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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

LAURA CARSNER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS OF TEXAS
CAUSE NUMBER 08-11-00326-CR

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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STATEMENT REGARDING ORAL ARGUMENT

Whenever the decision of an intermediate appellate court is deemed worthy of discretionary review by a court of last resort in an adversarial system, it is entitled to oral opposition and defense by the customary and traditional methods of appellate advocacy upon which our system of jurisprudence is founded.

STATEMENT OF THE CASE[1]

This is a petition for discretionary review from the judgment of the Eighth Court of Appeals, affirming Appellant's conviction for capital murder in the 171st District Court.

STATEMENT OF PROCEDURAL HISTORY

This is an appeal from the judgment of the 171st District Court of El Paso County, Texas, that Appellant is guilty of capital murder. Appellant was indicted for this offense on November 18, 2009 (1 CR 3), convicted after a trial by jury on July 25, 2011 (10 RR 121-24), and sentenced by the court on July 26, 2011 to a term of life imprisonment without the possibility of parole in the Texas Department of Criminal Justice, Institutional (now Correctional Institutions) Division. (11 RR 6) On October

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[1] "CR" refers to the clerk's record on appeal. "RR" refers to the reporter's record on appeal. "SX" refers to an exhibit introduced by the proscution, "DX" to an exhibit introduced by the defense.

7, 2011, the trial court denied Appellant's motion for new trial. (14 RR 4-5) The Eighth Court of Appeals reversed that decision on October 9, 2013 and remanded the case for a new trial. *Carsner v. State*, 415 S.W.3d 507 (Tex. App. – El Paso 2013). This Court granted the State's petition for discretionary review and, on September 24, 2014, vacated the judgment of the Court of Appeals and remanded to that Court for consideration of unaddressed arguments in the State's brief. *State v. Carsner*, 444 S.W.3d 1 (Tex. Crim. App. 2014). On June 15, 2018, the Court of Appeals, after addressing some of those arguments, affirmed Appellant's conviction and sentence in an unpublished opinion. *Carsner v. State*, 2018 WL 2998194 (Tex. App. – El Paso No. 08-11-00326-CR, June 15, 2018).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of law, evidence that has been forgotten by a defendant is unknown, for purposes of the newly-discovered-evidence rule, only if the defendant forgot about it because of a physical or mental condition, such as amnesia or repression, that was caused by a traumatic event, debilitating injury, or disease, the existence of which can be confirmed by science or medicine.

2. Whether, as a matter of law, a defendant who fails to recall evidence, once known but since forgotten , has not, for purposes of the newly discovered evidence

rule, exercised diligence to discover or obtain such evidence.

ARGUMENT

Laura Carsner was convicted of capital murder and sentenced to life in prison for shooting to death her elderly mother and stepfather. At trial, she claimed to have been sexually abused by her stepfather during her childhood and adolescence, from which she suffered a variety of mental health and addiction issues throughout her life. Ironically, because of these very issues, her parents initiated a complaint with Child Protective Services (CPS) that resulted in the removal from Laura's custody of her young daughter Andrea.

During judicial hearings to determine whether Laura should be reunited with her daughter, Laura learned that her mother and stepfather had been allowed unsupervised visitation with Andrea. Laura also suspected from other sources that Andrea had herself been sexually abused during their separation. When the court refused to prohibit further unsupervised visitation between Andrea and Laura's parents, Laura became hysterical with fear for her daughter's safety.

Having recently purchased a handgun for protection at her residence in Austin, Laura decided to abduct Andrea from her parents' home during their next unsupervised visitation, and then take Andrea to be examined by a physician. But,

when Laura entered her parents' backyard during a cook-out, looking for Andrea, she encountered unexpected resistance when her parents rushed toward her. Laura reacted by firing multiple shots at close range, killing them both. By then, Andrea had fled into the house. Laura's purpose effectively thwarted, she left the scene in shock and drove away. She later turned herself in to the police on the other side of town.

Throughout trial, and during closing argument, the prosecuting attorney adduced evidence and engaged in argument designed specifically to cast doubt on Laura's claim that her stepfather had ever abused her, contending that Laura had fabricated the story for purposes of the CPS investigation. After a protracted deliberation, the jury eventually convicted Laura of capital murder.

Meanwhile, one of Laura's friends from high school, Henry O'Hara, read a newspaper account of the state's closing argument. O'Hara remembered Laura telling him about the abuse, including much of the same detail, more than thirty years earlier. On his own initiative, and without having seen or spoken to Laura in ten years, O'Hara called the District Attorney, who in turn disclosed O'Hara's identity and information to Laura's defense counsel. Counsel then timely filed a motion for new trial, alleging newly discovered evidence. A hearing was held, and numerous

witnesses were called. Laura testified that she did not remember telling Henry O'Hara, many years earlier, about the sexual assaults committed against her by her step-father. Even after it came to light through Henry's independent contact with the District Attorney, Laura did not remember it.

The trial judge believed her, finding that O'Hara's testimony was unknown to Laura, but denied her new-trial motion on the ground that his testimony was merely cumulative of Laura's. On direct appeal, the El Paso Court of Appeals reversed. It accepted the trial court's findings in Laura's favor, but held that O'Hara's testimony was not merely cumulative or corroborative because it would have been admissible to overcome the prosecution's accusation of recent fabrication. It therefore reversed the trial court and remanded the case for a new trial.

This Court, however, granted the State's petition for discretionary review because the El Paso Court"failed to address every issue necessary to the disposition of the appeal." *State v. Carsner*, 444 S.W.3d at 3. In particular, the El Paso Court did not address the State's argument that O'Hara's testimony was necessarily known to Laura because she was the one who told him about it some thirty years earlier. Accordingly, this Court vacated the El Paso Court's judgment and remanded the case for "further proceedings." Id.

On remand, the El Paso Court rendered judgment in favor of the State. Conceding that it was required to accept as true in fact that Laura did not remember telling Henry O'Hara about the sexual abuse she suffered from her step-father as a child, the Court nevertheless agreed with the State "that, *as a matter of law*, [Henry O'Hara's testimony] was not newly discovered because Appellant was the source of the evidence." *Carsner v. State*, 2018 WL 2998194 at *4 (emphasis added, internal quotation marks omitted).

QUESTION ONE

To establish a claim of newly discovered evidence, the defendant must satisfy four criteria: (1) that the evidence was unknown or unavailable to the movant at the time of her trial; (2) that the movant's failure to discover or obtain the evidence was not due to a lack of diligence; (3) that the evidence was not merely cumulative, collateral, corroborative, or impeaching; and (3) that the evidence is probably true and would probably bring about a different result on another trial. *Keeter v. State*, 74 S.W.3d 31, 36-37 (Tex. Crim. App. 2002). See also TEX. CODE CRIM. PROC. art. 40.001.

After reviewing a handful of decisions from various other appellate courts, in which alibi and other later-recollected evidence was claimed by the defendant to be newly discovered after trial, the El Paso Court determined that there is, indeed, a rule

of law governing newly discovered evidence, where the central issue is whether a defendant was unaware of the new evidence because she forgot about it. In such cases, according to the El Paso Court, evidence that has been forgotten is unknown, for purposes of the newly-discovered-evidence rule, only if the defendant forgot about it because of a physical or mental condition, such as amnesia or repression, that was caused by a traumatic event, debilitating injury, or disease, the existence of which can be confirmed independently by science or medicine. *Carsner*, 2018 WL 2998194, *5-6.

None of the cases upon which the El Paso Court relied actually support this rule, however, and even if such a rule did exist, it would be a departure from the ordinary legal criteria generally governing motions for new trial based on newly discovered evidence. On its face, the legal issue under settled case law is not whether the defendant had a good or sufficient reason for being unaware of the evidence (although a failure to discover it through a lack of diligence would defeat the second prong of the test) but only whether the defendant was unaware of it in fact.

As applied to evidence that was once known, but since forgotten, including alibi testimony, the question would therefore seem to be whether the defendant

really forgot about it or was just pretending to have forgotten in order to get a second bite at the apple. See *Com. v. Malvitch*, 90 Mass. App. Ct. 1109, 60 N.E. 1197 (2016). This, however, is fundamentally a question of fact, not of law, and therefore an issue for the trial judge, not for the appellate court. Indeed, a careful examination of the very cases upon which the El Paso Court of Appeals relied for its rule of law reveal that the issue in each was actually resolved, not as a matter of law, but with a fact-finding, such as "these additional witnesses . . . must of necessity have been with the appellant," *Seals v. State*, 634 S.W.2d 899, 908 (Tex. App. – San Antonio 1982), or "Appellant himself surely knew at the time of trial that he had been in jail," *Martinez v. State*, 824 S.W.2d 688, 692 (Tex. App. – El Paso 1992), or he must have had knowledge of the existence of the document, *In re United States of America, Petitioner*, 565 F.2d 173, 176 (1st Cir. 1977), or "he was bound to know of his own whereabouts," *Brown v. State*, 150 Tex. Crim. 285, 292, 201 S.W.2d 50, 55 (1946), or he "must have known prior to the trial where he was and what he was doing, and who he was with." *Baker v. State*, 504 S.W.2d 872, 875 (Tex. Crim. App. 1974). Accord *Villarreal v. State*, 79 S.W.3d 806, 814 (Tex. App. – Corpus Christi-Edinburg 2002); *Soliz v. State*, 2015 WL 4141212, *4 (Tex. App. – Houston [14th Dist.] July 9, 2015).

Thus, when overruling claims of forgotten evidence, including alibi testimony, trial and appellate courts have rather consistently and uniformly held that such claims are not to be believed because the defendant, in spite of her claim to the contrary, must have known about the evidence all along. In effect, the courts have generally reached a conclusion, either explicitly or by necessary implication, that the defendant's claim was not credible. See *Ho v. State*, 171 S.W.3d 295, 307 (Tex. App. – Houston [14th Dist.] June 9, 2005); *McCollum v. State*, 112 Tex. Crim. App. 317, 16 S.W.2d 1087, 1088-89 (1929); *Adams v. Stark*, 280 S.W. 1074, 1076 (Tex. Civ. App. 1925); *Clemmons v. Johnson*, 167 S.W. 1103, 1104 (Tex. Civ. App. 1914). They have neither purported to establish, nor relied upon any existing, rule of law that evidence cannot be newly discovered under any circumstances if it establishes an alibi or involves evidence once known but now forgotten.

Such a rule would, in any event, be absurd. There are obvious hypothetical examples in which a defendant might not know of an alibi witness's availablity to testify, as when the witness was aware of the defendant's presence somewhere remote from the crime scene, but the defendant did not know that the witness was there. In such case, a conclusion that the defendant must have known of the potential testimony would obviously be false in fact.

The same is, of course, true when it comes to evidence, including alibi testimony, that was once known to the defendant, but which was forgotten by her before trial. Obviously, evidence that was forgotten is not known in any ordinary sense of the word. The El Paso Court of Appeals clearly realizes this, as it conceded in its written opinion that forgotten evidence might nevertheless be unknown to the defendant, and therefore qualify as newly discovered, if the defendant's memory loss was due to some injury, trauma, or illness. *Carsner*, 2018 WL 2998194, at 6, citing *Reynolds v. State*, 893 S.W.2d 156, 159-60 (Tex. App. – Houston [1st Dist.] 1995); *State v. Jiron*, 882 P.2d 685, 689 (Utah Ct. App. 1994); *People v. Love*, 51 Cal.2d 751, 757-58, 336 P.2d 169, 173-74 (1959).

The only imaginable argument in support of such a conclusion is that memory loss due to injury, illness, or trauma, unlike memory loss from other causes, is somehow excusable. But that hardly explains why some lost memories are still known to the defendant while others are not, which is the actual first prong of the newly-discovered-evidence test. Indeed, the Court's rational, if it can even be called that, does not make much sense either as a factual or as a moral proposition because lost memories of all kinds are indisputably unknown in fact, and because people cannot really be held morally responsible for lost memories of any kind, regardless

of the cause, except possibly for self-induced amnesia, if such a thing even exists.

The El Paso Court of Appeals claims that memory loss due to injury, illness, or trauma is an "unusual circumstance" that justifies treating some forgotten evidence as newly discovered. *Carsner*, 2018 WL 2998194 at *5. But the Court does not identify any actual justification for treating evidence as newly discovered just because it was forgotten by the defendant as a result of injury, illness, or trauma. Id. at *6. Is it because the Court feels sorry for the defendant? Is it because evidence forgotten because of injury is "unknown" while evidence forgotten for other reasons is "known"? Or is it simply because the courts do not regard most claims of memory loss as plausible?

The plain truth is that courts usually do not believe defendants who inexplicably remember evidence critical to their defense after the trial is over. But Laura's case is not one of refreshed recollection, and her claim of memory loss after the passage of thirty years is not, therefore, likely to have been feigned. O'Hara's availability as a witness was not something Laura later remembered or rediscovered herself. Indeed, it came to the attention of the District Attorney and then to her own defense counsel before she was ever aware of it. There is no suggestion of a subterfuge or collusion on her part or on the part of her lawyers. Had Henry O'Hara

not brought it up himself, or had the District Attorney not passed it along to defense counsel, there would have been no motion for new trial filed or subsequent appeal of its denial. It is no wonder the trial judge believed her.

The El Paso Court's rule of law, categorically excluding from the newly-discovered-evidence rule all memory loss not due to illness, injury, or trauma thus undermines the core value of the newly-discovered-evidence rule. Under our adersarial system of justice, defendants are responsible for assembling and producing at trial all evidence of which they are actually aware or of which they might become aware through reasonably diligent investigation. They are not responsible for a failure to produce such evidence as was both actually unknown to, and actually undiscovered by, them in spite reasonably diligent investigative efforts. This is the core value of, and fundamental basis for, the newly discovered evidence rule. See Dix & Schmolesky, 43A TEX. PRAC., *Criminal Practice & Procedure* § 50:24 (3d ed.)

Accordingly, when a critical part of a criminal case involves an issue upon which relevant evidence, favorable to the defendant, is missing because it was actually forgotten, it makes no difference, as a matter of law or logic, whether the defendant's memory loss was due to ordinary, unremarkable factors, such as the

passage of time, or to accident, illness, or trauma. In either instance, it is the fact of, not the reason for, the defendant's lack of awareness that matters. So long as her ignorance is not feigned or fraudulent, it does not make moral or policy sense to charge her with responsibility for it.

In Laura Carsner's case, the trial judge found that she had actually forgotten about the newly discovered evidence. That, in the judge's view, was enough to meet, and it does meet on its face, the first prong of the newly-discovered-evidence test. The El Paso Court of Appeals effectively overruled this fact-finding, holding that it does not matter whether Laura actually forgot about the evidence. All that matters, in the Court's opinion, is that Laura once knew about it and did not forget about it because of an injury, disease, or traumatic event. This is a new rule of law, not well supported by the exant case law upon which the El Paso Court relied or by the logic of the newly-discovered-evidence rule itself.

This Court previously granted discretionary review in this case, and ultimately remanded to the El Paso Court of Appeals for further consideration, because that Court had failed to address the very argument that is now the basis for this discretionary review petition. Surely, the State's petition for discretionary review would not have been granted in the first place had this Court not considered that

argument to be ultimately worthy of consideration on its merits. The Court of Appeals has decided an important question of Texas evidentiary law that has not been, but should be, settled by this Court. TEX. R. APP. PROC. 66.3(b).

QUESTION TWO

For essentially the same reason, the Court of Appeals concluded that O'Hara's testimony was not only known to Laura, but that it might also have been discovered by her through a reasonably diligent effort to remember it. As the Court of Appeals acknowledges, this conclusion is based on the same rationale as its conclusion that O'Hara's availability was known to Laura all along. In short, because it was somewhere in her head, all she needed to do was try harder to get it out.

Here, the Court of Appeals does not expressly purport to apply a rule of law, but seems to find as a matter of fact, that "because Appellant was admittedly aware of the need to find a witness to corroborate her defense of childhood sexual abuse, Appellant's failure to recall her outcry to O'Hara – a matter within her personal knowledge – exhibited a lack of diligence on her part." *Carsner*, 2018 WL 2998194 at *8. However, as there is no dispute that the trial court reached a contrary conclusion, it is evident that the Court of Appeals either failed to accord proper deference to the trial court or again applied a rule of law, categorically assigning a lack of diligence

whenever the defendant fails to recall evidence once known, but since forgotten.

In light of the Court's conclusion that O'Hara's availability was, as a matter of law, actually known to Laura, the latter seems more likely. Indeed, Laura's lack of diligence follows, as a matter of logical inference, from her knowledge that O'Hara could have testified on her behalf, and from the fact that, in preparing for trial, she evidently made no effort to locate O'Hara specifically. This lack of diligence is really just a corollary of the Court's conclusive presumption that evidence, once known, is never really forgotten – it can always be recalled through diligent effort. But, without a presumption of knowledge, the conclusion does not follow.

The El Paso Court's disposition of the State's arguments, as regards both knowledge and diligence, is wrong-headed for the same reason. It makes a rule of law out of what is necessarily a question of fact – was the evidence actually known to the defendant so that it could have been obtained through the exercise of reasonable diligence in time for trial? By refusing to accept the finding of the trial court that it was not, the Court of Appeals in this case reversed a fact-finding that is well supported by the testimonial record, substituted its judgment for that of the trial court, and established a rule of law that is demonstrably contrary to fact. Whether it was right to do so is an important question that deserves the attention

of this Court. TEX. R. APP. PROC. 66.3(b).

PRAYER FOR RELIEF

For the foregoing reasons, Appellant requests that his petition for discretionary review be granted, that the judgment of the Eighth Court of Appeals be reversed, and that the case be remanded for a new trial.

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CERTIFICATE OF COMPLIANCE

I hereby certify in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretionary review contains 3,501 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature,

proof of service, certification, certificate of compliance, and appendix.

/s/ Robin Norris
ROBIN NORRIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically through the electronic filing manager to the following parties or their attorneys whose email addresses are on file with the electronic filing manager.

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APPENDIX

(Opinion of the Court of Appeals)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LAURA CARSNER,	§	
		No. 08-11-00326-CR
Appellant,	§	
		Appeal from the
v.	§	
		171st District Court
THE STATE OF TEXAS,	§	
		of El Paso County, Texas
Appellee.	§	
		(TC#20090D05416)

O P I N I O N

Laura Carsner was found guilty of capital murder and sentenced to life without the possibility of parole. The trial court denied Appellant's motion for new trial based on newly-discovered evidence, finding that the first two prongs of the four-prong test had been met, i.e., that the evidence was newly discovered, as it was unknown or unavailable to Appellant prior to trial and she did not fail to use due diligence in obtaining it. But the trial court also found that the evidence did not meet the third prong of the test – it was merely cumulative or corroborative of the evidence presented at trial. In our original opinion, we concluded that the evidence was not merely cumulative or corroborative under the third prong, and we further found that it would have probably changed the outcome of the case under the fourth prong of the test. We therefore concluded that Appellant was entitled to a new trial. *Carsner v. State*, 415 S.W.3d 507, 514 (Tex. App.--El Paso 2013), *vacated & remanded*, 444 S.W.3d 1 (Tex. Crim. App. 2014). After granting

the State's Petition for Discretionary Review, the Court of Criminal Appeals concluded that we failed to analyze the first two prongs of the test, and remanded this case for further consideration. *Carsner v. State*, 444 S.W.3d 1, 1 (Tex. Crim. App. 2014). Upon analyzing those two prongs, we conclude that the evidence cannot be considered newly discovered. We also reject Appellant's argument that the trial court erred by refusing her request for an instruction on the law of self-defense.

FACTUAL SUMMARY

Trial

At trial, Appellant acknowledged that she shot and killed her mother and stepfather, but contended that she did so out of fear for her own safety and that of her then eight-year-old daughter. The evidence revealed that in the months preceding the shooting, Appellant's mother filed a complaint with Child Protective Services (CPS), alleging that Appellant had physically abused, neglected, or was unable to care for her daughter due to Appellant's alcoholism. At that time, Appellant's daughter was temporarily placed with a cousin, but when Appellant checked herself into a local residential treatment center, her daughter was permitted to reside there with her. According to Appellant, she forbade her daughter from going to a park where Appellant believed drug addicts congregated. Her daughter became angry, and "went yelling and screaming" to the management of the treatment center, which ultimately led to CPS's decision to place her in foster care in May 2009.

Thereafter, a series of court hearings were held to determine where Appellant's daughter should be placed. During this time, Appellant was living in Austin, but returned to El Paso for the court hearings. She was not allowed any contact with her daughter. Appellant testified that

during the course of the CPS proceedings, she informed CPS on more than one occasion that her stepfather had molested her as a child and asked that her daughter not be placed with her mother and stepfather. At a court hearing held on August 28, 2009, Appellant discovered, allegedly for the first time, that her mother and stepfather were allowed to have unsupervised visits with her daughter at their home. Appellant also learned that her daughter had made an outcry of abuse against a cousin whom Appellant believed would have access to her daughter at her parents' home during these supervised visits. At the hearing, Appellant asked the judge not to allow any further unsupervised visits due to her fear that her stepfather would abuse her daughter, but the caseworker recommended allowing unsupervised visitation to continue, and that Appellant not be permitted to see her daughter for the time being.

Appellant recalled that she was extremely upset after the hearing and was barely able to sleep out of fear for her daughter's safety. The next day, Appellant drove to Las Cruces to complete the purchase of a gun she had started on August 26. Armed with the gun, Appellant drove to her mother and stepfather's home for the purpose of removing her daughter from the home in order to take the child to the police and to a doctor to be examined for signs of sexual abuse. Upon her arrival, she found her mother and stepfather in the backyard grilling hamburgers, along with her daughter and two of the victims' other grandchildren. Appellant claims that when she announced that she was there to take her daughter to the hospital, her stepfather "rushed" at her, causing her to fear her would take the gun away from her. She then reflexively began shooting the gun, firing eight shots that struck her mother, and four shots that struck her stepfather, resulting in their deaths.

Although Appellant admitted to the shooting, she contended that she did not intentionally kill them but fired her gun because she was afraid they would take her gun away, and because she feared for her own and her daughter's safety. Appellant further explained that her extreme reaction occurred because her stepfather had sexually molested her as a child, beginning when she was eleven years old, and that her mother had been aware of the abuse but did nothing to stop it. According to Appellant, the abuse continued until she was seventeen years old, when her mother kicked her out of the house for violating the family's strict curfew rules.

The State argued at trial that the murder was premeditated and intentional, and that Appellant's claim that she had suffered childhood sexual molestation at the hands of her stepfather was recently fabricated as a means of excusing her conduct. During closing argument, the State maintained that Appellant had not directed any claims of sexual molestation against her stepfather until after her mother had made the CPS report. Consequently, Appellant's claim should be viewed with skepticism, but in any event, the claim, even if true, did not serve as a defense to the murder charge. The jury found Appellant guilty of capital murder, and she was sentenced to life without the possibility of parole.

Motion for New Trial

Appellant filed a motion for new trial, asserting that she had "newly discovered evidence" that supported her defensive theory. At the hearing, she presented the testimony of Henry O'Hara, who had dated Appellant thirty years earlier when she was a senior in high school. O'Hara testified that after Appellant was sentenced, he read a newspaper article regarding her conviction indicating that the prosecutor had persuaded the jury that Appellant's assertion of childhood sexual

abuse was recently fabricated.[1] He voluntarily came forward to disclose this information to the district attorney's office, who then forwarded the information to the police, and ultimately to Appellant's counsel.

O'Hara explained that after he had dated Appellant for several months, she confided in him that she was frightened of physical intimacy because she had been sexually molested for several years during her childhood. Although O'Hara could not remember Appellant's exact words, he recalled that her assailant had either been her stepfather or her grandfather. He also recalled that she had described to him a particularly unusual form of abuse, with her assailant hanging her upside down, smearing hamburger meat over her, and licking it off.

Defense counsel testified that he had interviewed Appellant extensively about her claim of past sexual abuse prior to trial, and recognizing the importance of corroborating her claim, he asked her whether she could provide the names of any witnesses who could corroborate her outcry against her stepfather. Appellant did not identify O'Hara. In her testimony at the hearing, she acknowledged that she had dated O'Hara in high school, but she did not recall making an outcry to him or anyone else. Appellant claimed that O'Hara's testimony should therefore be considered "newly-discovered" evidence, and she sought a new trial on that ground.

Article 40.001 of the Code of Criminal Procedure provides, "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." TEX. CODE CRIM. PROC. ANN. art. 40.001 (West 2018). To be entitled to a new trial on the basis of newly discovered or newly available evidence, a defendant must satisfy a four-pronged test:

[1] O'Hara testified that following her graduation from high school he lost contact with Appellant, but did have contact with her for a brief period of time approximately ten years later, when Appellant, who had a chiropractic practice, treated him for an injured thumb. He lost contact with her again until reading of her conviction in the newspaper.

> (1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial;
>
> (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence;
>
> (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and
>
> (4) the new evidence is probably true and will probably bring about a different result in a new trial.

State v. Arizmendi, 519 S.W.3d 143, 148–49 (Tex. Crim. App. 2017); *see also Keeter v. State*, 74 S.W.3d 31, 36–37 (Tex. Crim. App. 2002). The trial court held that the first two prongs had been met, but that the third prong had not. Because of its finding on the third prong, the trial court explicitly refrained from addressing the fourth prong. Because it held that the third prong of the test had not been met, the trial court denied the motion for new trial.

Appeal

In her appeal to this Court, Appellant argued that the trial court had abused its discretion in denying her a new trial. The State countered that none of the four prongs of the test had been satisfied. We noted in our original decision that the trial court had found in Appellant's favor on the first two prongs of the four-prong test, but had rejected her argument based on the third prong.[2] *Carsner*, 415 S.W.3d at 512. We then addressed only the third and fourth prongs of the test, concluding that those prongs had been satisfied. *Id*. at 512-14. In particular, we held that O'Hara's testimony was not merely cumulative of Appellant's claims of childhood abuse, but would have had independent evidentiary value beyond mere corroboration in light of the State's

[2] The trial court concluded on the record that Appellant was "okay" as to prongs one and two. The trial court requested the prosecutor to draft and submit proposed findings of fact, but ultimately the trial court did not issue any findings.

assertion of recent fabrication. *Carsner*, 415 S.W.3d at 512. We also held that O'Hara's testimony would have probably resulted in a different result in a new trial because it would have made an acquittal, a conviction for a lesser-included offense, or a hung jury substantially more probable. *Id.* at 513. We concluded that the trial court was required to grant a new trial because all four prongs of the test had been met. *Id*. at 514. Because we reached that conclusion, we did not address Appellant's second issue on appeal regarding whether the trial court erred by failing to include an instruction on the law of self-defense in the jury charge. *Carsner,* 415 S.W.3d at 514.

The Court of Criminal Appeals subsequently granted the State's petition for review and held that we had failed to analyze the first two prongs of the applicable four-prong test and remanded this case to this Court for further consideration of those two prongs. *Carsner*, 444 S.W.3d at 1.

Remand

Because the Court of Criminal Appeals has remanded the case for further consideration, we now address the first two prongs of the newly-discovered evidence test to determine if Appellant established (1) the existence of newly-discovered evidence that was unknown or unavailable to her at the time of trial, and (2) that her failure to discover or obtain that new evidence was not due to her lack of due diligence. As a result, we must also reach the second issue raised by Appellant regarding whether the trial court erred by failing to instruct the jury on the law of self-defense.

THE MOTION FOR NEW TRIAL

Standard of Review

The trial court has discretion to decide whether to grant a new trial based on newly-discovered evidence, and its ruling will not be reversed absent an abuse of discretion. *Keeter*, 74 S.W.3d at 37. However, motions for new trial based on newly-discovered evidence are not favored by the courts and are viewed with great caution. *Drew v. State*, 743 S.W.2d 207, 225 (Tex. Crim. App. 1987); *Manley v. State*, 28 S.W.3d 170, 173 (Tex. App.--Texarkana 2000, pet. ref'd); *Dotson v. State*, 28 S.W.3d 53, 55 (Tex. App.--Texarkana 2000, pet. ref'd).

Here, as directed by the Court of Criminal Appeals, we must determine whether Appellant met the first two prongs: (1) the newly-discovered evidence was unknown or unavailable to the defendant at the time of trial; and (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence. We review the evidence in the light most favorable to the trial court's conclusions that Appellant did so.

Deference to Credibility Determinations

The credibility of witnesses and the probable truth of the newly-discovered evidence are matters determined by the trial court. *Keeter*, 74 S.W.3d at 37; *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014) (appellate courts defer to the trial court's credibility determinations). The trial court determined that the first two prongs had been met. In doing so, the trial court must have found O'Hara to be a credible witness and that he had voluntarily come forward when he learned from the newspaper article that Appellant had been convicted in part due to the State's argument that Appellant had recently fabricated her claim of childhood sexual abuse. The trial court also must have necessarily believed Appellant's testimony that she did not remember confiding in O'Hara and defense counsel's testimony that she did not inform him that she had confided in O'Hara. Had she done so, counsel would have attempted to locate O'Hara to secure

his testimony at trial. We defer to those credibility determinations on appeal. *Thomas*, 428 S.W.3d at 104. The dispositive issue then is a legal one—whether we should recognize the evidence of Appellant's outcry to O'Hara as being "newly discovered" evidence that was unknown or unavailable to Appellant at the time of trial, and whether Appellant failed to use due diligence to discover the evidence prior to trial.

Prong One:
The Evidence was not Unknown or Unavailable to Appellant Prior to Trial

The State argues that, as a matter of law, the evidence was not "newly discovered" because Appellant was the source of the evidence -- she was the one who made the outcry to O'Hara. The State then reasons that she was necessarily privy to the subject of O'Hara's testimony and therefore, his testimony was not unknown to Appellant at the time of trial. The State analogizes Appellant's case to alibi cases in which courts have consistently held that testimony of an alibi witness cannot be considered newly-discovered evidence because, by necessity, the defendant must have known of the potential testimony since the defendant was with the alibi witness at the time of the offense. *See, e.g., Drew*, 743 S.W.2d at 226-27 (substance of the unavailable witness's alibi testimony was known to the defendant at the time of trial because the defendant and witness were together at the time of the offense, and thus the testimony of the unavailable witness did not qualify as newly-discovered evidence).

Appellant responds that the alibi cases apply only when the defendant herself claims to have suddenly remembered an incident, not when others come forward of their own volition to offer testimony that is unremembered by the defendant. The State counters that regardless of who remembers an incident, the premise remains the same -- evidence to which a defendant is privy,

particularly when the defendant is the source of that evidence, cannot be considered newly-discovered evidence.

The Information was Within Appellant's Personal Knowledge

We agree with the State on this point for several reasons. First, we agree that it is appropriate to analogize the present case to situations in which a defendant has come forward with a new alibi witness after trial. As Texas courts have repeatedly pointed out, the rationale behind not characterizing alibi testimony as being newly discovered is clear -- in general, a defendant, "must have known prior to the trial where he was, what he was doing, and who he was with" at the time of an offense, and therefore, in general, alibi evidence cannot be considered "newly discovered." *Baker v. State,* 504 S.W.2d 872, 875 (Tex. Crim. App. 1974); *Villarreal v. State,* 79 S.W.3d 806, 814 (Tex. App.--Corpus Christi 2002, pet. ref'd) (setting out cases holding that the testimony of an absent alibi witness is not newly-discovered evidence because the alleged alibi was known to the defendant at the time of trial, "[s]ince appellant must have known prior to the trial where he was, what he was doing, and who he was with"); *Seals v. State*, 634 S.W.2d 899, 908 (Tex. App.--San Antonio 1982, no pet.) (alibi witnesses must by necessity have been with defendant, and defendant therefore must have known of their testimony before trial such that the evidence would not be considered newly discovered).

This rationale has been applied to other situations, apart from those involving alibi witnesses, when a party seeks a new trial based on items of evidence that they claim to be newly discovered, when in fact the party had personal knowledge of the evidence prior to trial. For example, in *Martinez v. State,* a defendant attempted to argue that he had newly-discovered evidence to substantiate the fact that he had been in jail in another state at the time the charged

offense occurred in the form of his jail records. *Martinez v. State*, 824 S.W.2d 688, 692 (Tex. App.--El Paso 1992, pet. ref'd). We rejected the defendant's claim that his jail records could be considered "newly-discovered" because he "surely knew at trial that he had been in jail at those times and could have testified as such." *Id.* In other words, the evidence was not unknown or unavailable to the defendant at the time of trial. *Id.*; *see also In re United States of America, Petitioner*, 565 F.2d 173, 176 (1st Cir. 1977) (where defendant in securities fraud case signed a document four years before trial, court concluded that he must have had knowledge of the existence of the document, and therefore, the document could not be considered newly discovered for purposes of granting a new trial); *State v. Daymus*, 380 P.2d 996, 997 (Ariz. 1963) (evidence of financial records could not be considered newly discovered, where the defendant had personal knowledge of their existence prior to trial).

Forgotten Evidence is not Newly Discovered

Appellant suggests that because she did not recall the conversation, we should nevertheless deem it to be newly discovered. We disagree. Courts have long held that "forgotten" evidence cannot be considered newly discovered absent unusual circumstances. Where the evidence was once known to the defendant, but the defendant does not recall it prior to trial, it cannot typically be considered "newly-discovered" for purposes of granting a new trial. *See Brown v. State*, 150 Tex. Crim. 285, 292, 201 S.W.2d 50, 55 (1946) (existence of alibi witnesses claiming that defendant was elsewhere at time offense was committed could not be considered newly discovered merely because defendant claimed that he did not remember seeing them until the matter was called to his attention by one of the witnesses at his trial, as defendant was bound to know his whereabouts at that time); *McCullom v. State*, 112 Tex. Crim. 317, 321–22, 16 S.W.2d 1087,

1088–89 (1929) (where defendant claims to have forgotten where he spent the night at the time of the offense, evidence of such could not be considered newly discovered for purposes of granting a new trial, as those facts were within the defendant's knowledge before his trial); *Cornell v. State*, No. 02-10-00056-CR, 2011 WL 856910, at *2 (Tex. App.--Fort Worth Mar. 10, 2011, no pet.) (not designated for publication) (rejecting defendant's argument that an order from juvenile court was newly discovered where the defendant testified that he knew about the order as he was present when it was rendered but had "forgotten about it since that time"); *Adams v. Stark*, 280 S.W. 1074, 1076 (Tex. Civ. App.--Fort Worth 1925, writ dism'd w.o.j.) (concluding that defendant was not entitled to a new trial based on his desire to present the testimony of an alibi witness, where the defendant's only excuse for failing to present the witness at trial was the assertion that the alibi witness's existence had "slipped his memory"); *Clemmons v. Johnson*, 167 S.W. 1103, 1104 (Tex.Civ.App.--Galveston 1914, no writ) (where defendant's only excuse for not obtaining witness's testimony prior to trial is that the matter "slipped" his memory, the trial court did not abuse its discretion by refusing to grant a new trial on the ground of newly-discovered evidence); *United States v. Leyba,* 504 F.2d 441, 443 (10th Cir. 1974) (application for new trial to introduce testimony of witnesses known to, but forgotten by, party at time of trial denied); *State v. Daymus,* 380 P.2d 996 (Ariz. 1963) (facts or evidence not introduced or otherwise made use of at trial because they were forgotten until after the trial do not constitute newly-discovered evidence). In other words, information that is "within the personal knowledge of a defendant does not become newly discovered evidence by reason of later recollection." *See generally* 92 A.L.R.2d 992 (Originally published in 1963) (citing *State v. Sims,* 99 Ariz. 302, 310-311, 409 P.2d 17 (1965), (citing *State v. Daymus,* 93 Ariz. 332, 334, 380 P.2d 996 (1963)); *see also Com. v. Malvitch,* 90

Mass. App. Ct. 1109, 60 N.E.3d 1197 (2016) ("'[A] want of recollection of a fact ... cannot be a reasonable ground for granting a new trial,' for it 'may always be pretended, and may be hard to be disproved.'") (internal citations omitted).

We recognize that there are exceptions to this general rule, such as when a defendant suffers from amnesia or some other physical ailment that prevented him from recalling an incident prior to trial. *See, e.g., State v. Reynolds,* 893 S.W.2d 156, 157–60 (Tex. App.--Houston [1st Dist.] 1995, no pet.) (where defendant established that he suffered memory loss following an accident that prevented him from recalling a statement he had made, the court found that the statement could be considered unknown or unavailable to the defendant prior to trial); s*ee generally People v. Love*, 51 Cal. 2d 751, 757-58, 336 P.2d 169, 173-74 (1959) (trial court did not abuse its discretion in granting new trial where witness recanted his testimony against defendant, claiming that his memory had improved since treatment for alcoholism following trial); *see also State v. Jiron*, 882 P.2d 685, 689 (Utah Ct. App. 1994) (recognizing possibility that genuine amnesia could make evidence unavailable at trial and thus render regained memory newly-discovered evidence) (citing *United States v. Bourchier,* 17 C.M.R. 15, 20, 1954 WL 2578 (C.M.A.1954)). Similarly, we recognize the possibility that a memory of an event could be repressed due to psychological trauma, and later recovered or regained. Although not all courts are in agreement, numerous jurisdictions have recognized the scientific validity of repressed memories, particularly involving cases in which memories of childhood trauma, such as sexual abuse, are repressed and only later regained in adulthood. *See generally Scarborough v. Alstatt*, 450 Md. 129, 146 A.3d 476 (2016) (chronicling cases from around the country on the subject); *see also S.V. v. R.V.,* 933 S.W.2d 1, 19–20 (Tex. 1996) (recognizing the scientific literature related to repressed memory and

recognizing the possibility that a repressed memory may be "inherently undiscoverable").[3] In such cases, it may not be appropriate to equate repressed memory that is later regained with a memory that is simply forgotten and later remembered. *See generally Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 331–32, 534 S.E.2d 672, 677 (2000) (expressing the view that "equating a repressed memory to merely 'forgetting' ignores advances in the understanding of the human mind") *aff'd*, 341 S.C. 320, 534 S.E.2d 672 (2000), *overruled on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004).

Appellant does not claim that she suffered any memory loss due to any physical or psychological issues, and in particular, she does not claim that she repressed the memory of the sexual abuse she allegedly suffered at her stepfather's hands. Instead, she clearly recalled the abuse prior to trial and made it the centerpiece of her defense. Her own attorney questioned Appellant extensively about whether she had made an outcry to anyone to rebut the State's contention that she had fabricated the abuse, and Appellant was unable to recall making an outcry to O'Hara or anyone else. At best, this was simply a forgotten memory, which we cannot categorize as being unavailable or unknown to Appellant prior to trial.

The Fact that O'Hara Came Forward is Irrelevant

[3] In *S.V.*, the Texas Supreme Court ruled that despite the existence of expert opinions indicating the possibility that an individual might repress memories of childhood abuse, and that such memories might be "inherently undiscoverable" until later regained in adulthood, the court held that the expert opinions were not subject to objective verifiability. Therefore, the court held that it would not extend the statute of limitations for filing a claim of abuse by allowing a plaintiff to argue that he or she did not discover the abuse until the memory was regained. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996). Instead, the court concluded that the discovery rule should be applied in such cases in the same manner as it would apply in any other case. *Id.; see also Placette v. M.G.S.L.*, No. 09-09-00410-CV, 2010 WL 1611018, at *2 (Tex. App.--Beaumont Apr. 22, 2010, no pet.) (recognizing that neither the Legislature nor the Supreme Court has adopted an exception applicable to sexual assault cases in which the full extent of harm is unknown until after the five-year statute of limitations has run due to the lack of objective verifiability of regained memories).

And finally, we address Appellant's claim that we should reach a different result because she was not the one who regained the memory of her outcry to O'Hara; O'Hara came forward with the proposed testimony relating to her outcry. This lends credence to the credibility of his testimony. In other words, it makes it less likely that it was fabricated than if Appellant had contacted him to ask him to testify on her behalf. But we do not dispute the credibility of O'Hara's testimony, and we assume for the purposes of our analysis that O'Hara was credible and that his testimony was in fact true.

Other than impacting on his credibility, the fact that O'Hara was the one who came forward with his proposed testimony is irrelevant, as it does not transform his proposed testimony into the category of newly-discovered evidence. Contrary to Appellant's argument that this is a distinguishing feature, several Texas courts have refused to deem alibi witness's testimony newly discovered even in similar situations where, as here, the witness does not realize that the defendant is on trial, and only comes forward to disclose information upon hearing about the defendant's conviction after the fact. For example, in *Baker v. State*, 504 S.W.2d 872 (Tex. Crim.App. 1974), a defendant moved for a new trial on the basis of newly-discovered evidence after a witness came forward to provide alibi testimony for the defendant, claiming that he had been playing pool with the defendant at the time the robbery for which the defendant was convicted. *Id.* at 875. The witness did not realize that the defendant had been accused of the robbery until after trial and provided the information to the defendant's attorney. The Court of Criminal Appeals rejected the argument that this evidence was "newly-discovered," pointing out that the defendant must have known prior to the trial "where he was and what he was doing, and who he was with[.]" *Id.* As

such, the fact that it was the alibi witness who came forward after trial with his proposed testimony was not relevant to the Court's analysis.

Similarly, the Corpus Christi Court of Appeals also ruled that an alibi witness's testimony was not newly discovered, despite the fact that the witness testified she did not know about the defendant's trial until after he was convicted and the witness's mother told her about it. *Villarreal v. State*, 79 S.W.3d 806, 814 (Tex. App.--Corpus Christi 2002, pet. ref'd). In that case, the witness was the defendant's sister, who claimed that she was with the defendant visiting their mother in the hospital when the burglary occurred for which the defendant was convicted. *Id.* The defendant argued that the evidence was newly discovered, as the witness was not aware of his conviction until after the trial, and thus, could not have come forward sooner. *Id.* In rejecting this argument, the court noted that the focus is not on whether the witness knew to come forward, but whether the defendant knew about the evidence, or conversely, whether the evidence was "unknown" to him prior to trial. *Id.* (citing *Drew*, 743 S.W.2d at 226). Because the defendant must have known where he was and what he was doing at the time the burglary occurred, the court concluded that the evidence could not be considered "newly discovered" under these circumstances. *Id.* (citing *Baker v. State*, 504 S.W.2d 872, 875 (Tex. Crim. App. 1974)).

We contrast this with situations in which a witness comes forward after trial that was *not* within the defendant's knowledge at the time of trial. *See, e.g., Wallace v. State*, 75 S.W.3d 576, 587–89 (Tex. App.--Texarkana 2002), *aff'd*, 106 S.W.3d 103 (Tex. Crim. App. 2003) (where a witness came forward after trial with information indicating that another individual was to blame for the crime after reading about the defendant's conviction in a newspaper, this was information that was not in the defendant's knowledge before trial, and could be considered newly-discovered

evidence for purposes of granting a new trial); *see also Jock v. State*, 708 S.W.2d 545, 547 (Tex. App.--Texarkana 1986, pet. ref'd) (witness who came forward after trial with information incriminating another individual in the crime could be considered newly-discovered witness).

We are not dealing with a situation in which a third party came forward with information that was unknown or unknowable to Appellant prior to trial. Instead, O'Hara came forward with information that was within Appellant's personal knowledge prior to trial. The fact that Appellant did not remember the information prior to trial does not alter the true nature of the evidence, and does not transform it into being newly-discovered evidence worthy of a new trial. We therefore conclude that Appellant did not meet the first prong of the test for receiving a new trial based on the ground of newly-discovered evidence.

Prong Two:
Appellant did not use Due Diligence in Obtaining O'Hara's Testimony Prior to Trial

For similar reasons, we conclude that Appellant did not use due diligence in obtaining O'Hara's testimony prior to trial. She was aware of her stepfather's abuse prior to trial, and knew that she intended to use that as a "defense" to the murder. Her own attorney acknowledged that he understood the critical importance of obtaining witnesses to corroborate Appellant's story of past abuse, to rebut the State's claim that she recently fabricated her claim of childhood abuse, and in particular, quizzed Appellant about whether she had made any outcries prior to the CPS proceedings. Appellant contends that she "tried her best" to provide her attorney with "information or leads in her memory," but simply could not recall her outcry to O'Hara.

Given the serious nature of the charges against her, and her intent to rely on her stepfather's abuse prior at trial, due diligence required Appellant to search her memory for individuals who might have been witnesses to the abuse or those to whom she may have made a contemporaneous

statement that the abuse was occurring at the time. *See generally State v. Munson*, 204 Neb. 814, 818, 285 N.W.2d 703, 706 (1979) (defining reasonable diligence as appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful); *Com. v. Duest*, 30 Mass.App. 623, 628, 572 N.E.2d 572, 575 (1991) (recollection of fact after trial does not constitute newly-discovered evidence justifying new trial, since such recollection pertains to known rather than unknown, to which concept of discovery applies; by due attention fact might have been remembered). Under similar circumstances, courts have concluded that a defendant's failure to recall critical information of this nature is inconsistent with the exercise of due diligence. *See, e.g., McCullom v. State*, 112 Tex. Crim. 317, 321–22, 16 S.W.2d 1087, 1088–89 (1929) (rejecting defendant's claim that alibi evidence was newly discovered despite defendant's claim that he used due diligence in trying to remember who was with him on the night of the offense); *Villarreal*, 79 S.W.3d at 814 (where defendant's failure to recall the identity of alibi witnesses prior to trial was due to his own lack of diligence); *Soliz v. State*, No. 14-14-00498-CR, 2015 WL 4141212, at *4 (Tex. App.--Houston [14th Dist.] July 9, 2015, no pet.) (not designated for publication) (defendant failed to use due diligence in informing his attorney of alibi witnesses despite the fact that his attorney repeatedly questioned him on the subject); *Ho v. State*, 171 S.W.3d 295, 307 (Tex. App. --Houston [14th Dist.] 2005, pet. ref'd) (where defendant claimed, among other things, that he did not remember the existence of an alibi witness until after trial, defendant failed to use due diligence in obtaining his testimony and was therefore not entitled to a new trial based on newly-discovered evidence); *see also Bouldin v. State*, 109 Tex. Crim. 372, 372–73, 5 S.W.2d 137, 138 (1928) (defendant provided no excuse for failing to call two alibi witnesses at his trial and failed to establish that he exercised due diligence in procuring the attendance at trial);

Zamora v. State, 647 S.W.2d 90, 95 (Tex. App.--San Antonio 1983, no pet.) (holding that appellant's failure to inform his attorney about known witness showed lack of due diligence); *see generally State v. Hirsch,* 245 Neb. 31, 49–52, 511 N.W.2d 69, 81–83 (1994) (recognizing, as other jurisdictions have, that forgetfulness is inconsistent with the diligence required in presenting the evidence during the trial, and such lack of due diligence does not warrant a new trial on the basis of newly-discovered evidence); *see also* 92 A.L.R.2d 992 (Originally published in 1963) (the reason most often advanced by the courts in denying a motion for new trial on the ground of newly-discovered evidence where such evidence consists of facts forgotten by the party or a witness at the time of the original trial is that such forgetfulness is inconsistent with the diligence required in properly presenting the evidence in the first instance, and that newly-discovered evidence, if it is to warrant the grant of a new trial, must be such as could not have been obtained earlier by due diligence on the part of the defendant seeking a new trial). Appellant has not directed us to any authority to the contrary.

We conclude that because Appellant was admittedly aware of the need to find a witness to corroborate her defense of childhood sexual abuse, Appellant's failure to recall her outcry to O'Hara—a matter within her personal knowledge—exhibited a lack of due diligence on her part. We therefore conclude that the second prong of the test for granting a new trial based on newly-discovered evidence has not been met. We overrule Issue One.

THE JURY CHARGE

At the close of trial, Appellant's attorney unsuccessfully objected that the jury charge did not include an instruction on self-defense. Appellant contends that the trial court erred in overruling her objection, and this error was harmful to her case.

Standard of Review

A defendant is entitled to a jury instruction on the law of self-defense in a jury charge if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *See Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017) (citing *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016) (quoting *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001)). When reviewing a trial court's decision denying a request for a self-defense instruction, we view the evidence in the light most favorable to the defendant's request. *Id*. (citing *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006)). A trial court errs in denying an instruction on self-defense if there is some evidence, when viewed in the light most favorable to the defendant, to support the elements of self-defense, regardless of the source of that evidence. *Id*. (citing *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007); *Ferrel*, 55 S.W.3d at 591).

However, the defendant shoulders the initial burden of proof to come forward with evidence to support the instruction. *See, e.g., Kelley v. State*, 968 S.W.2d 395, 399 (Tex. App.--Tyler 1998, no pet.) (defendant has the initial burden of producing some evidence to justify submission of a self-defense instruction; state must then persuade jury beyond a reasonable doubt that defendant did not act in self-defense); *Trammell v. State*, 287 S.W.3d 336, 340 (Tex. App.--Fort Worth 2009, no pet.) (a defendant has the burden of producing sufficient evidence at trial that raises the issue of self-defense to have that issue submitted to the jury); *Clifton v. State*, 21 S.W.3d 906, 907 (Tex. App.--Fort Worth 2000, pet. ref'd) (before an instruction on self-defense is warranted, the defendant has the burden of coming forward with evidence that sufficiently raises

the issue) (citing *Riddle v. State,* 888 S.W.2d 1, 6 (Tex. Crim. App. 1994)); *Broussard v. State*, 809 S.W.2d 556, 559 (Tex. App.--Dallas 1991, pet. ref'd) (if testimony, viewed in the light most favorable to defendant, does not establish case of self-defense, instruction is not required); *Wyatt v. State*, 889 S.W.2d 691, 695 (Tex. App.--Beaumont 1994, no pet.) (an instruction on self-defense is not required if the evidence, viewed in a light favorable to the defendant, does not establish a case of self-defense) (citing *Dyson v. State,* 672 S.W.2d 460, 463 (Tex. Crim. App. 1984)); *Lay v. State*, 359 S.W.3d 291, 297 (Tex. App.--Texarkana 2012, no pet.) (a defendant bears the burden of production of some evidence supporting the justification of self-defense) (citing. *Zuliani v. State,* 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State,* 804 S.W.2d 910, 913 (Tex. Crim. App. 1991); *Dyson,* 672 S.W.2d at 463); *see also* TEX. PENAL CODE ANN. § 2.03(c) (West 2011) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."). Where the evidence does not support the giving of a self-defense instruction, the trial court does not err by refusing to provide one in the jury charge. *Bowman v. State,* 504 S.W.2d 880, 881 (Tex. Crim. App. 1974); *see also Lay,* 359 S.W.3d at 297–98 (trial court did not err in refusing to give self-defense instruction, where the evidence, viewed in the light most favorable to the defendant, established as a matter of law that force was not justified in self-defense) (citing *Ferrel,* 55 S.W.3d at 591).

The Law on Self-Defense

According to Section 9.31 of the Texas Penal Code, a person is justified in using force against another when and to the degree that person reasonably believes the force is immediately necessary to protect himself against another person's use or attempted use of unlawful force. *Gamino*, 537 S.W.3d at 510 (citing TEX. PENAL CODE ANN. § 9.32(a)(1), (2)(A); *see also Alonzo*

v. State, 353 S.W.3d 778, 782 (Tex. Crim. App. 2011). Section 9.32 justifies the use of deadly force "if the actor would be justified in using force against the other under Section 9.31; and when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force." *Alonzo*, 353 S.W.3d at 782 (quoting TEX. PENAL CODE ANN. § 9.32(a)(1), (2)(A)). In turn, Section 9.01 of the Penal Code defines "deadly force" as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." *Alonzo*, 353 S.W.3d at 782-83 (citing TEX. PENAL CODE ANN. § 9.01(3)). The self-defense provisions in the Penal Code focus on the actor's motives and on the level of force used, not on the outcome of that use of force; therefore, if the actor reasonably believed that the force was necessary to protect himself against another's unlawful use of force, and the amount of force actually used was permitted by the circumstances, Sections 9.31 and 9.32 apply, regardless of the actual result of the force used. *Alonzo*, 353 S.W.3d at 783.

Analysis

Appellant contends that the record supported her request for an instruction on the law of self-defense, pointing to her testimony at trial that she fired her weapon when the victims "came at [her]," and were "rushing" her. In response to questioning, Appellant testified she was afraid for her daughter's safety as well as her own. Although she acknowledges that she did not expressly testify that she believed her stepfather intended to kill her or use deadly force against her, she speculated that her stepfather intended to take the gun from her, and then expressed that she did not know what he might do at that point, in light of the fact that he knew she was there to take her daughter away. On appeal, she contends that she therefore made it clear in her testimony

that she "feared for her own safety if her stepfather were to succeed in wrest[l]ing the gun from her control."

We do not believe that this constitutes evidence that the victims were using or attempting to use deadly force against her. At most, Appellant's testimony indicated that her stepfather was "rushing" at her, but there was no evidence that he had a weapon, or that he was approaching her in an attempt to use deadly force against her. "In the absence of evidence of use or attempted use of deadly force by the victim, the section 9.32 defense is not available and the accused is not entitled to a jury instruction on self-defense." *Hernandez v. State*, 946 S.W.2d 108, 114 (Tex. App.--El Paso 1997, no pet.) (defendant charged with aggravated robbery and aggravated assault for stabbing victim was not entitled to instruction on self-defense or defense of third person, where defendant offered no evidence that either of the victims had a weapon or attempted to use deadly force, and defendant presented no evidence that victims used or attempted to use deadly force against defendant's companions); *see also Jureczki v. State*, 211 S.W.2d 231, 233 (Tex. Crim. App. 1948 (in prosecution for murder where there was no testimony that deceased made any demonstration towards accused as a result of which he fired or that deceased came any closer after having been warned by accused not to do so, charge on self-defense was properly refused); *Clifton*, 21 S.W.3d at 907 (evidence at trial was insufficient to raise the issue of self-defense because there was no evidence that Appellant used force to counter force (no error in refusing instruction); *Davis v. State*, 268 S.W.3d 683, 698 (Tex. App.--Fort Worth 2008, pet. ref'd) (defendant failed to present any evidence that the force he used against victim, which consisted of stabbing victim seven times, was necessary to protect himself, where victim was curled into a defensive position in an attempt to defend herself); *Broussard v. State*, 809 S.W.2d 556, 559–60 (Tex. App.--Dallas 1991, pet.

ref'd) (finding, as a matter of law, that there was no evidence that defendant had a reasonable belief that the use of deadly force against his victim was immediately necessary to avoid imminent bodily injury or death, where there was nothing in the record to indicate that the victim used or attempted to use deadly force); *Trammell*, 287 S.W.3d at 340 (evidence failed to warrant self-defense instruction in aggravated assault prosecution, where defendant could not have reasonably believed at time of shooting that his conduct was immediately necessary because, although victim pointed knife at him several hours before shooting, victim was in his car when defendant shot him, never showed defendant weapon, and never indicated he intended to cause defendant death or serious injury); *Gaspar v. State,* 327 S.W.3d 349, 356–57 (Tex. App.--Texarkana 2010, no pet.) (jury instruction on self-defense was not warranted where the record contained no evidence suggesting that the defendant reasonably believed the use of force was immediately necessary to protect himself from the use or attempted use of unlawful force); *see generally Cooper v. State*, 455 S.W.2d 273, 274 (Tex. Crim. App. 1970 (defendant was not entitled to charge on self-defense where issue was not raised by evidence and defendant testified under cross-examination that he was not afraid of deceased or his wife). It is not enough for the defendant to speculate regarding a victim's intentions, and the defendant must instead come forward with some evidence to justify his use of deadly force before a self-defense instruction will be given. *Broussard,* 809 S.W.2d at 559–60 (citing *Werner v. State*, 711 S.W.2d 639, 644 (Tex. Crim. App. 1986)).

Appellant presented no evidence that the victims were armed, or that they used or attempted to use "unlawful deadly force" against her before she fired at them a total of twelve times. At most, she speculated, albeit indirectly, that they might have intended to take the gun from her,

implying that they might have then harmed her.[4] However, such speculation, without more is insufficient to raise the issue of self-defense.

The Statutory Exceptions to Claims of Self-Defense

In addition, there are two statutory provisions that prohibit Appellant from relying on a claim of self-defense. First, Section 9.31(b) of the Penal Code provides that an actor's use of force against another is not justified if, among other things, the "actor provoked the other's use or attempted use of unlawful force[.]" TEX. PENAL CODE ANN. § 9.31(b)(4) (West 2011). However, an actor who is the initial aggressor may nevertheless still be entitled to claim self-defense if the "actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and the other nevertheless continues or attempts to use unlawful force against the actor[.]" TEX. PENAL CODE ANN. § 9.31(b)(4)(A)(B). As set forth above, Appellant initiated the deadly encounter by displaying a gun at the victims, and there is no evidence that Appellant abandoned or attempted to abandon the encounter before firing her weapon at the victims. Under such circumstances, where the evidence conclusively establishes that the defendant was the aggressor and took no steps to abandon the confrontation, Texas courts have uniformly held that a defendant is not entitled to a self-defense instruction. *See, e.g., Dyson v. State*, 654 S.W.2d 577, 579 (Tex. App.--Fort Worth 1983), *aff'd*, 672 S.W.2d 460 (Tex. Crim. App. 1984) (a defendant who initiated confrontation was not entitled to a self-defense charge, as any aggression against the defendant was the result of the defendant's "provocation"); *Lavern v. State*, 48 S.W.3d 356, 361 (Tex. App.--Houston [14th Dist.] 2001, pet.

[4] In her brief, Appellant acknowledges that she never expressly testified that she believed her stepfather might have used the gun against her, but avers that the jury could have reasonably inferred from her testimony that this was in her thoughts at the time.

ref'd) (defendant was not entitled to a charge on self-defense where there was no dispute that he was the first one to display a deadly weapon and where he provoked the victim's use or attempted use of force); *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016) (if a defendant provokes another to make an attack on him, so that the defendant would have a pretext for killing the other under the guise of self-defense, the defendant forfeits his right of self-defense); *In Matter of E.O.E.*, 508 S.W.3d 613, 621 (Tex. App.--El Paso 2016, no pet.) (self-defense instruction was not warranted in juvenile justice proceeding in which juvenile was charged with the offense of aggravated assault with the use of a deadly weapon, where, among other things, the evidence reflected that the juvenile provoked the initial argument, took the first swing at victim, and used disproportionate use of force in stabbing victim); *Bynum v. State*, 874 S.W.2d 903, 908 (Tex. App. --Houston [1st Dist.] 1994, pet. ref'd) (facts did not raise issue of self-defense, and defendant was not entitled to instruction on self-defense; defendant pulled his gun on complainant before another person in the store pointed his gun at defendant); c*f. Semaire v. State*, 612 S.W.2d 528, 531 (Tex. Crim. App. 1980) (defendant was entitled to self-defense instruction where evidence did not conclusively establish that the defendant provoked his victim's attempted use of force).

Second, a defendant is not entitled to claim that he acted in self-defense when the "actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was: (A) carrying a weapon in violation of Section 46.02; or (B) possessing or transporting a weapon in violation of Section 46.05." TEX. PENAL CODE ANN. § 9.31(b)(5). Appellant herself acknowledged that she went to the victims' home due to the pre-existing court battle concerning her daughter's placement, with the intent of resolving the court battle in her favor, by taking her daughter to a physician to have her examined for signs of sexual

assault. Further, she testified that when she arrived at the victims' house, she announced that she was there to take her daughter from them. As such, we conclude that her purpose was, at least in part, to discuss the differences that existed between them.

Further, it appears that Appellant was carrying the gun in violation of Section 46.02, which provides that: "A person commits an offense if the person: (1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun or club; and (2) is not: (A) on the person's own premises or premises under the person's control: or (B) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control." TEX. PENAL CODE ANN. § 46.02 (West Supp. 2017). The evidence conclusively established that Appellant was not entitled to claim self-defense under these circumstances. *See, e.g., Lay*, 359 S.W.3d at 298 (where the undisputed evidence established that the defendant sought a discussion concerning his differences with the victim while carrying a gun in violation of Section 46.02 of the Texas Penal Code, he was not entitled to an instruction on the issue of self-defense as a matter of law); *see also Williams v. State*, 35 S.W.3d 783, 787 (Tex. App.--Beaumont 2001, pet. ref'd) (defendant was not justified in using force, as a matter of law, where the evidence established that the defendant sought an explanation or discussion with his victim about their differences while defendant was illegally carrying a handgun); *Casares v. State*, No. 1888-03, 2005 WL 77049, at *3 (Tex. Crim. App. Nov. 17, 2004) (not designated for publication) (defendant charged with the murder of the brother of his mistress was not entitled to instructions on self-defense where evidence showed that he sought a discussion with the victim and the victim's family while illegally carrying a firearm, concerning phone calls to his wife; statute provides that use of force against another is not justified if the accused sought an explanation from or discussion with the other

person concerning the accused's differences with the other person while unlawfully armed); *Moore v. State*, 392 S.W.3d 697, 701 (Tex. App.--Dallas 2010, no pet.) (defendant was not entitled to a self-defense instruction where the evidence was undisputed that force was not justified as a matter of law because of the applicability of Section 9.31(b)(5)(A) of the Penal Code) (citing *Williams*, 35 S.W.3d at 786; *Davis v. State*, 276 S.W.3d 491, 499 (Tex. App.--Waco 2008, pet. ref'd) (defendant not justified in using force as matter of law when he sought interaction with victim while illegally carrying a handgun); *Elmore*, 257 S.W.3d at 259 (defendant not entitled to self-defense instruction because evidence established as matter of law that defendant confronted victim about prior disagreements while carrying gun in violation of former Section 46.02 of Penal Code)).

Appellant's Claim of Self-Defense was Inconsistent with her Trial Testimony

The State also argues that Appellant's testimony was inconsistent with her claim of self-defense, as Appellant claimed that the shooting occurred reflexively in an accidental, rather than intentional, manner. To be entitled to an instruction on self-defense, a defendant must admit to every element of the offense, including the culpable mental state, and then interpose the defense in question. *See Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) (recognizing that with respect to defenses such as necessity and self-defense, a defensive instruction is "only appropriate when the defendant's defensive evidence essentially admits to every element of the offense *including* the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct"); *Ex parte Nailor*, 149 S.W.3d 125, 133-34 (Tex. Crim. App. 2004). Like other statutory defenses, a defendant's conduct is not negated under self-defense, but is excused from what would otherwise constitute criminal conduct. *In Matter of E.O.E.*, 508 S.W.3d at 621 (citing *Shaw*, 243 S.W.3d at 659; *see also Young*, 991 S.W.2d at 838) (explaining that "[i]n order

to raise [a] necessity [defense], a defendant admits violating the statute under which he is charged and then offers necessity as a justification which weighs against imposing a criminal punishment for the act or acts which violated the statute"). A defendant is required to admit every element of a charged offense before interposing a claim off self-defense and an instruction is inappropriate when the defensive evidence fails in this regard. *Id*. (defendant was not entitled to self-defense instruction where, among other things, defendant denied committing the offense of aggravated assault with a deadly weapon, as required to entitle him to a self-defense instruction).

In a murder case, the defendant must admit that she acted in an intentional manner in shooting her victim; if she denies that she had the requisite intent, and claims that she instead acted accidentally in shooting her victims, she has failed to raise a valid claim of self-defense. *See, e.g*., *Wyatt*, 889 S.W.2d at 695 (defendant charged with murder was not entitled to instruction on self-defense where he was asked on number of occasions if he was acting in self-defense and he repeatedly responded that he was not and where his testimony was that the shooting was an accident); *Vanwright v. State,* 454 S.W.2d 406, 409 (Tex. Crim. App. 1970) (where defendant claimed at trial that shooting was accidental, and there was no evidence that he was defending himself against an unlawful attack, he was not entitled to instruction on self-defense); *see also Marsh v. State,* 343 S.W.3d 475, 480 (Tex. App.--Texarkana 2011, pet. ref'd) (recognizing that one cannot act accidentally or recklessly when acting in self-defense, the decision to employ self-defense is one that must be made in an intentional and knowing manner) (citing *Nevarez v. State*, 270 S.W.3d 691, 695 (Tex. App.--Amarillo 2008, no pet.); *Martinez v. State,* 16 S.W.3d 845, 848 (Tex. App.--Houston [1st Dist.] 2000, pet. ref'd)).

Appellant never testified that she shot the victims intentionally, and instead expressly denied that she had any intent to do so, claiming that when her stepfather approached her, the gun simply "went off," and that she did not recall shooting the victims. In fact, in her brief, Appellant acknowledges that her primary defense at trial centered on her lack of intent to kill the victims, asserting that she lacked the requisite mental state for murder. As her own testimony indicated that the shooting was accidental in nature, we cannot conclude that she was entitled to an instruction on self-defense. We overrule Issue Two and affirm the judgment of conviction.

ANN CRAWFORD McCLURE, Chief Justice

June 15, 2018

Before McClure, C.J., Chew, C.J. (Senior Judge), and Hughes, J.
Chew, C.J. (Senior Judge), sitting by assignment
Hughes, J., not participating

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