation to the police. (RR.32: 1399-1400). Documents recovered from the room where the murders occurred included life insurance policies on the dead boys. (RR.33: 1751; 1756). Documents recovered from the trash included a letter showing that Appellant's American Express account was $964 overdue and that her mortgage was two months past due. (RR.33: 1681; RR.42: 4358; RR.43: 4510; SX 83A; SX. 83B). Later, investigators learned that the Routiers were turned down for a $5000 vacation loan due to excessive debt and delinquent accounts only five days before the murders. (RR.34: 2120-29).

The staff at the hospital believed Appellant acted strangely. (RR.30: 747-51). Appellant had a flat affect, while most mothers who had recently lost children were hysterical. (RR.30: 747-51; RR.31: 1041-43; 932-34; RR.32: 1209-10). The visible wounds on Appellant's forearm and hand did not appear to be typical defensive wounds, but could have been self-inflicted. (RR.30: 753-61; RR.28: 132-33). Appellant described the events at her home to several different nurses at the hospital, but her various accounts contained major discrepancies regarding the number of alleged assailants, how she awoke, and where she found the knife. (RR.31: 895-97; 923; 982-83; 1029-30; RR.32: 1206-07). None of the hospital staff noticed severe blunt trauma injuries to Appellant's arms. (RR.30: 769-70;RR.31: 935-37; 1038-40; 1100-1102; 1163; RR.32: 1212-14). Photographs dated four days after the offense, however, showed Appellant with severe bruising on her arms that could only have been caused by readily apparent, severe blunt trauma injuries received within the prior 24 to 48 hours, at least two days after the offense. (RR.30: 765-68; RR.31: 935-37; 1037-40; 1099-1102; 1161-63; RR.32: 212-13).

Appellant also told different stories to her friend Barbara Jovell. First, she told Jovell that she awoke when she heard Damon say "Mommy Mommy," and a man was on top of her stabbing at her throat. (RR.36: 2564-65). Later, she told Jovell that the man was rubbing the knife on her face and "looked like he enjoyed it." (RR.36: 2568). Jovell was also present at a bizarre "birthday party" held at Devon's grave on June 14, 1996. (RR.36: 2570-71). A news crew videotaped the family as they sang songs and played with Silly String, laughing, over the dead boys' graves. (RR.36: 2572-75; SX 101). The jury watched the videotape of the "party." (RR.36: 2572-75; SX 101). Jovell also testified that Appellant attempted to commit suicide about a month before the murders. (RR.36: 2551-53). After Appellant was arrested, she told Jovell not to speak to investigators from the District Attorney's office. (RR.36: 2578-79).

The forensic investigation continued after Appellant was arrested and charged with the murders of her sons. Analysis of the kitchen sink by forensic serologist Kathryn Long showed seven distinct blood stains that appeared "washed out," consistent with someone washing blood off their hands. (RR.36: 270-10). A blood transfer stain was on the bottom of the cabinet handle beneath the kitchen sink—the stain could not have been caused by blood dripping from above, but was consistent with someone with blood on her hand opening the cabinet. (RR.36: 2712-13). A streak that tested positive for blood was located *inside* the cabinet door beneath the kitchen sink. (RR.36: 2715-16) Cleaning products were stored inside the cabinet beneath the kitchen sink. (RR.36: 2715).

Trace evidence analyst Charles Linch found several cuts in Appellant's nightshirt that did not correspond to the wounds she suffered. (RR.37: 2889-90). Linch also analyzed the window screen allegedly cut by the intruder to enter the house. (RR.37: 2896-2904). The screen was

constructed of fiberglass coated with rubber. (RR.37: 2896-97). One of the knives from the knife block in Appellant's kitchen was covered in debris consistent with the fiberglass and rubber from the screen. (RR.37: 2905-28; SX. 117). Robert Poole a firearm and toolmark examiner, determined that the knife that caused one of Devon's wounds had characteristics similar to the butcher knife from the knife block in Appellant's kitchen that she had identified as the murder weapon dropped by the "intruder." (RR.38: 3098-99). DNA testing on the sock found in the alley showed that the bloodstains contained the DNA of both victims, but not that of Appellant. (RR.38: 3127; 3175). The toe of the sock contained faint traces of Appellant's DNA, consistent with skins cells shed in the sock if worn by Appellant. (RR.38: 3128-29).

Tom Bevel, an expert in crime scene and blood spatter analysis with 25 years' experience, examined the crime scene and evidence, reviewed the reports of other experts, and conducted tests. (RR.38: 3223-31). Bevel examined the bloodstains in the locations where Appellant claimed she picked up the knife—the utility room and living room. (RR.38: 3285-3301). Bevel conducted a test in which he dropped a blood knife from wait height onto the utility room floor. None of the bloodstains found in the utility room were consistent with the stains generated by Bevel's test. (RR.38: 3285-97). Bevel conducted a similar test in the living room, again, none of the stains found were consistent with the stains generated by Bevel's drop tests, but one stain was consistent with the bloody murder weapon being *laid* onto the carpet. (RR.38: 328-3301).

The vacuum cleaner had bloodstains on the handle consistent with someone grasping the handle with a bloody hand. (RR.38: 3802). Some portions of the vacuum cleaner had bloodstains consistent with low velocity blood dripping onto it while it was upright, while other portions had stains consistent with low velocity blood dripping onto it while it was lying on its side on the floor. (RR.38: 3302-06). The kitchen floor showed "roll marks" caused by the wheels of the vacuum cleaner soon after blood was deposited on the floor. (RR.38: 3307). The roll marks went in opposing directions, consistent with someone picking up the vacuum cleaner and rolling it in different directions through the blood on the floor shortly after the blood was deposited. (RR.38: 3308-12).

Bevel also examined the sock recovered in the alley. (RR.39: 3333-34). The stains could not have been deposited on the sock if a perpetrator were wearing the sock on his foot while wearing shoes. (RR.39: 3335). Similarly, the stains were inconsistent with a perpetrator wearing the sock on his hand as a glove during the offense because none of Appellant's blood was found on the sock. (RR.39: 3336-38).

Bevel also examined two small bloodstains found on the upper right shoulder area of Appellant's blood-soaked nightshirt. (RR.39: 3340). One stain was a combination of Damon's and Appellant's blood, and was consistent with blood being cast off of the knife as Appellant raised the knife in order to stab Damon while kneeling over him. (RR.39: 3344; 3347). The other stain was a combination of Devon's and Appellant's, blood and was consistent with blood being cast off as Appellant raised the knife to stab Devon another time while kneeling over him. (RR.39: 3344; 3345-46). Bevel also examined two small stains on the left shoulder of the nightshirt. (RR.39: 3348). One was a mixture of Damon's and Appellant's blood, and was consistent with being cast off as the knife was on the down stroke of a stab. (RR.39: 3348-50). The other left-shoulder stain was a combination of Devon's and Appellant's blood, and was consistent with being cast off during an upstroke before a stab. (RR.39: 3352). Finally, Bevel examined a small stain on the back of the shirt that consisted

only of Damon's blood. (RR.38: 3130-32; SX. 122). This stain was consistent with being cast off as the knife was raised up over Appellant's head. (RR.39: 3354-56). Bevel was able to recreate similar stains through testing where he kneeled down and moved a bloody knife up and down as if stabbing into a victim. (RR.39: 3356-63).

Alan Brantley, a Special Agent and psychologist assigned to the FBI National Center for the Analysis of Violent Crimes, reviewed the investigative reports, crime scene photographs, and witness statements. (RR.40: 3655-61) In his opinion, the boys were killed by someone they knew well, and the crime scene was staged. (RR.40: 3661). Factors that supported this opinion included:

· The absence of similar crimes in the area; (RR.40: 3662-63)

· That the area was generally a low-crime area; (RR.40: 3663)

· The crime scene was "high risk" for a criminal, because other houses were nearby, lights were on, a car was visible in front of the house, and the house was on a cul de sac; (RR.40: 3663-66)

· The alleged point of entry—the window—was intimidating because of the animal cage immediately inside the garage; (RR.40: 3667-70)

· Window screens are normally removed during crimes rather than cut; (RR.40: 3671-72)

· The route through the garage was risky in the dark; (RR.40: 3672)

· The initial focus on the children was unusual and risky given the presence of an adult; (RR.40: 3673)

· The children's wounds were dramatically different in type and severity from Appellant's wounds; (RR.40: 3673; 3678).

· Appellant's statements that she chased the intruder out was inconsistent with typical violent crimes due to the disparity in her size and the described size of the alleged intruder; (RR.40: 3673-74)

· Dropping a weapon while fleeing is risky and inconsistent with most reported crimes; (RR.40: 3674)

· The location of the sock was inconsistent with a real crime because it was in the opposite direction of the exit from the cul de sac; (RR.40: 3675)

· The children were low risk victims due to their ages and place in society, yet appeared to be the object of the attack, thus suggesting a personal motive for the attack; (RR.40: 3676-77)

· The attack appeared to be a personal assault because there were no indications of theft or robbery; (RR.40: 3676)

· The maximum damage to the children but minimum damage to property inside the

home suggested a proprietary interest in the contents of the home; (RR.40: 3679)

· The minimal damage in the living room or "Roman Room" was inconsistent with a struggle between two adults; (RR.40: 3680-81; 3682-86)

· The position of the vacuum cleaner on top of blood stains suggests deliberate placement; (RR.40: 3681-82; 3688)

· The absence of blood in the garage escape route; (RR.40: 3682; 3690)

· The presence of window screen debris on a knife from *inside* the house; (RR.40: 3690-91)

· The use of two knives from the same knife block inside the house in committing the offense was inconsistent because most offenders carry weapons with them to crime scenes; (RR.40: 3691-93)

· The placement of one of the knives back into the knife block suggests a proprietary interest; (RR.40: 3691-93)

· Jewelry was in plain view in the house but left undisturbed. (RR.40: 3694-95)

· The killing of the children was inconsistent with a sexual assault attack because children are usually used as leverage to control the object of the sexual assault; (RR.40: 3695-97)

Appellant presented testimony from family members and friends who generally described her as a good mother who was not depressed and who grieved "appropriately" for her dead children. (RR.40: 3801-04; 3811-12; 3839-40; 3890-92; RR.41: 3929-35; 3966-70; 4000; 4006-07; 4225; 4265). Some of Appellant's friends and family testified that they saw bruising on her arms in the hospital. (RR.40: 3808; 3893-94; RR.41: 3967-68; 4001-03; RR.42: 4323). Appellant presented testimony about an attempted burglary in Rowlett on the night of the murders. (RR.42: 4194-98). Darin Routier disputed the State's evidence that the family was in financial difficulty, but admitted that his business had slowed, he was behind on his taxes, was behind on his office rent, and had large credit card debts. (RR.42: 4248-57; 4354-56; 4364; RR.43: 4445).

Appellant presented expert testimony from medical examiner Vincent Dimaio, that her wounds were consistent with defensive wounds and inconsistent with self-inflicted wounds. (RR.43: 4528-52). Dimaio agreed with the State's suggestion, however, that the bruises on Appellants arms could have been caused by trauma inflicted after she left the hospital. (RR.43: 4577-81). Dimaio also testified that he did not believe a person could sleep through the knife attack or a blunt trauma sufficient to cause the arm bruises. (RR.43: 458-90). Appellant presented expert testimony from psychiatrist Lisa Clayton that she did not fit into the "categories" of mothers who kill their children. (RR.43: 4615-45). Clayton believed that Appellant suffered from "traumatic amnesia" due to the attack. (RR.43: 4647-56).

Appellant tesitified in her own defense. (RR.44: 4789). Appellant claimed that she woke when Damon said "mommy mommy." (RR.44: 4868). Appellant saw a man walking away, and heard glass breaking. (RR.44: 4868). She followed the man and saw him walk into a

utility room. (RR.44: 4868). She stopped to turn on the lights, then saw a knife on the floor of the utility room. (RR.44: 4868-69). According to Appellant, she picked up the knife, and took it into the kitchen. (RR.44: 4869). Then, she walked into the living room, saw Devon on the floor, and began screaming. (RR.44: 4869-70). She called 911. (RR.44: 4870-71). She made trips into the kitchen to get towels, which she wet at the sink before returning to the living room. (RR.44: 4870-71). She put towels on Damon's back and Devon's chest, while Darin performed CPR on Devon. (RR.44: 4872-73). Appellant claimed she used the vacuum cleaner like a cane to support herself, and that she took the vacuum cleaner with her when Officer Waddell ordered her to sit down. (RR.44: 4874; 4876-77). Appellant did not take the vacuum cleaner into the kitchen. (RR.44: 4877).

During cross-examination, Appellant testified that Darin did not commit the murders. (RR.44: 4921-23). She also admitted that Glenn Mize—whom she had identified as a suspect—did not commit the murders after she viewed him in open court with Detective Frosch. (RR.44: 4938-42). She did not believe she could sleep through the stabbings of her children and the attack on herself—instead, she felt that she could not remember the attacks. (RR.44: 4927-35).

Appellant also did not remember making her many inconsistent statements to the nurses and staff of the hospital. (RR.44: 4970-72; 4973-79). Appellant admitted, however, that she had called in to a radio program after her arrest and stated "she knew what happened in the house that night." (RR.44: 5000-01). Appellant also admitted that she had written letters to friends and family in which she claimed that she knew who committed the murders. (RR.44: 5002-14). In fact, Appellant had identified both Glenn Mize and Gary Austin as the intruder even though she testified that she did not remember the attacks. (RR.44: 5003; 5004; 5005; 5007; 5012; 5013; 5014).

In rebuttal, the State called Bill Parker, a retired homicide detective who interviewed Appellant for the Rowlett Police Department after her arrest for three hours. (RR.45: 5054-66; 5071-73). During the interview, Appellant never denied killing her children. (RR.45: 5065-66). Parker confronted her several times with his belief that she had killed her children. (RR.45: 5065-66). Each time she replied: "If I did it, I don't remember." (RR.45: 5065-66).

Appellant presented rebuttal testimony from psychiatrist Richard Coons. (RR.45: 5122). Coons, who only reviewed crime scene photographs, testified that the quality and intensity of memory decreases as the level of trauma to an observer increases. (RR.45: 5129-32; 5164-66). A sufficient level of trauma could cause disassociation, in which a person simply does not experience something that would be overwhelming. (RR.45: 5131-32) Disassociation can lead to "snapshot" recall of a traumatic event, where only certain periods are remembered. (RR.45: 5132-33). The disassociated person is susceptible to suggestions in trying to fill-in gaps in memory. (RR.45: 5134-38; 4139-42). In Coons's opinion, a person subjected to Appellant's assumed facts could be suffering from disassociation and could have been awake during a traumatic event even though they have no memory of the event. (RR.45: 5142-46).

On cross-examination, Coons admitted that a forensic psychiatrist reviewing a case like this one would have to be cautious of malingering when evaluating the defendant. (RR.45: 5167-68). Evidence of a staged crime scene and disparity between the injuries of the defendant and victims would increase his level of caution. (RR.45: 5168; 5178-79). Coons agreed that the open-ended questions asked of Appellant by the detectives were not suggestive. (RR.45: 5172-73). Coons also agreed that many of the things remembered by Appellant were very

traumatic. (RR.45: 5175-78).

The jury deliberated for 10 hours and found Appellant guilty as charged in the indictment. (RR.46: 5354-5359; RR.47: 5368-5371).

SUMMARY OF ARGUMENT

In Point of Error 1, Appellant claims that she is entitled to a new trial because her lead trial counsel, Douglas Mulder, had a conflict of interest because he briefly represented her husband, Darin Routier, at a show cause hearing months before trial. Appellant also claims that she is entitled to a new trial because the trial court did not sua sponte convene a hearing and investigate whether Mulder had a conflict of interest. The record demonstrates that no conflict of interest existed. Rather, the record demonstrates that, at most, Darin and Mulder had a fleeting, informal relationship that was unrelated to the merits of the case. Darin has never been charged in the offense, and no evidence adduced at trial implicated him in the charged offense. Darin was not a State's witness during the trial, and his testimony strongly supported the defense. Appellant testified that Darin did not commit the offense. Finally, Appellant's counsel assured the trial court that there was no conflict of interest, and Appellant had four other attorneys assisting her during the trial. Thus, the record fails to show that Mulder had an actual conflict of interest that adversely affected his performance. Likewise, the record does not show that the trial court was aware of a "particular conflict" it should have investigated.

In Point of Error 2, Appellant claims that she is entitled to a new trial because a potion of the reporter's record has been lost or destroyed since 54 pages of the record were not certified by the court reporter. Appellant also claims that a hearing regarding the alleged conflict of interest has been lost. The record demonstrates that none of the court reporter's notes have been lost or destroyed. Moreover, a transcription of the 54 pages that accurately sets out the contents of the underlying notes is in the record. As such, the transcription of those pages meets the certification test applicable when one court reporter transcribes notes for another court reporter. The 54 pages are a minute portion of the 10,000+ page record in this case and therefore do not constitute a significant portion of the record. Finally, the 54 pages are not necessary to the appeal because the record otherwise demonstrates that the events recorded in those pages could not be successfully appealed.

In Point of Error 3, Appellant claims that she is entitled to a new trial because the reporter's record does not comply with the Rules of Appellate Procedure and cannot be corrected. This Court abated this cause to the trial court so that the reporter's record could be made to conform to the events that occurred at trial. Hearings held in the trial court revealed that the original court reporter had not completed editing her record prior to filing it in this Court. The trial court appointed a new court reporter, who completed the editing process using the original reporter's notes, edit discs, and audio tapes. The record and case authority reveal that the process used is acceptable practice.

In Points of Error 4 and 5, Appellant claims that the trial court violated rule 34.6(e)(2) of the Rules of Appellate Procedure and her due process rights by denying her a fourth evidentiary hearing regarding the reporter's record while the case was abated to the trial court. Appellant identified no fact issues that that could not be resolved from the records before the trial court, nor did she make proffers of relevant evidence outside the record that the trial court needed to consider in order to completing its task. The appellate rule does not specify what process a

trial court must use when resolving record disputes. Thus, the trial court was not required to convene a hearing and produced a record that correctly reflected the events that occurred at trial

In Points of Error 6 and 7, Appellant claims that the trial court violated Rule 613 of the Rules of Criminal Evidence and her due process rights by excluding the testimony of an impeachment witness, her investigator, who was present in the courtroom for the entire trial. The record demonstrates that the trial court did not abuse its discretion because defense counsel knew their investigator was in court and because they were aware of his status as a potential impeachment witness. The investigator's testimony was not critical to the defense because three of Appellant's attorneys could have testified in his place. Moreover, whether provided by the investigator or one of her attorneys, the impeachment testimony would have been of minimal value. Similarly, Appellant's due process rights do not allow her to flagrantly violate state procedural rules.

In Points of Error 8, 9, and 10, Appellant claims that the trial court erred in determining that a juror was disabled due to the flu without conferring with the parties and without eliciting evidence from the parties on the extent of the illness. Appellant did not have constitutional right to be present when the trial court determined the juror was disabled. Moreover, Appellant has not established a violation of article 36.29 of the Code of Criminal Procedure. The Code does not specify what sort of evidence must be received, nor does it specify that a hearing must be held where the defendant and counsel are present. The record demonstrates that the trial court had a sufficient basis to determine the juror was disabled. Appellant never produced evidence showing that the juror was not disabled. Indeed, the trial court admitted a letter from the juror's doctor, without objection from the defense, supporting the ruling. Moreover, the record demonstrates that Appellant was not harmed because she had a jury of twelve jurors selected by her counsel. Appellant had no right for her cause to be decided by a particular juror.

In Points of Error 11, 12, and 13, Appellant claims that the trial court violated articles 36.27 and 33.03 of the Code of Criminal Procedure and her due process rights by providing the jury with an inaccurate transcription of testimony in her absence. These claims are not presented for review because Appellant's counsel affirmatively waived her presence when the trial court answered the jury's note and provided the transcription. Appellant did not have a right to be present that could not be waived by counsel. Moreover, the record demonstrates that Appellant was not harmed because there were no material differences between the transcription provided to the jury and the transcription ultimately appearing in the reporter's record.

In Point of Error 14, Appellant claims that the trial court erred when it refused to consider her bill of exception filed after the trial court forwarded its last supplemental record to this court. The record demonstrates that the supplemental record was filed in this court on the same day that Appellant filed her bill of exception. Thus, the trial court lacked jurisdiction to act on the bill and correctly refused to do so. In any event, Appellant was not harmed because the contents of the bill are generally reflected elsewhere in the record and do not support any of her claims on appeal.

ARGUMENT

RESPONSE TO POINT OF ERROR 1

In Point of Error 1, Appellant claims that she was denied effective assistance of counsel because of a conflict of interest between Appellant and her lead counsel, Douglas Mulder, due to his representation of Darin Routier. Appellant also claims that the trial court erred by failing to sua sponte convene a hearing regarding the conflict of interest.

The record of this case demonstrates that Appellant's counsel did not have a conflict of interest. Specifically, the record and the Appellant's motion to substitute counsel demonstrate that her lead counsel, Doug Mulder, did not have a formal attorney-client relationship with Darin and that, even if he did, Mulder was not actively representing conflicting interests at the time of trial. The only record evidence regarding any representation of Darin by Mulder is from a pretrial show cause hearing that was held in response to the filing of the State's "Notice of Violation of Court's Gag Order." At the hearing, the following dialogue occurred:

THE COURT: Mr. Mulder, you represent Ms. Kee *for the purposes of this hearing only*; is that correct?

MULDER: *Yes, sir*.

* * *

THE COURT: So, Mr. Mulder, it's my understanding *for this hearing*, you are representing both Darlie Kee and Darin Routier?

MULDER: Yes, sir.

THE COURT: You are retained to represent them; is that correct?

MULDER: *I am retained by Ms. Kee to represent her and she has asked me to represent Darin as well, I didn't know until this morning*.

THE COURT: Is that correct, Ms. Kee?

MULDER: Judge, I had asked Mr. Parks if he represented him and he said he didn't think he could, so *I just volunteered to represent him*.

(RR. 8:7-8) (emphasis added). At the time of the show cause hearing, Mulder was not representing Appellant; she had three court-appointed attorneys.

Approximately one month later, on the first day of general voir dire, Mulder requested to be substituted in as Appellant's retained counsel, along with three other retained attorneys. At that time, he explained to the judge that, in addition to representing Appellant, he was continuing to represent Appellant's mother, Darlie Kee, as a "consultant." (RR. 10:10). The fact that Mulder did not say anything about representing Darin or his brief representation of Darin causing a conflict, demonstrates that they did not then have an attorney-client relationship. "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises . . . . " *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) .

Thus, the record demonstrates that Mulder was simply representing Darin for the brief gag order hearing, which was tangential to the capital murder case. The record even reveals

Mulder had no direct knowledge of Darin's actions with regard to the gag order and did not call Darin as a witness. (RR.8: 12). Nothing about Darin's actions with relation to the gag order hearing are related to any knowledge he might have regarding the murders. Mulder's brief representation of Darin does not constitute a formal and substantial attorney-client relationship; rather, Mulder's representation of Darin at the hearing was transient and insubstantial. A defense counsel's involvement in a prior representation that was transient or insubstantial is less likely to give rise to an actual conflict of interest than where the prior representation involved a formal and substantial relationship. *Perillo v. Johnson,* 205 F.3d 775, 779 (5th Cir. 2000) . Because the matters were not substantially related, there is not presumption that confidential information was disclosed by Darin. *Id.* at 800.

Even if there was a formal attorney-client relationship between Darin and Mulder, Mulder's representation of Darin and the defendant did not create an *actual* conflict of interest. An actual conflict of interest exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests to the detriment of his client's interest. *Ex parte Morrow,* 952 S.W.2d 530, 538 (Tex. Crim. App. 1997) . In order for a defendant to demonstrate a conflict of interest, he must show: 1) that defense counsel was *actively representing conflicting interests,* and 2) that the *conflict had an adverse effect on specific instances of counsel's performance*. *Morrow,* 952 S.W.2d at 538. Two common conflict of interest situations occur where: 1) defense counsel represents more than one defendant during a single proceeding, *James v. State*, 763 S.W.2d 776 (Tex. Crim. App. 1989) ; and 2) defense counsel represents the defendant and also represents, or has done so in the past, a State's witness. *Perillo v. State*, 758 S.W.2d 567 (Tex. Crim. App. 1988) .

In this case, the record clearly demonstrates that Mulder was in no way "actively representing conflicting interests" during the trial. First, the State never charged or indicted Darin in this case, and therefore, Darin and Appellant were not codefendants. In fact, the State never even suggested to the jurors during trial that Darin participated in the murders. In the guilt phase closing arguments the State argued, "The only issue is who did it? Identity. And it comes down to this: It's either going to be some unknown intruder who came into that house and committed a horrible murder or it's going to be the defendant." (RR. 46:5212-13).

Second, Darin was a defense witness, not a State's witness. And the record demonstrates that Darin's and Appellant's interests in the outcome of the trial were virtually identical. *See United States v. Alvarez,* 696 F.2d 1307, 1310 (11th Cir.), *cert. denied*, 461 U.S. 907 (1983) (holding that where testimony of codefendant is corroborative, no conflict of interest arises from counsel's joint representation). In that regard, Appellant did not blame Darin for the murders; rather, both she and Darin blamed the murders on an unidentified intruder. Specifically, in his testimony for the defense, Darin supported his wife's testimony and version of events by testifying that an intruder killed his two sons (RR. 43:4516-18). And, in an effort to explain why blood from both of the victims was found on the defendant's night shirt, Darin testified that, contrary to the testimony of the police officers who reported to the scene and to Darin's prior written statement to the police, Appellant did assist Darin in trying to save their two young son's lives. (RR. 42:4293-4; RR. 43:4453-6). Likewise, in an effort to explain why Appellant's blood was found on the vacuum cleaner and why watered-down blood was found in the sink, Darin testified that Appellant leaned on the vacuum cleaner for support and that she wet rags in the kitchen sink to use on the boys. (RR. 42: 4298; RR.43: 4459-60). And Darin further testified that the day before the murders he repaired the gate in the wooden fence surrounding his back yard so that, contrary to the testimony of the officers at the scene, the gate swung back and forth freely. (RR. 42:4271-2). Darin clearly gave this

testimony to support Appellant's theory and story that the intruder exited the house through the garage and then the back yard without difficulty.

Not only does Darin's testimony alone establish that Mulder did not have a conflict of interest in representing both the defendant and her husband, but Appellant's own testimony establishes that there was no conflict of interest as well. Specifically, during the State's cross-examination of Appellant, she testified that her husband could not have killed her children because the man she saw was not her husband and because her husband could not have left the house through the garage and then re-entered the house and gone back upstairs. (RR. 44:4921-3).

The Fifth Circuit has held that "[a] conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to a codefendant whom counsel is also representing." *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975) . That scenario is not present in this case. Appellant fails to even allege any specific argument or defense that Mulder was precluded from making or to any specific evidence that he was precluded from adducing on Appellant's behalf.

Third, in addition to Mulder, Appellant was represented by *three other trial attorneys*—Curtis Glover, Richard Mosty, and S. Preston Douglas, Jr.—and one appellate attorney—John Hagler—each of whom was active in her representation. The presence of untainted counsel has in many cases been sufficient for a court to reject a defendant's conflict of interest claim. *See United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991) (citing *United States v. Partin*, 601 F.2d 1000 (9th Cir. 1979)). Appellant's authorities disputing the value of additional counsel are distinguishable because, in each case, the record demonstrated that a lawyer with an undisputed, egregious conflict actively undermined other counsel.

Fourth, although the trial judge has a threshold obligation to determine whether the attorney has an actual or potential conflict, or no conflict, if he knows or reasonably should know of the possibility of a conflict of interest, "[i]n fulfilling this initial obligation to inquire into the existence of a conflict of interest, *the trial court may rely on counsel's representation." United States v. Kliti*, 156 F.3d 150, 153 (2nd Cir. 1998) (emphasis added); *see also United States v. Santiago*, 167 F.3d 81, 84 (1st Cir. 1999) . Here, defense counsel made just such representations of no conflict to the trial court. Specifically, the last day of voir dire, when Judge Tolle stated that he thought Appellant had waived all conflicts regarding Mulder's representation of her mother and Darin, defense counsel Richard Mosty replied, *"Our response, that Darlie Routier signed last week, further reconfirms that."* (RR. 26:3322) (emphasis added). The trial court then stated, "We can have a brief hearing when we start this on the 6th *if everybody wants to*, but I'm quite sure the answers will be the same." (RR. 26:3323) (emphasis added). The fact that there never was a hearing after that statement demonstrates that Appellant's position was that there was no conflict. As the Supreme Court has held:

Absent special circumstances . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed . . . *trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel.* "An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" [citation omitted.]

Cuyler, 446 U.S. at 347 (emphasis added).

Thus, whether there was a hearing and whether Appellant made a knowing and intelligent waiver of a non-existent conflict of interest is insignificant and harmless. *See United States v. Carr*, 740 F.2d 339, 348-49 (5th Cir. 1984), *cert. denied*, 471 U.S. 159 (1985) (holding that in prosecution in which two lawyers jointly represented two defendants, although the trial court failed to "personally advise" each defendant of his rights to separate representation as required by Rule 44(c), such failure was inconsequential because there was no actual conflict); *United States v. Benavidez*, 664 F.2d 1255, 1258 (5th Cir.), *cert. denied*, 457 U.S. 1135 (1982) . Because there was no actual conflict of interest here even if Mulder did represent both Appellant and her husband, Appellant is not entitled to a new trial.

Appellant claims that the trial court had a duty to sua sponte convene a hearing regarding whether a conflict of interest existed. (Appellant's brief at 25-27). According to Appellant, this failure leads to automatic reversal. Appellant's own authority refutes this argument. In *Levy v. United States*, 25 F.3d 146, 154 (2d Cir. 1994) , the court noted that an inquiry as to the conflicts by the court answered by representations of counsel was sufficient to meet the trial court's duty under *Cuyler* to investigate the matter. In this case, the trial court did take up the matter and was assured by Appellant's counsel that there was no conflict and that Appellant waived any conflict. (RR. 26:3322-23) Combined with Appellant's abundance of other counsel and the absence of evidence inculpating Darin, there was no evidence of a "particular conflict" the trial court was required to investigate. *See Cuyler*, 446 U.S. at 346-47 (trial court not required to investigate where the only evidence of a conflict was the fact that Cuyler's lawyers represented multiple defendants in the case). Moreover, the appropriate remedy if the trial court should have held a hearing is abatement to hold the hearing, not reversal of the conviction. *See Wood v. Georgia*, 450 U.S. 261, 273-74 (1980) . The other cases cited by Appellant present far stronger evidence of the conflict the court did not investigate and are distinguishable. The record before this Court does not establish a conflict of interest or a duty on the part of the trial court to investigate such. Point of Error 1 should be overruled.

RESPONSE TO POINT OF ERROR 2

In Point of Error 2, Appellant claims that she is entitled to a new trial because a portion of the reporter's record has been lost or destroyed.

On October 14, 1998, this Court ordered the trial court to ensure that the reporter's record of the trial on the merits was made to conform to what occurred at trial. On April 26, 1999, this Court further ordered the trial court to conduct an independent review of all portions of Appellant's court proceedings to ensure that the entire reporter's record was made to conform to what occurred at trial. In compliance with these two orders, the trial court (with the agreement of the State and the defense) appointed certified court reporter Susan Simmons to independently review the entire trial, using court reporter Sandra Halsey's original reporter's record, her stenographic notes, her edit discs, and her audiotapes. (AR. 5:15-17; 16:3-4; 17:3-7). [1] After reviewing and editing the record, Simmons testified that she was able to produce an accurate record. (AR. 13:34; 23:12, 17; 26:9, 19). Simmons further testified that she certified the entire record except the first fifty-four pages of Volume 10, which included a hearing on the defendant's request for substitution of counsel and the qualification of a morning jury panel. (AR. 13:39, 56; 23:12, 17; 26:9, 19). Although Simmons did not certify the fifty-four pages of the pretrial hearing, she nonetheless testified that those pages were a

true and accurate transcription of Sandra Halsey's stenographic notes. (AR. 26:12-13, 19). In fact, in its January 28, 2000 "Order and Court's Findings" the trial court specifically found that "[t]he first 54 pages of Volume 10 of the Simmons record is a true and accurate transcription of the stenographic notes of Sandra Halsey, which notes appear to Ms. Simmons to flow uninterrupted without any gaps or lapses." (Jan. 28, 2000 "Order and Court's Findings" at 5).

Simmons did not testify that the first fifty-four pages of Volume 10 were not certifiable. Instead, she testified that she did not "feel comfortable" certifying the pages because, although Halsey's stenographic notes appeared to be in good and usable form and she was able to transcribe the fifty-four pages from the notes, there was no corresponding audiotape for those pages. (AR. 26:10, 12, 13). Simmons further testified that, although everything in the stenographic notes flowed smoothly, and there did not appear to be any gaps or lapses or 'anything missing, she did not "feel comfortable" certifying the pages without the aid of an audiotape because she did not attend the trial in Kerrville. (AR. 26:12, 19).

Nothing is Lost

Appellant claims that a 54 page portion of the record from volume 10 is lost because it was not "certified" by the court reporter who completed the record in this case. Appellant also claims that a hearing on a possible conflict of interest was "lost." Lost record claims are governed by Texas Rule of Appellate Procedure 34.6(f), which provides in relevant part that a defendant can receive a new trial if a "significant portion" of the court reporter's notes which are necessary to the appeal is lost or destroyed. *See* Tex. R. App. P. 34.6(f) ; *Issac v. State,* 989 S.W.2d 754, 756-57 (Tex. Crim. App. 1999) .

Halsey's stenographic notes underlying the fifty-four pages, along with the computer discs containing the electronic version of the paper notes are in the possession of the District Clerk. The notes are readable. (AR. 26:10, 13). Simmons has testified that Halsey's notes are within the range of competent court reporting. (AR. 13:20-22). Moreover, the transcription of the notes in question indicates that they present a complete record of an arraignment, the substitution of counsel, and the qualification hearing of a panel of prospective jurors. (AR. 10). There are no obvious gaps in the notes, and the contents "flow smoothly." (AR. 26:12, 18-19). Simmons testified that her transcription accurately portrays the contents of the notes. (AR. 26: 25, 26). In fact, the only defect apparent in the fifty-four pages is Simmons's refusal to certify them. Thus, Halsey's notes are not "lost" or "destroyed" as contemplated by the Rules of Appellate Procedure, and the Rules of Appellate Procedure do not provide for a new trial when a record is not certified, but rather only when the court reporter's notes are lost or destroyed. Tex. R. App. P. 34.6(f).

Moreover, Simmons' decision not to certify the fifty-four pages is at odds with her testimony regarding her transcription of those fifty-four pages as well as her testimony regarding the approximately 10,000 pages of the record she previously certified. Simmons has previously testified that Halsey's notes were competent. (AR. 13:20-22). Moreover, she testified that Halsey's notes for the fifty-four pages appeared to be complete and that the contents of those notes "flowed smoothly." (AR. 26:12, 18-19). Simmons testified that her transcription accurately portrays the contents of the notes. (AR. 26:25, 26). Thus, Simmons' testimony demonstrates that the fifty-four pages are certifiable. The certification applicable when a court reporter transcribes another court reporter's notes is:

I certify that the foregoing is a true and correct transcription, to the best of my ability, of the stenographer's notes of the proceeding as provided to me by the [Court Name] in the above matter.

See Uniform Format Manual for Texas Court Reporters at figure 17 (Adopted by Order of the Court of Criminal Appeals, effective May 1, 1999) [2] . Simmons' testimony "mirrors" the applicable certification. Thus, the fifty-four pages of the record should be treated as accurate and certifiable, even if Simmons does not feel comfortable signing the certificate.

Appellant also argues that statements made by the attorneys, trial judge, and court reporter demonstrate that notes were lost. (Appellant's brief at 45). On November 12, 1996, the State filed a "Notice of Possible Conflict of Interest," stating that "[r]ecent analysis of physical evidence suggests that Darin Routier may have participated with the Defendant in the crime or coverup of the crime," and asking the trial court to have a hearing to determine: 1) whether a conflict of interest existed for Douglas D. Mulder; 2) whether the defendant would knowingly and intelligently waive any conflict of interest shown to exist; and 3) whether Darin Routier would knowingly and intelligently waive any conflict of interest shown to exist. That same day, the trial judge referred to the State's motion and stated, "I believe that the record will reflect that I have already asked these same questions of Mr. Mulder when we first started and that Mrs. Routier knowingly and willingly waived any conflict of interest. Is that not so, Mrs. Routier?" (RR. 22:2669). Appellant replied, "Yes, yes, sir." (RR. 22:2669). The trial judge then stated that he would conduct another hearing on the issue after the jury was selected. (RR. 22:2670). Approximately one week later, the trial judge referred again to the State's motion and stated, "On the 21st, as I recall, I put Ms. Kee under oath, Mr. Routier under oath, Mrs. Darlie Routier, the defendant, under oath for this purpose only. And they both waived any conflicts that may exist." (RR. 26:3322). Both parties and the court reporter agreed with the judge, who then stated, "Now, we can have a brief hearing when we start this on the 6th if everybody wants to, but I'm quite sure the answers will be the same." (RR. 26:3323). The certified record shows that another hearing was never held.

Appellant argues that these statements and the State's motion demonstrate that some other hearing was held on October 21, 1996, that is not reflected in the "uncertified" 54 pages or remainder of the record. The fact that the State filed the "Notice of Possible Conflict" motion is not evidence that there was a "missing hearing." The prosecutors could have filed that motion for any number of reasons. The most logical explanation is that, precisely because the defendant had not previously specifically stated that she waived any conflict of interest Mulder might have regarding Darin on the record, the prosecutors filed the motion in an abundance of caution. The prosecutors did not pursue the motion, however, because, when the trial judge brought up the motion, the defense assured everyone that Mulder had no such conflict. (RR. 26: 3322). The prosecutors also could have filed the motion as a prosecution tactic to make Darin realize that the State was committed to prosecuting these heinous crimes and, if he was not involved, that it would be to his benefit to tell the police what he knew about the murders. Whatever the reason the prosecutors had for filing the motion, it is not evidence that any eventual hearing was held.

Moreover, even if there was a conflict hearing, Appellant is not entitled to any relief because she has failed to prove that the "missing" hearing was stenographically recorded. Appellant's theory is that the "missing" hearing occurred on October 21, 1996, the same day the defendant waived any conflict as to her mother. Appellant simply suggests, without citing

supporting evidence, that the court reporter might have removed the hearing from her paper notes or that her machine might have malfunctioned. (Appellant's brief at 47). If this Court is to engage in the speculation requested by Appellant, it is equally plausible to speculate that the hearing was not on the record and, therefore, not lost or destroyed. *See Moore v. State*, 999 S.W.2d 385, 397 (Tex. Crim. App. 1999) (discussing the difference between lost or destroyed records and unrecorded proceedings). Alternatively, the lawyers could merely have misremembered the earlier proceeding. These facts simply do not show that some other hearing was held, that it was on the record, and that the court reporter's notes are lost or destroyed.

Halsey's notes of the October 21, 1996 proceedings are not lost or destroyed. Simmons' testimony demonstrates that the transcription of the fifty-four pages from October 21, 1996, could be certified. Accordingly, Appellant has failed to show that Halsey's notes are lost or destroyed for the purposes of Rule 34.6(f).

The Challenged Portion of the Record is Insignificant

Appellant has likewise failed to show that the 54 pages in question constitute a "significant portion" of the record. There are over 10,000 pages to the reporter's record in this case. (AR.26: 13). Thus, these fifty-four pages constitute approximately one-half of one percent of the record as a whole, an entirely insignificant portion of the whole. Because 99.5% of the record is certified, and the substance of the remainder is available and readable, this Court should find that no *significant* portion of the record is lost or destroyed for the purposes of Rule 34.6(f). *See Gomez v. State*, 962 S.W.2d 572, 574 (Tex. Crim. App. 1998) (noting that records are typically "lost or destroyed" only when the missing portion was "the entire [reporter's record], the final argument, or an *essential portion* of the trial which was *relevant to the appeal*.") (emphasis added).

The Challenged Potion of the Record is not Necessary to the Appeal

Furthermore, Appellant has failed to demonstrate that these fifty-four pages are necessary to her appeal. Appellant argues that an appeal cannot be prosecuted without a certified record of all of the other significant events of October 21, 1996, which include and her conflict of interest claim and administering an oath and giving preliminary instructions to a panel of prospective jurors.

The uncertified record, the certified records of the judge's remarks to other panels, and the standards applicable to appellate review of the jury selection demonstrate that the uncertified pages are not necessary to the appeal. *See* Tex. R. App. P. 34.6(f); *Isaac v. State*, 989 S.W.2d 754, 757 (Tex. Crim. App. 1999) (interpreting Rule 34.6(f) of the Texas Rules of Appellate Procedure to require a harm analysis.).

First, as discussed under Point of Error 1, the record affirmatively shows that Mulder was not burdened by a conflict of interest in his representation of Appellant. Thus, regardless of whether the substitution hearing or some other hearing on a conflict of interest is lost, it is not necessary to the appeal since this Court has ample record before it to dispose of the conflict of interest claim. Other than the substitution of Mulder as defense counsel, the remaining portion of the uncertified pages covers the trial court's qualification hearing to a panel of prospective jurors. This small portion of the record (34 pages) does not constitute a significant portion of the reporter's record, and other evidence in the record demonstrates that

nothing appealable occurred. Specifically, the trial court's afternoon instructions to prospective jury members (which are contained in the certified portion of Volume 10) are almost identical to his morning instructions. In fact, Simmons testified at a hearing regarding Volumes 10 and 11, "The afternoon session was qualification of the jury panel, as was the morning, and pretty much the afternoon session, which I had an audiotape was – to, was the same as the morning. I mean, the same type of questions were asked. Pretty much the same." (AR. 26:18). Thus, if Appellant desired to raise an issue on appeal regarding the trial judge's instructions to the jury, he would still be able to do so competently.

The only other event that took place on that morning was the excusal of eight veniremembers, each of whom was either disqualified under Section 62.102 of the Government Code or Article 35.16 of the Code of Criminal Procedure, exempt under Section 62.106 of the Government Code, or excused by agreement by both parties under Article 35.05 of the Code of Criminal Procedure. Appellant has made no legal argument demonstrating that this portion of the reporter's record is significant and necessary for the appeal. *See Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998). In *Jones*, the Court of Criminal Appeals held that the erroneous excusal of a veniremember is reversible only if the record shows that the error deprived the defendant of a fair and impartial jury. *Jones*, 982 S.W.2d at 392-94. The *Jones* Court additionally held:

[A] defendant has no right that any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified. *The defendant's rights go to those who serve, not to those who are excluded.*

Jones, 982 S.W.2d 386, 393 (Tex. Crim. App. 1998) (emphasis added). The *Jones* Court specifically held that the trial court's erroneous granting of one of the State's challenges for cause constituted harmless error. Thus, excusing statutorily exempt veniremembers would not deprive the defendant of a fair and impartial jury.

In this case, the uncertified record is accurate and complete enough to show that the trial judge excused three prospective jurors because they were not citizens of the United States [3] (RR. 10:48), and prospective juror number 190 because he could not read or write and because he had been convicted of a felony. (RR. 10:51). Both sides agreed to excuse prospective jurors numbers 20, 59, 99, and 199. (RR. 10:49, 50, 53-54).

The certified portion of Volume 10 shows that, at the afternoon jury qualification hearing, the only people the trial judge excused were prospective jurors who were absolutely disqualified, statutorily exempted, or agreed upon by both parties. [4] (RR. 10:85-88). Both parties agreed to excuse two prospective jurors. [5] (RR. 10:90-91). Volume 11 of the reporter's record shows that, at the third and final jury qualification hearing, both parties agreed to excuse prospective juror number 270 because he had terminal lung cancer. (RR. 11:104). At neither of the hearings covered by the certified record were any of the prospective jurors excused for cause, which indicates that the trial judge was not excusing prospective jurors for cause at any of the jury qualification hearings, including the hearing recorded in the uncertified portion of the record.

The Court of Criminal Appeals has held that trial courts have "inherent authority" under Article 35.03, which gives them "broad discretion in excusing prospective jurors on any proper basis, either with or without the prompting of counsel." *Kemp v. State*, 846 S.W.2d 289, 293 (Tex. Crim. App. 1992) . It stands to reason that, if the Court of Criminal Appeals in

Jones did not reverse the trial court's erroneous granting of a State's challenge for cause, the Court will not reverse this case on the trial court's excusal of exempt or disqualified veniremembers. *See Jones*, 982 S.W.2d at 391 (where the Court identified the following errors as violating the constitution: when a juror is erroneously excused because of general opposition to the death penalty and when a juror is excluded for an impermissible reason such as race, sex, or ethnicity). Additionally, any agreements made by the parties under Article 35.05 would not be appealable.

Appellant had *years* to adduce evidence supporting her claim of a lost or destroyed record while this cause was abated to the trial court. Instead, she has simply tried to bootstrap this claim based upon the existing record. Nothing in this record shows that any of Sandra Halsey's stenographic notes were lost or destroyed. The 54 uncertified (but certifiable) pages are an insignificant portion of the record, and they are not necessary for Appellant to present her claims to this Court, or for this Court to adjudicate those claims. Point of Error 2 should be overruled.

RESPONSE TO POINT OF ERROR 3

In Point of Error 3, Appellant claims that the reconstructed reporter's record does not comply with the Rules of Appellate procedure and cannot be corrected.

Appellant claims that Simmons has improperly "created" a "new" record by using Halsey's audiotapes to edit Halsey's transcription. Appellant's arguments are without merit. Simmons merely *edited* Halsey's transcription of the record. Court reporters routinely use backup audiotapes to edit their work. Finally, Appellant offered no evidence in the trial court that the audiotapes have been altered in any way or that they are not what they purport to be.

Halsey failed to properly edit the transcription of her stenographic notes. (AR.13: 34; *Tyler Morning Telegraph*, Nov. 1, 1999, at 1 & 6), and Simmons has merely completed the proper editing of the record. Simmons simply filled in the missing step in the transcription process: she compared Halsey's reporter's record to the audiotapes and stenographic notes and corrected errors in the transcription. (AR.13: 22-25). Simmons testified that Halsey's notes were competent and *complete*, that Halsey's computer discs were complete, and that her audiotapes of the defendant's trial were complete and usable. (AR.13: 20-22, 35). Simmons never testified that her edited transcription contains *anything* outside the notes or tapes. Thus, Simmons–and the trial court–did not create a *"new"* record.

A court reporter's use of backup audiotapes in the editing process is an acceptable method of obtaining an official record. In fact, Simmons testified that the purpose of a thorough and careful edit is to make a record as accurate as possible. (AR. 13:55). *Simmons specifically testified that it is a common practice for court reporters to use their backup audiotapes to edit their transcriptions*. (AR.13:13-14, 50, 55). Tommy Mullins, another court reporter who testified during the record hearings, also testified that this is common practice. (AR.13: 48). Moreover, Simmons further testified that many court reporters use a "scopist" to help them edit their records and that the scopist loads the court reporter's edit disc in her computer and, *while listening to the court reporter's audiotapes*, "goes through line by line looking for corrections that need to be made." (AR. 13:15). Additionally, Texas cases have sanctioned the use of backup audio recordings to edit records for over thirty years. *See, e.g., Williams v. State*, 427 S.W.2d 868, 870 (Tex. Crim. App. 1967) (referring to the use of backup audio discs to edit the shorthand notes—and certify the record—of a dead court reporter), *cert.*

denied, 391 U.S. 926 (1968); *State Farm Fire and Cas. Ins. v. Vandiver*, 941 S.W.2d 343 (Tex. App.–Waco 1997, no writ) .

Vandiver stands for the proposition that courts can use other means, like audiotapes, to clarify the reporter's official method of making a record. In *Vandiver*, the court reporter tape recorded the entire trial and stenographically took down everything that was said during the trial except certain depositions and exhibits that were read to the jury. These depositions and exhibits were subsequently reconstructed using the court reporter's steno notes and the audiotapes. *Vandiver*, 941 S.W.2d at 347. The issue on appeal was whether the use by the court reporter of "anything besides verbatim contemporaneous notes would amount to the 'creation' of a new statement of facts." *Vandiver*, 941 S.W.2d at 348. In holding that the missing deposition and exhibit testimony could be properly reconstructed, the court of appeals explained:

[W]hile it cannot be denied that a contemporaneous verbatim recording of the events at trial is a large part of ensuring that a complete and accurate record of the trial court proceedings is prepared, the conclusion does not follow that the record will necessarily be incomplete in every instance where there is some absence of a contemporaneous verbatim recording.

The veracity of this statement is proven under the facts of the very case before us. Here, portions of several exhibits and depositions were read to the jury. An audio recording of every instance where this occurred was made by the court reporter. There is no contention that what was read at trial differed in any way from the actual wording of the relevant exhibits and depositions that were read. In addition, it is undisputed that the court reporter, by listening to the audio tapes to find where the portions of these exhibits and depositions that were read begin and where they end, could reconstruct the very testimony that is missing from the original statement of facts.

Vandiver, 941 S.W.2d at 349.

Thus, *Vandiver* supports Simmons' use of audiotapes as an aid in transcribing Halsey's stenographic notes. Similarly, in *Williams v. State*, 427 S.W.2d 868, 872 (Tex. Crim. App. 1967), citing *Norvell v. Illinois*, 373 U.S. 420, 424 (1963) , the Court of Criminal Appeals held that, in a case where a court reporter died before the record was transcribed, some "practical accommodation must be made" in order to obtain a record for appeal. In the case at hand, Halsey, like a deceased court reporter, is unavailable, and Simmons, under the direction of the trial court, made the practical accommodation of utilizing the audiotapes to obtain a record that conformed to what occurred at trial. Appellant has failed to present any evidence or authority that this method was an unacceptable or inaccurate method of editing Halsey's reporter's record.

Appellant's reliance on *Valenzuela v. State*, 940 S.W.2d 664, 666 (Tex. App.–El Paso1996, no pet.) and *Ex parte Occhipenti*, 796 S.W.2d 805, 806-807 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) , is misplaced because those cases do not deal with reconstruction or editing of stenographic notes. In *Valenzuela*, the defense attorney asked the court reporter to certify her backup audiotapes as being an accurate record of the trial instead of transcribing her stenographic notes so that he could have parts of the record produced by someone less expensive. *Valenzuela*, 940 S.W.2d at 665. In denying Valenzuela's request, the court of appeals held that, except when the use of audiotapes is authorized by the Court of Criminal Appeals and the court reporter follows the proper procedures for making a record by

electronic recording, the reporter's record is a transcription of the court reporter's stenographic notes. The court of appeals held that, in a situation where the court reporter's stenographic notes were the official record of the proceedings, the court reporter may not certify the audiotapes as an accurate record of what occurred at trial. *Valenzuela*, 940 S.W.2d at 666.

Ex parte Occhipenti, is also distinguishable because the *only* record in that case was an audio recording, audio recordings of court proceedings were not authorized by the Supreme Court of Texas for the county where the proceeding arose, and the protocols applicable to the audio recording of court proceedings had not been followed. Thus, the court of appeals treated the proceeding as if there were no record. Contrary to what occurred in *Occhipenti*, the proceedings in the instant case were fully reported in the court reporter's stenographic notes, and the audiotapes were merely used to edit the transcription of those notes.

Similarly, Appellant relies *Soto v. State*, 671 S.W.2d 43, 44-46 (Tex. Crim. App. 1984) , in support of her argument that "[t]he tapes cannot be used to create a new record." (Defense Objections at 20). In *Soto*, the trial judge overruled Soto's objection to conducting a jury trial without a court reporter present and ordered a clerk to tape the trial and prepare a transcription of the tapes. In reversing the judgment, the Court of Criminal Appeals held that the trial court violated Article 40.09(4) of the Code of Criminal Procedure, a mandatory statute which required a court reporter to take notes at the request of either party. *See Soto*, 671 S.W.2d at 45-46. In the instant case, by contrast, a court reporter was present throughout the trial, and she made stenographic notes of the entire trial as well as audiotapes, thereby complying with Texas Rule of Appellate Procedure 13.1(a), [6] the current version of Article 40.09(4).

Simmons followed accepted editing practice as she carried out her assignment for the trial court of completing Halsey's record. Appellant has had years to examine the various records in this case, yet she has wholly failed to show that the final product is unreliable. The vast majority of Simmons's changes to the record consist of correcting typographical errors and spelling. Many of the errors in the record would normally be ignored by appellate lawyers and courts or quoted with [sic] in briefs and opinions. This Court has Simmons's "red-line" record as well as the certified record, and therefore can readily examine exactly what function Simmons performed. Appellant points out no specific part of the record that cannot be reliably edited using the audiotapes. The trial court and Simmons painstakingly prepared a record for this Court that is ample for Appellant to raise her claims. Indeed, Appellant raised ten substantive points of error independent of her claims about the record, and nothing about the record can lead to summary disposition of those claims. Appellant is in no different position than any other appellant before this Court. Point of Error 3 should be overruled.

RESPONSE TO POINTS OF ERROR 4 and 5

In Points of Error 4 and 5, Appellant claims that the trial court denied her right to due process and violated Rule 34.6(e)(2) of the Rules of Appellate Procedure by denying her a hearing on her record claims. Appellant was not entitled to a fourth evidentiary hearing because Appellant raised no issues that would require the trial court to consider additional evidence and proffered no evidence outside the record necessary to the resolution of the court's task.

After Simmons completed her transcription of the entire record in this case and the trial court held live hearings, the court requested that Appellant submit her written objections to the

record. (SCR.2: 569). Appellant submitted several objections to the record and requested yet another hearing. (SCR.2: 490). Appellant's objections did not identify specific factual disputes that the trial court needed to resolve, nor did it contain affidavits proffering evidence outside the original, reconstructed, and auxiliary records that Appellant wished to adduce at the requested hearing. The State filed a response to Appellant's objections which, in addition to answering Appellant's objections, pointed out that she had identified no fact issues for resolution and no extraneous evidence that needed to be adduced. Appellant still made no proffer as to what specific issues needed to be resolved and/or what specific evidence needed to be adduced. Eventually, the trial court set a hearing, but later cancelled the hearing, finding that it was unnecessary to comply with the orders of this court. (SCR.2: 368; 391).

This Court ordered the trial court "to conduct an independent review of all portions of Appellant's court proceedings to ensure that the entire reporter's record is made to conform to what occurred at trial." (Order of April 26, 1999). On September 7, 2000, the trial court noted that it had reviewed the records of all the many hearings conducted regarding the reporter's record and its previous findings from those hearings. (SCR.2: 367-68). The court stated:

The court has also considered at great length the Defendant/Appellant's objections to the reporter's record, the State's responses thereto, the evidence adduced at each of the hearings on this matter, and the arguments of counsel at such hearings.

* * *

The court finds that any additional evidentiary hearing is not necessary to comply with the orders of the Court of Criminal Appeals.

* * *

IT IS THEREFORE ORDERED that Defendant/Appellant's objections to the record filed with this court, along with all previous transcripts of hearings, orders, and findings issued by this court, be remanded to the Court of Criminal Appeals for consideration. No additional evidentiary hearings shall be conducted by this court unless the Court of Criminal Appeals instructs otherwise.

(SCR.2: 367-68). The trial court had already conducted three separate hearings about the Simmons record. Appellant was given the opportunity to proffer written question that the trial court would submit to Simmons during these hearings, and while she objected to the process, she also availed herself of this opportunity. (AR.13: 5; AR: 23: 13-17; AR.26: 30). Indeed, the various proceedings regarding the validity of the record that occurred in open court comprise 18 volumes of auxiliary record. (*See* AR. 1-18). Based on her experience as a court reporter, Simmons testified that she was able to certify all but fifty-four pages of an approximately 10,000-page record and that the record as a whole is accurate. Appellant had almost two years in which to attack the accuracy of the record, but has yet to uncover and proffer evidence of any material errors or faults. Simmons' testimony demonstrated that all of Halsey's stenographic notes are present, as well as virtually all of her computer discs [7] and audiotapes covering all but fifty-four pages of the record. Appellant has cited no authority showing that the process followed by the trial court and Simmons was improper or incapable of producing a record sufficient for the defendant to pursue her appeal. To the contrary, case and statutory law support the procedure used by the trial court to insure that the record

conformed to what occurred at trial. Halsey merely failed to edit her reporter's record, and Simmons completed the editing process. (AR.13: 34; 22-25). Thus, the record demonstrates that Appellant merely wanted a "fishing expedition" in which some *unidentified* witness *might* say something that could *possibly* support her otherwise unsubstantiated allegations about the record. Appellant cites no authority supporting the proposition that she should receive a hearing simply because she wants to have a hearing, especially when other hearings took place and she participated in them.

With regard to motions for new trial, this Court has noted that a defendant does not have an absolute right to a hearing on a motion for new trial. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) ; *see also Carranza v. State*, 960 S.W.2d 76, 81 (Tex. Crim. App. 1998)(Overstreet, J., concurring) . In *Jordan*, this Court held that motions for new trial must both state reasonable grounds for a new trial and raise matters that are not determinable from the record before a trial court is required to hold a hearing. *Jordan*, 883 S.W.2d at 665.

This Court has applied similar reasoning in construing Article 38.22 of the Code of Criminal Procedure. In *Wolfe v. State*, 917 S.W.2d 270, 281-82 (Tex. Crim. App. 1996) , the Court addressed a claim where the trial court refused to hold a hearing pursuant to article 38.22, section six regarding the voluntariness of a confession. The Court, noting that Wolfe had not alleged facts implicating voluntariness, held that the trial court was justified in concluding that no hearing was required. Similar policy is codified in Article 11.071 of the Code of Criminal Procedure. Under Article 11.071, a trial court is only required to convene a hearing on the applicant's allegations when there are "controverted, previously unresolved factual issues material to" the claims. Tex. Code Crim. Proc. Ann. art. 11.071, §9(a)(Vernon Supp. 2001) .

Jordan, *Wolfe*, and Article 11.071 all stand for the proposition that a trial court need not convene a hearing unless matters are raised that are not determinable from the existing record. Appellant did not identify controverted issues of fact that the trial court could not resolve from the existing record, nor did she identify evidence material to the issues before the court that was not already contained in the record. A trial court should not be required to convene a hearing merely to hear legal arguments already presented in written pleadings, nor should hearings be convened merely to allow "fishing" for new evidence or contradictory testimony. Because Appellant identified no factual issues for resolution and no evidence relevant to the issues before the trial court, the trial court did not abuse its discretion in denying a fourth evidentiary hearing regarding the reporter's record. *See Wolfe*, 917 S.W.2d 281-82; *Jordan*, 883 S.W.2d at 665; *cf.* Tex. Code Crim. Proc. Ann. art. 11.071, §9(a).

Further, Appellant's reliance the portion of rule 34.6(e)(2), which provides that "the trial court must settle disputes about the accuracy of the reporter's record after notice and hearing" is misplaced because that is not the rule applicable to this case. Rather, because the record was filed in this Court prior to the abatement, the applicable rule is rule 34.6(e)(3). *See* Tex. R. App. P. 34.6(e)(3) . Rule 34.6(e)(3) provides that an appellate court can submit disputes about the record to a trial court for resolution, but says nothing regarding the procedure the trial court must use. *See id.; Stafford v. State*, 63 S.W.3d 502, 2001 Tex. App. Lexis 6383 at *15-17 (Tex. App.–Fort Worth 2001, no pet.). Appellant has not shown she was entitled to a fourth hearing regarding the reporter's record in this case. Points of Error 4 and 5 should be overruled.

RESPONSE TO POINTS OF ERROR 6 and 7

In Point of Error 6, Appellant claims that the trial court violated Rule 613 of the Texas Rules of Criminal Evidence when it excluded impeachment testimony from a defense witness that sat in the courtroom throughout trial. In Point of Error 7, Appellant claims that the trial court violated her rights under the Due Process Clause by excluding the testimony.

Prior to the beginning of testimony, the State requested that the trial court invoke the "Rule" as to all witnesses in the case. (RR.28: 25). The court granted the request. (RR.28: 28). Later, the State's blood spatter expert, Tom Bevel testified that he examined five bloodstains from Appellant's nightshirt. (RR.39: 3340-56). Four of these five stains consisted of mixtures of Appellant's blood and the blood of Damon or Devon. (RR.39: 3344; 3347; 3345-46; 3348-50; 3352). Bevel testified that the stains on the upper right shoulder of Appellant's nightshirt could be either separate stains of Appellant's blood overlaid on the child's blood or a mixture of Appellant's and the child's blood. (RR.39: 3343-46). If the stains were mixed, then it would indicate that Appellant's blood was already on the knife when the stain was deposited, while overlaid stains would be consistent with Appellant inflicting her own wounds after stabbing the children consistent with the State's theory of the crime. Bevel testified that he could not tell whether these two stains were overlaid or mixed. (RR.39: 3346). Bevel testified that one of the stains on the left shoulder of Appellant's nightshirt, LS-1, did not appear to be an overlaid stain. (RR.39: 3348). During cross-examination, Appellant's counsel asked Bevel whether Appellant would have had to have to already been bleeding if the stains were mixed stains when the boys were stabbed. (RR.39: 3488). Bevel agreed that, if the stains were not overlaid, this was true. (RR.39: 3488; 3490-91). Appellant's counsel asked Bevel if he had told them prior to trial that the four bloodstains he analyzed on Appellant's nightshirt were "mixed" stains rather than "overlaid" stains. (RR.39: 3491-92). Bevel replied:

A. I told you there was some mixed blood. I don't know if we specifically addressed that stain. *I don't recall*.

Q. Well, you told us that in your judgment, that was mixed blood in one stain?

A. I don't recall specifically stating that it was one stain. Now, which are we referring to here?

Q. I'm talking about these, I'm talking to all four of them on the front of the shirt, all four of them mixed?

A. The only one that I can say is really consistent without any hesitation is the one that is up in this area here, which is going to be LS-1.

Q. You are talking about the highest one on the left shoulder?

A. That is correct.

Q. Okay. But you didn't tell us when we were up there that you thought all of those others were a stain that was mixed before it hit the shirt?

A. *I don't believe so*.

(RR.39: 3491-92). (emphasis added).

During Appellant's case-in-chief, she attempted to call her private investigator, Lloyd Harrell, to testify that Bevel had told the defense team that, in order to deposit the stains in question, the knife had to have contained the blood of both Appellant and one of the children when the stain was deposited. (RR.44: 4770-71). The trial court refused to allow Harrell to testify because he had been in the courtroom throughout the trial in violation of the rule. (RR.44: 4771; 4780; 4783; 4754-55).

Rule 613 of the Rules of Criminal Evidence provided in pertinent part:

At the request of a party the court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses. Tex. R. Crim. Evid. 613 . [8] (emphasis added)

Generally referred to as "*the* Rule," Rule 613 serves the critical function of preserving integrity of the trial process by preventing witnesses from tailoring their testimony based upon what they might hear in court. *See Webb v. State*, 766 S.W.2d 236, 239-40 (Tex. Crim. App. 1989) . When a trial court excludes a witness from testifying because of a rule violation, the court's ruling is reviewed for abuse of discretion. *Davis v. State*, 872 S.W.2d 743, 745-46 (Tex. Crim. App. 1994) . In order to show an abuse of discretion due to the exclusion of the witness, the defendant must show:

1. That the defendant or his counsel did not consent, produce, or have *knowledge* of the witness's presence in the courtroom; and

2.That the excluded testimony is crucial to the defense.

See Davis, 872 S.W.2d at 746; *Webb*, 766 S.W.2d at 244. In this case, Appellant has failed both prongs of the test and cannot establish an abuse of discretion.

The record conclusively demonstrates that Appellant's counsel were aware that Harrell was present in the courtroom during the trial because he was their investigator. (RR.44: 4780). Harrell testified that he was in the courtroom for the entire trial, that he knew Bevel would testify, that he was not surprised when Bevel testified, and that he was in the court during Bevel's testimony. (RR.44: 4769; 4776-77).

Moreover, Harrell was not (as Appellant tris to characterize him) an "unintended" witness because the defense team obviously included him in the interview session with Bevel so that a non-lawyer would be able to provide impeachment testimony, if necessary, against Bevel. Harrell, Mulder, Richard Mosty, and Curtis Glover all met with Harrell. (RR.44: 4769). After all, Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct strongly discourages lawyers testifying on behalf of their clients. *See* Tex. Disciplinary R. Prof. Conduct 3.08 (1989), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. (Vernon 1998) . Finally, Appellant did not attempt to make a showing that Harrell fit within any of the enumerated exceptions to Rule 613's general exclusionary rule. Rule 613 provided exceptions for witnesses who are parties, officers or designees of corporate entities that are parties, a person whose presence is shown by a party to be essential to the presentation of his cause, or victims of an offense. Tex. R. Crim. Evid. 613. Thus, Appellant has failed the first prong of the *Webb* test to show an abuse of discretion.

Moreover, Appellant cannot show that Harrell's testimony was critical to the defense. Bevel's challenged testimony was opinion, not fact. Thus, Harrell's proffered testimony, at best,

would merely have showed that Bevel's opinion had changed, not that he was untruthful. Bevel did not deny making the statements, but instead testified that he remembered the conversation differently. Bevel, however, *admitted* that all four stains in question could be "mixed stains," indicating that Appellant's blood was already on the knife when the stains were cast off and undermining the State's theory that Appellant inflicted her own wounds after killing her children. Indeed, Bevel testified that one stain LS-1, appeared to be a mixed stain. Bevel's testimony regarding the four bloodstains on Appellant's blood drenched nightshirt was neither the most important part of Bevel's testimony nor a disproportionately significant piece of evidence in the State's massive array of circumstantial evidence. Bevel's testimony rebutting Appellant's statements about the dropped knife, demonstrating the staging in the kitchen, and demonstrating that the sock was probably a plant was far more important to the State's case. Moreover, the fifth bloodstain on the nightshirt was not mixed, and thus supported the State's theory of the offense.

Finally, since Appellant had five lawyers at trial, three of whom also participated in the interview with Bevel, other means existed within the confines of Rule 613 and Rule 3.08 for her to present impeachment testimony against Bevel. After all, Rule 3.08 does not bar a lawyer from testifying on behalf of a client, it merely discourages it. The comments to the Rule indicate that, by testifying, the State could not have successfully sought disqualification of any of Appellant's counsel. *See* Tex. Disciplinary R. Prof. Conduct 3.08 cmts. 9, 10; *see also House v. State*, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997) . Indeed, Appellant's lead counsel at one point announced his intention to testify as to this issue. (RR.44: 4755). Accordingly, Appellant has failed the second prong of the *Webb* test to show an abuse of discretion. [9] *Cf. Tell v. State*, 908 S.W.2d 535, 543 (Tex. App.–Fort Worth 1995, no pet.) (affirming trial court's exclusion of defense investigator's testimony on harmless error grounds because it was not crucial to the defense since it did not substantially contradict the State witness whom Tell sought to "impeach" and there was abundant other evidence establishing Tell's identity).

Appellant's principal authority is distinguishable from the instant case. In *Webb*, the witness in question was not a defense investigator involved in the interview of a State's witness, but instead an acquaintance of Webb whom he noticed in the courtroom and brought to the attention of his counsel. Thus, Webb could show the absence of knowledge and participation in the rule violation necessary to establish an abuse of discretion when the witness was excluded. *See Webb*, 766 S.W.2d at 245.

Appellant's invocation of the federal constitution does not dictate a different outcome. A defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) . The Supreme Court has recognized that "[t]he State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Id.* at 411. Rule 613 serves the important purpose of maintaining the integrity of the truth seeking function of criminal trials by preventing witnesses from tailoring their testimony. *See Webb*, 766 S.W.2d at 239. Thus, exclusion of a professional defense witness for a knowing, egregious violation of Rule 613 did not violate Appellant's rights under the federal constitution. *See Taylor*, 484 U.S. at 416-18 (upholding exclusion of alibi testimony for failure to comply with procedural notice requirements); *see also Michigan v. Lucas*, 500 U.S. 145, 150-53 (1991) (upholding exclusion of victim's sexual history in a rape case where the defense failed to comply with "notice and hearing" requirement).

Appellant also argues that Harrell's testimony should have been admitted under the rule of optional completeness, Rule 107. Tex. R. Crim. Evid. 107 (Appellant's brief at 100-102). Appellant did not raise this argument in the trial court, however. (RR.44: 4779-83). Accordingly, this claim is not preserved for appellate review. Tex. R. App. P. 33.1(a). Appellant has failed to establish that the knowing violation of the rule by her investigator was insufficient to warrant the exclusion of his testimony. Similarly, she has not established a constitutional violation. Accordingly, Points of Error 6 and 7 should be overruled.

RESPONSE TO POINTS OF ERROR 8, 9 and 10

In Points of Error 8, 9, and 10, Appellant claims that the trial court violated her constitutional rights and Article 36.29 of the Code of Criminal Procedure by determining that a juror was disabled because of the flu without first conferring with the defense and without eliciting evidence from the parties on the extent of the illness. [10]

One morning during the State's case-in-chief, the trial court announced that juror number twelve was sick with the flu and disabled, and that she would be replaced with an alternate juror. (RR.35: 2228-29). Specifically, the trial court stated: "This juror had the flu yesterday, struggled to come down, continues to have it today, and is bedridden." (RR.35: 2229). Appellant asked the trial court to continue the case for twenty-four hours so that the juror's claim of disability could be investigated. (RR.35: 2229). The trial court denied the request and the trial proceeded with the alternate juror on the panel. (RR.35: 2229)

Appellant's own authority demonstrates that her constitutional rights were not violated by the trial court's actions. In *Santiago v. United States*, 977 F.2d 517, 522 (10th Cir. 1992) , the Court held that Santiago's constitutional rights were not violated when the trial court examined a juror ex parte to determine whether the juror was biased. The court noted that a defendant's due process right to be present in situations that did not involve confrontation of witnesses or evidence against her related to her opportunity to defend against the *charge*. *Id* (citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985)(per curiam)). "The mere occurrence of an ex parte communication between a juror and the judge does not constitute a deprivation of any constitutional right." *Gagnon*, 470 U.S. at 526. The ability of a juror to continue serving does not relate to the charge on trial, but instead is a procedural matter. Thus, the presence of the defendant, or her lawyer, during the judge's conversation with a juror regarding the juror's ability to continue service was not constitutionally required. *Gagnon*, 470 U.S. at 527 (defendant's presence not required at judge's ex parte conversation with juror regarding defendant's actions in courtroom); *Santiago*, 977 F.2d at 522 (defendant and lawyer not required to be present when judge determined whether an alternate juror could serve after hearing a negative comment from another venire member during voir dire). Accordingly, Points of Error 8 and 9 are meritless.

Appellant also claims that the trial court violated article 36.29 of the Code of Criminal Procedure because there was no evidence the juror was disabled. Article 36.29(b) provides that:

If alternate jurors have been selected in a capital case in which the state seeks the death penalty and a juror dies or becomes disabled from sitting at any time before the charge of the court is read to the jury, the alternate juror whose name was called first under Article 35.62 of this code shall replace the dead or disabled juror. Tex. Code Crim. Proc. Ann. art 36.29(b)(Vernon Supp. 2002) .

Illness is a disability for the purposes of Article 36.29. *See Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000); *see also Allen v. State*, 536 S.W.2d 364, 366-67 (Tex. Crim. App. 1976) (trial court did not abuse its discretion in determining that juror with flu was disabled). The decision whether to excuse a juror under article 36.29 is vested within the discretion of the trial court. *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999) . The statute does not specify what sort of evidence must be adduced to show a juror is disabled, nor does it specify that a hearing is required where the defendant and her counsel are present to hear the evidence. *See* Tex. Code Crim. Proc. Ann. art. 36.29 (Vernon Supp. 2002). Rather, the statute merely requires that the record be sufficient for the reviewing court to determine the trial court's determination whether the juror was disabled. *See Valdez v. State*, 952 S.W.2d 622, 624 (Tex. App.–Corpus Christi 1997, pet. ref'd) .

In this case, the trial court detailed the basis for the juror's disability, that she was "bedridden" with the flu. (RR.35: 2229). Moreover, the next day the trial court admitted letters from the juror's physicians indicating that she was ill. (RR.36: 2779-80; CX. 1). Appellant's counsel did not object to the admission of these letters. (RR.36: 2779-80). Appellant produced no evidence that the juror was not in fact too ill to proceed, and the record does not demonstrate that her investigator or one of her five lawyers could not have attempted to verify the facts related by the trial judge. After all, this hearing took place on January 16, 1997, fully a week before the State rested its case-in-chief and fifteen days before the arguments in the guilt phase of the trial. (RR.35: 2244; 2228; RR.40: 3611; 3795; RR.46: 5193). Moreover, nothing prevented Appellant from raising this claim in her motion for new trial and further developing the facts. Appellant did not dispute the judge's statements or the letters, only the judge's procedure. (RR.35: 2229). Absent other evidence on the matter, the record does not demonstrate an abuse of discretion by the trial court in determining that the juror was disabled. *Compare Marquez v. State*, 620 S.W.2d 131, 132-33 (Tex. Crim. App. 1981) (abuse of discretion shown where facts insufficient to demonstrate disability) *with Reyes*, 30 S.W.3d at 411 (juror's concern over retaliation sufficient to demonstrate disability); *see also Valdez*, 952 S.W.2d at 624 (noting that record that only demonstrated a juror's difficulty with English and no specific ruling that the juror was disabled was insufficient to support the trial court's ruling).

Even if the trial court erred in its handling of these claims, Appellant is not entitled to a new trial because the record does not demonstrate that she was harmed. In *Jones v. State*, 982 S.W.2d 386, 393 (Tex. Crim. App. 1998) , this Court noted that a defendant does not have a right to have a particular person on her jury. Rather, the defendant has a right to a fair and impartial jury. *Id.* Thus, a defendant can only obtain relief for the improper removal of someone from a jury if she shows that the removal deprived her of a fair and impartial jury. *Id.* at 344. While *Jones* dealt with the improper grant of a State's challenge for cause during voir dire, the same reasoning should be applied where, as here, the action of the trial court is to remove a person from the jury. Appellant has made no showing that her jury was not "fair and impartial." Appellant cannot rely on cases applying Article 36.29(a) to show harm because she was not found guilty or sentenced by a jury consisting of less than twelve jurors. *Cf. Landrum v. State*, 788 S.W.2d 577, 579 (Tex. Crim. App. 1990) (reversing where juror was not disabled for the purposes of article 36.29(a), thus leading to a conviction by a jury of less twelve jurors).

Appellant claims she was harmed because she was denied the right to have her trial heard by a particular tribunal, citing the plurality opinion in *United States v. Jorn*, 400 U.S. 470, 490 (1970) . (Appellant's brief at 113-14). *Jorn* dealt with a claim of double jeopardy after the

trial court granted a mistrial. *See also Ex parte Mitchell*, 977 S.W.2d 575 (Tex. Crim. App. 1997) . The concept discussed in *Jorn* and *Mitchell*—that a defendant has an interest in taking her case to a verdict before a particular jury—does not support Appellant's claim. The jury—including alternates—her counsel selected decided appellant's case. She was not deprived of that jury's verdict by a mistrial, unlike the defendant in *Jorn*. The record demonstrates that Appellant was not harmed. *See Jones*, 982 S.W.2d at 394; Tex. R. App. P. 44.2(b). Points of Error 8, 9, and 10 should be overruled.

RESPONSE TO POINTS OF ERROR 11, 12, and 13

In Points of Error 11, 12, and 13Appellant claims that the trial court violated articles 36.27 and 33.03 of the Code of Criminal Procedure and her due process rights by providing the jury with an inaccurate transcription of testimony in her absence.

After the jury retired to deliberate in the guilt phase of the trial, they informed the trial court that they had a disagreement regarding some of Darin Routier's testimony. The court reporter prepared a three-page transcript of the testimony in question, and neither party objected to the transcription. (RR.46: 53-58). The trial court noted for the record that Appellant was not present and asked Appellant's counsel if he waived her presence for the purposes of answering the jury's note. (RR.46: 5358). Appellant's counsel waived her presence, and the trial court provided the transcription of the disputed testimony to the jury. (RR.46: 5359).

These claims are not presented for review because Appellant did not raise them in the trial court. Indeed, Appellant's counsel affirmatively waived these claims. To preserve error for appellate review, the record must show that: (1) a complaint was made by a timely request, objection, or motion; (2) sufficiently specific to make the trial court aware of the complaint; (3) and the trial court ruled on the complaint, either expressly or implicitly. Tex. R. App. P. 33.1(a); *see Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995)(applying former rule 52(a)). Some aspects of the criminal justice system may only be relinquished by express acts of an accused, such as the right to counsel and the right to a jury trial. *Marin*, 851 S.W.2d at 278-79

In this instance, the rights waived by Appellant's counsel are not so fundamental that they cannot be forfeited by inaction, much less affirmatively waived by counsel. Because Appellant's counsel affirmatively waived Appellant's presence during the reply to the jury's note, Points of Error 12, 13, and 14 should be summarily overruled. *See Ransom v. State*, 789 S.W.2d 572, 588 (Tex. Crim. App. 1989) (holding article 36.27 claim waived by failure to object at trial); *Boatwright v. State*, 933 S.W.2d 309, 311 (Tex. App.–Houston [14th Dist.] 1996, no pet.) (holding that article 36.27 claim was forfeited because the record did not contain an objection or bill of exception raising the claim).

Appellant appears to claim that her counsel could not waive the provisions of Article 36.27 and 33.03. Article 36.27 provides in pertinent part that, if the jury sends out a note, the trial court "shall use *reasonable diligence* to obtain the presence of the defendant and his counsel" prior to answering the note. Tex. Code Crim. Proc. Ann. art. 36.27 (Vernon 1981)(emphasis added) . Thus, the plain language of the statute allows the trial court to answer the note without the defendant's presence under appropriate circumstances—it does not absolutely require the presence of the defendant. Accordingly, Appellant could waive the provisions of article 36.27. *See Ransom*, 789 S.W.2d at 588 (holding that article 36.27 claim could be forfeited); *cf. Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997) (upholding

plea bargain agreement where McJunkins waived the mandatory statutory prohibition on consecutive sentences assessed in a single criminal proceeding).

Article 33.03 provides that "the defendant must be personally present at the trial." Tex. Code Crim. Proc. Ann. art. 33.03 (Vernon 1989) . This statute, too, contains exceptions to the general rule and allows the trial of a defendant who voluntarily absents himself after pleading to the indictment and jury selection. *Id.* Furthermore, this Court has previously held that defendants can waive the provisions of Article 33.03. *See Garcia v. State*, 919 S.W.2d 370, 393-94 (Tex. Crim. App. 1994) . Similarly, the federal constitution does not provide Appellant "unwaiveable" rights to be present at every aspect of a case. *See, e.g., United States v. Gagnon*, 470 U.S. 522, 526 (1985)(per curiam).

Furthermore, the record does not demonstrate that the trial court's handling of the jury note harmed Appellant. Violations of article 36.27 and 33.03 are subject to review for harmless error. *See Garcia*, 919 S.W.2d 370, 393-94 (Tex. Crim. App. 1994)(op. on reh'g)(performing harm analysis on an article 33.03 claim); *Damian v. State*, 776 S.W.2d 659, 664-65 (Tex. App.–Houston [14th Dist. 1989, pet. ref'd)