

CASE NO. 14-24-00099-CR

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DEBORAH M. YOUNG  
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THE STATE OF TEXAS, )( IN THE 14th COURT OF APPEALS  
Plaintiff-Respondent )( HOUSTON, TEXAS  
(  
vs. )( 7/23/2024 5:14:26 PM  
(  
NATHAN GERARDO GARZA )( OF TEXAS  
Defendant-Appellant )( DEBORAH M. YOUNG  
(  
/ Clerk of The Court

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**APPELLANT'S BRIEF**

Appeal from the Judgment of the District Court of the 409<sup>th</sup> Judicial  
District of Texas of Galveston, County before Judge John Ellisor  
Cause Number 21-CR-1383

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument.

## **CERTIFICATE OF FONT AND TYPE-VOLUME COMPLIANCE**

I certify that the size and style of type used in this brief is Times New Roman, 14-point Font and complies with the font requirements of Texas Rules of Appellate Procedure 9.4(e). Microsoft Word reports that this brief contains 7,432 words.

/s/ Robert Finlay  
ROBERT FINLAY

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## **STATEMENT OF JURISDICTION**

Appellant was tried by a jury with Judge John Ellisor presiding in case number 21-CR-1383 before the 409<sup>th</sup> Judicial District Court. Found guilty, Appellant was sentenced to 25 years in state prison. On October 24, 2023 he filed his Notice of Appeal in this cause.

This Court has jurisdiction over this appeal pursuant to the Texas Constitution, Article V, Sections 5 and 6 and Articles 38.04, 36.13 and 44.25 of the Texas Code of Criminal Procedure, which gives the 14<sup>th</sup> Court of Appeals of Texas jurisdiction over final decisions and sentences of the District Courts of Texas.

## **ISSUES PRESENTED**

### **ISSUE I.**

THE EVIDENCE IS INSUFFICIENT TO SUPPORT  
APPELLANT'S CONVICTION FOR PARTICIPATING IN  
ANY SEXUAL ABUSE.

### **ISSUE II.**

THE TRIAL COURT ABUSED ITS DISCRETION BY  
ALLOWING AN IMPROPER OUTCRY WITNESS TO TESTIFY  
UNDER ARTICLE 38.072.

### **ISSUE III.**

THE COURT ABUSED ITS DISCRETION BY ALLOWING  
DETECTIVE REMMERT TO TESTIFY AS TO SIGNS OF  
DECEPTION AND THAT APPELLANT WAS UNTRUTHFUL,  
DECEITFUL AND A LIAR, THEREBY INVADING THE  
PROVINCE OF THE JURY.

## **STATEMENT OF THE CASE**

This is a criminal case in which the Appellant seeks reversal of his conviction for sexual assault against a child younger than 14 years of age in Galveston County, Texas.

The Appellant was charged by an indictment with the following offense:

“The defendant during a period that was 30 or more days in duration, namely from about January 1, 2021 through March 25, 2021, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against a child younger than 14 years of age, namely intentionally or knowingly cause the contact or penetration of the sexual organ of Alexis Parish by the defendant’s sexual organ, and/or intentionally and knowingly cause the contact or penetration of the mouth of Alexis Parish by the defendant’s sexual organ.”

In cause number 21-CR-1383 before the 409<sup>th</sup> Judicial District Court, Appellant pled “not guilty,” and after having a trial by jury presided over by Judge John Ellisor he was found guilty. Appellant received a sentence of 25 years and on October 24, 2023 his Notice of Appeal was filed in this cause.

## **STATEMENT OF FACTS**

The indictment alleges Appellant Nathan Garza committed two or more acts of sexual abuse against his stepdaughter, Alexis Parish, then 13. Ms. Parish's testified that Mr. Garza's sexual organ went into her vagina three on three different dates, (T. VI., 201-202) "thrusting inside of me." (T. VI., 133 and 146) On the third occasion she reported that he "put his penis in my mouth." (T. VI, 144)

Maylin Gerado-Lopez, the state's SANE nurse, examined Alexis Parish's genital area shortly after the alleged sexual assault. (T. IV, 245) She testified that there "were no findings of trauma" and that Ms. Parish's "hymen was a lot more thicker than usual." (T. V., 67)

Shannon Garza, Alexis Parish's mother, was the first person over the age of 18 to whom Ms. Parish described being the victim of sexual assault. (T. VI, 147and 150) The court permitted Officer Deandre Savage to testify as a second outcry witness. The officer stated that "Ms. Parish said she was assaulted by her stepdad (T. IV, 245) and was told by him that if she told anyone, the CPS would remove her that and her mother would become depressed and kill herself." (T. IV, 245)

Detective Merle Remmert interviewed Appellant as a suspect in the sexual assault of his stepdaughter and a video was made of the interview. (T. V., 161-165) The state attorney asked the detective: “What are the signs of deception?” The defense objected, saying that Detective Remmert was “no expert in deception and had no qualifications.” (T. III, 37; V., 168) The court ruled that: “The foundation has been laid, so I’m going to overrule the objection.” (T. V., 168)

Detective Remmert testified that signs of deception were “repetitive actions, shakes that are invisible to the interviewer, they think; subconscious responses and whether they get mad or ‘try to convince me of their story-- that leads me to believe that they are being untruthful.’” (T. V, 171-174)

The detective testified as to Appellant’s signs of deception: “The first major sign was Lieutenant Miller asked him a question—he answered ‘No ’ but nodded, ‘yes’ when she asked him. (T. V., 174) There were times he became rigid and started chewing gum like crazy. (T. V., 177)

Detective Remmert testified that he “was accusing Mr. Garza of being

defensive and a liar; that 'just based on his behavior, I'm not claiming to know what he's lying about, just that he's not being truthful,' (T. V., 183) and that he was being deceptive. (T. V., 184-185)

## STANDARD OF REVIEW

Issue I. The state's evidence was insufficient to find Appellant guilty whether reviewing the evidence neutrally, in a light most favorable to the presumption of innocence or in a light most favorable to the prosecution. After giving proper deference to the factfinder's role, the court will uphold the verdict unless a rational factfinder must have had reasonable doubt as to any essential element. *Laster v. State*, 275 S.W. 3d 512, 518 (Tex. Crim. App. 2009) Ms. Parish's testimony contrasts directly with state-introduced medical evidence, thereby creating reasonable doubt as to the essential element of the state's case—whether sexual abuse actually occurred.

Issue II. The court abused its discretion by allowing a second outcry witnesses' testimony under Tex. Code of Criminal Procedure, Annotated, Article 38.072.

Issue III. The court abused its discretion by allowing Detective Remmert to testify as to signs of deception and that Appellant was untruthful, deceitful and a liar, thereby invading the province of the jury.

The detective's testimony denied Appellant his right to due process of law, to equal protection and a right to a fair trial under the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution as well as the Texas Constitution.



## **SUMMARY OF THE ARGUMENT**

I. The oft-repeated theme of the state's case was that Appellant took his stepdaughter Alexis Parish's virginity and had sex with her on two day thereafter. The state's nurse, examined Ms. Parish's genital area and testified that there "were no findings of trauma and that her hymen was a lot more thicker than usual."

The state's own evidence proved Ms. Parish's sexual abuse allegations to be untrue and showed that the state had insufficient evidence to support Appellant's being found guilty.

II. Though Shannon Garza, Alexis Parish's mother, was the first person over the age of 18 to whom the Ms. Parish first described being the victim of sexual abuse, the court permitted Officer Deandre Savage to testify as an outcry witness. It was an abuse of the court's discretion to permit his testimony, which served only to bolster unfairly and repeat the false allegations of Ms. Parish.

III. Detective Merle Remmert interviewed Appellant as a suspect in the sexual assault of Appellant's stepdaughter. Over objection Detective

Remmert testified as to recognizing Appellant's body language as "conveying signs of deception--by becoming rigid and chewing gum like crazy; by his answering 'No' but nodding, 'yes' and by not denying." Detective Remmert testified that Mr. Garza was "being defensive and a liar; was not being truthful and of being deceptive."

The court abused its discretion by allowing Detective Remmert's testimony, which was unlawful, prejudicial and which unconstitutionally invaded the province of the jury.

## **ARGUMENT**

### **ISSUE I.**

**THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT’S  
BEING FOUND GUILTY FOR PARTICIPATING IN ANY SEXUAL  
ABUSE.**

Appellant Nathan Garza is accused of committing “two or more acts of sexual abuse against a child younger than 14 years of age. Namely, intentionally or knowingly causing the contact or penetration of the sexual organ of Alexis Parish, his stepdaughter, by the defendant’s sexual organ or intentionally or knowingly causing the contact or penetration of the mouth of Alexis Parish by the defendant’s sexual organ.” (T. III, 6)

Alexis Parish’s mother, who is Nathan Garza’s wife, Shannon Garza, stated the central issue in the case when she testified that on or about March 21, 2021 (T. VI, 24) Alexis told her that Nathan “took her virginity.” (T. VI, 28) (T. IV, 52) Mrs. Garza testified that she did not take Alexis to the emergency room nor to a doctor or hospital, (T. IV., 32-33) and did not think it was an emergency situation since her daughter would not give her any information.” (T. VI, 114)

Alexis Parish testified that her mother “did not seem to believe her” and did not call the police, Child Protective Services or a doctor. (T. VI, 150)

Alexis Parish testified that she blurted out to her mother that “Nathan took my virginity” and ran off to her room. (T. VI, 147) Then later that week on the night of March 25, 2021, Ms. Parish went to a fire station where she called the police and told about being sexually abused. (T. IV, 235) (T.VI, 153)

Ms. Parish testified that Mr. Garza’s sexual organ “went into her vagina” on three separate days. (T. IV., 126) (T. VI., 201-202) The days were “January 2021, sometime after Valentine’s Day, February of 2021 and March of 2021.” (T. IV., 126-127) Ms. Parish testified that Mr. Garza had his penis inside of her and that on two of the times “he kept thrusting inside of me.” (T. VI., 133 and 146) She testified that “it hurt” (T. VI., 133) and that “my vagina was hurting really bad. It was a burning sensation.” (T. VI, 146) She testified that on the third occasion, Mr. Garza “put his penis in my mouth.” (T. VI, 144)

On April 13, 2021 Nathan Garza was interviewed by Galveston police

officers as a suspect in the alleged sexual abuse of his stepdaughter, Alexis Parish. A video was made of the interview (T. V., 161-165) and during the trial it was published as State's Exhibit 40 to the jury. (T. V., 174) In the video Nathan Garza denied "ever having been alone with Ms. Parish" (St. Ex 40 at 18:45, 23:43 and 30:15) or "ever having talked to her about shaving her vagina." (St. Ex 40 at 23:00) He repeated several times that "It never happened," (St. Ex 40 at 23:00, 23:43, 31:50, 40:42 and 49:42) adding that he was being accused of something he didn't do. (St. Ex 40 at 23:00 and 38:34) He said that "Alexis is lying," (St. Ex 40 at 42:21) and that he did not know why. (St. Ex 40 at 23:00, 23:43 and 40:00)

Trial testimony showed that Alexis Parish had a strong motive for fabricating the story against her stepfather. Ms. Parish's mother, Shannon Garza testified that on the day Alexis stated that 'Nathan had taken her virginity,' Alexis was upset because she was getting in trouble for things she had said and for being disrespectful to Mrs. Garza's in-laws. Mrs. Garza had grounded Alexis from her phone and her iPod. (T. VI., 24, 25

and 28) Mrs. Garza testified that her daughter was also getting in trouble for having been on Snapchat--for “looking at porno” (T. IV, 25) and for putting out inappropriate messages of sexual things, such as taking a picture of herself right out of the shower. (T. IV, 26) Ms. Parish testified that her eighth grade boyfriend had sent her “a nude picture showing his genitalia and penis,” (T. V, 186 and 220) and admitted to “having attitude problems toward her mom and stepdad.” (T. V., 58)

Witness Joe Ellison, Nathan Garza’s stepfather and Ms. Parish’s step-grandfather testified that “on the day Alexis ran away from home,” (T. V, 142) Alexis had been a drama queen with an attitude and thrown a tantrum in a store. (T. V, 142) Alexis’s mother Shannon had ‘ate Alexis’s butt out,’ and as discipline for her disobedience, grounded her for (wearing too much) makeup and had taken her phone. (T. V, 145) “Alexis is a very smart little girl and very deceiving sometimes.” (T. V, 155) “She’s a very mature young lady. She’s built like a brick you-know-what house.” (T. V, 144)

Shannon Garza testified that “Alexis was well developed and did not

look her age as far as the way she was built. She was more like a teenager than a child. (T. IV, 64)

Maylin Gerado-Lopez, a family nurse practitioner and former child abuse specialist at U.T.M.B., did a genital area, sexual assault examination (SANE) on Alexis Parish on March 31, 2021. (T. V., 51)

This was less than a month of her last alleged sexual assault. (T. IV, 245)

Ms. Gerado-Lopez's report of Ms. Parish's physical exam reads in part:

“Vestibular is another term for all the different tissues within the labia majora. And I put, no finding of trauma. I look at the hymen. Once you look at the outside, you have to pull on the labia majora and minora to open up the inner insides of the tissue, and you see the hymen then. And on this visit there were no findings of trauma, but we have redundant with red discharge noted (menses), **which means the hymen was a lot more thicker than usual.** *Emphasis provided.* Then we look at the bottom part of the image right before the perineum and there is no finding of trauma. The perineum is the tissue between the female genitalia and the anus and there was no finding of trauma.” (T. V., 67)

Interpretation of genital findings is a key component of the medical examination for suspected child abuse. Normal genital anatomy in non-abused girls compared to abused girls reveals obvious differences such as visible injuries, sexual history and abuse. (*See Note 1*)

Weighing the factors in *Note 1* which indicate likely sexual abuse: Alexis Parish was not reported to have a significantly larger transverse opening than non-abused children. Her hymen being found thicker than usual means she had much more than 1.0 mm of hymenal tissue. Also, she had no transection (tearing) through the posterior hymen.

Nurse Maylin Gerado-Lopez's genital inspection provided direct medical evidence that Ms. Parish had undergone no trauma to her vagina and that her hymen was intact. Ms. Parish was a virgin and was never sexually assaulted as she described. It was a physical impossibility.

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*Note 1.* "Children with a penetration history had a significantly larger transverse opening than non-abused children. Less than 1.0 mm of hymenal tissue at 6 o'clock was detected only in victims of abuse." *Pediatrics*, 2002 Feb; 109(2): 228-35, Abby Berenson, Marion Chacko, Use of hymenal measurements in the diagnosis of previous penetration. "A full thickness transection (tearing) through the posterior hymen is reliable evidence of trauma and does not heal without surgical repair." *J. Pediatr Adolesc Gynecol*, 2008 Aug; 21(4): 177-85. Mary Pillai, Genital findings in prepubertal girls: what can be concluded from an examination? "Without a history of genital trauma from sexual abuse, the majority of prepubertal girls will not have a hymenal transection (specifically close to 100%)." *JAMA*, 2008 Dec. 17; 300(23): 2779-92; Molly Berkoff, *et al*, Has this prepubertal girl been sexually assaulted?



In *Thompson v Wooten*, 650 S.W. 2d 499 (1983) (Tex. App.—Houston) a medical doctor who examined an alleged rape victim found “an enlarged hymenal ring and (as here) no evidence of penetration. Portions of the hymenal ring were intact and she was ‘certainly still virginal.’”

In *Brazil v. State*, Tx. Cr. App., 401 S.W. 2d 843 (1966), a thirteen year old girl testified that her stepfather placed his sexual organ in her private part. The stepfather denied ever having had sexual relations with her. A medical doctor examined her six weeks after the incident and found that “the hymeneal ring had been destroyed indicating entrance into the vagina.” In this case Alexis Parish’s hymeneal ring had not been destroyed—Mr. Garza had not entered her vagina. (T. V., 67)

*Hindman v. State*, Tex. Crim. App., 211 S.W. 2d 182 (1948), was a case involving the rape of a fifteen year old girl. The Court found that “the law requires “close scrutiny” of convictions resting alone upon the uncorroborated testimony of a prosecutrix in a statutory rape case who testifies to facts showing a rape by force and who makes no (immediate) outcry.”

The state did not present any scientific evidence against Mr. Garza that sexual abuse had ever occurred: no DNA, no fingerprints; there was no sperm, no blood, no bruises, no scratches nor other evidence of bodily trauma nor was there any damage to her clothing. Ms. Parish's testimony was itself *contradicted* by the state's own medical evidence. "Close scrutiny" of Mr. Garza's conviction is called for. *Hindman*, supra 184.

In *Murphy v State*, 65 Tex. Cr. R. 55, 143 S.W. 616, 620 (1912), the court reversed a conviction for the crime of seduction on account of insufficiency of the evidence. Finding that "while the jury is the judge of the credibility of the witnesses and the weight to be given the testimony, the appeals court is authorized to look to see if there is any testimony, or that it is so slight as not to authorize a finding therein against the great preponderance of the testimony."

*Laster v. State*, 275 S.W. 3d 512, 519 (Tex. Crim. App. 2009) found that "to convict, a rational factfinder cannot have a reasonable doubt as to an essential element of the crime." Shortly after Ms. Parish

allegedly suffered three penetrating sexual assaults, a state nurse testified that her hymen was “a lot more thicker than usual.” An essential element of the alleged crime—vaginal penetration—never happened. Surely this must create reasonable doubt in the mind of a rational factfinder.

In *Hood v State*, 944 S.W. 2d 743, 746 (Tex. App.—Amarillo, 1997 no. pet.) the state “relied heavily on evidence of vaginal tears to prove Hood had penetrated the complainant’s vagina.” The converse should be allowed to be relied upon by the defense—that no vaginal or hymenal tearing is strong physical evidence that Mr. Garza’s penis did *not at any time penetrate Ms. Parish’s vagina*.

If Alexis Parish’s accusatory statements are reviewed under the “indicia of reliability” formulated in *Buckley v. State*, 758 S.W.2d 339, 343-44 (Tex App.-Texarkana 1988), *aff’d*, 786 S.W.2d 357) (Tex. Crim. App.), two key elements are missing. Ms. Parish’s accusatory statements are not corroborated by any other evidence and there is a motive for her to have fabricated her story. Ms. Parish’s testimony was the heart of the state’s

case—her credibility and believability were the *only* evidence of sexual abuse--the case's central element.

If Ms. Parish's lack of candor in her reporting of the penetration of her vagina is deemed reasonable, any factfinder must also question her claim as to contact or penetration of her mouth by Mr. Garza's sexual organ. "Close scrutiny" of this element would raise reasonable doubt and also require a reversal.

Under any standard of review of the evidence presented against Mr. Garza, it is factually insufficient to support his conviction. *Clewis v. State*, 922 S.W. 2d 126 (Tex. Crim. App. 1996), *White v State*, 890 S.W. 2d 131 (Tex. App.—Texarkana 1994), *Stone v State*, 823 S.W. 2d 375 (Tex. App. --Austin 1992 pet. ref. untimely filed). Viewed neutrally, in light of the presumption of innocence or in a light most favorable to the prosecution, the weight and preponderance of the evidence supporting the verdict against Mr. Garza is weak, clearly wrong and manifestly unjust. A rational factfinder must necessarily have reasonable doubt as to the essential element of the charges against him." *Laster*, *supra* at 518.

This Court is authorized to act in the capacity of a so-called “thirteenth juror.” *Tibbs v Florida*, 457 U.S. 32, 42, 102 S. Ct. 2211, 72 L. Ed. 652 (1982) This thirteenth appellate juror can find that *the great weight and preponderance* of the evidence contradicts the jury’s verdict and can order a new trial. *Watson v. State*, 204 S.W. 3d 416, 417 (Tex. Crim. App. 2006); *Clewis v. State*, supra at 127; *White v. State*, 890 S.W. 2d 131 (Tex.App.-Texarkana 1994, *petition. pending*); *Stone v. State*, supra at 377.

The medical evidence in Mr. Garza’s trial contradicts the jury’s verdict and his conviction should not be sustained on appeal. *Seawell v State*, 578 S.W. 2d 131 (Tex. Cr. App. 1979).

Citing the venerable case of *Walker v. State*, 14 Tex. Ct. App. 609 (1883) “where the evidence is insufficient to rebut the presumption of innocence, where the verdict is contrary to the weight of the evidence and where the verdict *clearly appears to be wrong*,” the Court is justified in exercising its appellate authority to reverse. Mr. Garza’s guilty verdict should be reversed and his case remanded for a new trial. Appellant Nathan Garza asks for such a reversal and remand.

## ISSUE II.

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING AN IMPROPER OUTCRY WITNESS TO TESTIFY UNDER ARTICLE 38.072.

Tex. Code of Criminal Procedure, Annotated, Article 38.072, in pertinent part reads:

Sec. 2(a) This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed and,

(2) were made to the first person, 18 years or older, other than the defendant, to whom the child made a statement about the offense.

Alexis Parish's mother, Shannon Garza, was the first person over the age of eighteen to whom the Ms. Parish described being the victim of aggravated sexual assault. Ms. Parish told her mother, "(Nathan) took my virginity." (T. VI, 147 and 150).

Ms. Parish’s statement was not an inexact or misleading general allegation or allusion that something in the area of child abuse was going on in the home. It was a specific charge with no ambiguity to it. The determination of who “the first person given a statement about the offense” was clear—it was Alexis Parish’s mother, Shannon Garza.

The “how, when and where” details of the offense were inherent in Ms. Parish’s accusation. *Hanson v State*, 180 S.W.3d 726, 730 (Tex. App.—Waco 2005, no pet) Virginitly taken during sexual abuse occurs when a male penis penetrates a female’s vagina and breaks open her hymen. “Where” was in the house where Mr. Garza were sometimes left with Ms. Parish and her other siblings and “when” was clearly at a time not long before Ms. Parish’s outcry. *Reyes v. State*, 274 S.W. 3d 724, 727 (Tex. App.—San Antonio 2008, pet. ref’d)

Shannon Garza, Alexis Parish’s mother, was the appropriate outcry witness in this matter. An outcry witness may testify as an exception to the hearsay rule about the victim’s out-of-court description of the offense.

*Sanchez v. State*, 354 S.W. 3d 476 (Tex. Crim. App., 2011)

On the night of March 25, 2021 Alexis Parish left home and went to a fire station where she called the police and reported having been abused. (T. IV, 235) (T.VI, 153) Officer Deandre Savage answered the call and took a statement from Ms. Parish. (T. IV, 235) (T.VI, 153) Officer Savage testified that “(Ms. Parish) said she was assaulted by her stepdad.” (T. IV, 245) Compounding hearsay on hearsay, the officer testified that Ms. Parish was told by her stepdad if she spoke of the incident, CPS would get involved. They would remove her. Her mother would become depressed and kill herself. (T. IV, 248)

Since Ms. Parish had made her first outcry to her mother and Ms. Parish was available as a trial witness, the court improperly allowed Officer Savage to testify as an outcry witness under Article 38.072. All statements made by Ms. Parish to him were inadmissible hearsay. *Garcia v. State*, 792 S.W. 2d 88, 92 (Tex. Crim. App.—1990)

Also, there having been no impeachment of Ms. Parish, Officer Savage being allowed to repeat to the jury what she had said erroneously



“constituted bolstering of her unimpeached testimony.” *State v. Yount*, 808 S.W.2d 633, 636 (Tex. App.—Austin 1991). Officer Savage’s bolstering of Ms. Parish’s testimony substantially prejudiced Mr. Garza by improperly influencing the jury and had an injuriously negative effect in the determination of their verdict. *Barshaw v State*, 342 S.W. 3d 91, 93 (Tex. Crim. App. 2011)

By allowing Officer Savage to testify as an “outcry witness” and to repeat and thereby bolster Ms. Parish’s fabricated story, the court abused its discretion. Constitutional error was committed. Mr. Garza was denied a fair trial and due process of law.

### ISSUE III.

THE COURT ABUSED ITS DISCRETION BY ALLOWING  
DETECTIVE REMMERT TO TESTIFY AS TO SIGNS OF  
DECEPTION AND THAT APPELLANT WAS UNTRUTHFUL,  
DECEITFUL AND A LIAR, THEREBY INVADING THE PROVINCE  
OF THE JURY.

Galveston County Detective Merle Remmert and Lt. Kelcie Miller interviewed Appellant Nathan Garza on April 13, 2021 as a suspect in the alleged sexual assault of his stepdaughter, Alexis Parish. A video, marked as State's Exhibit 40, (T.V., 164) was made of Mr. Garza's interview (T. V., 161-165) and during the trial it was published to the jury. (T. V., 174)

In a pretrial Motion in Limine defense counsel objected to the officers' statements on the video as "hearsay and for being offered for their truth." (T. III, 36) Counsel also objected to Detective Remmert being allowed to say on the video, "I don't believe you. I'm watching your body language and in my experience you are being very defensive and you're not telling

the truth because you are chewing gum and you are rubbing your legs.”

(T. III, 37)

The state asked Detective Remmert: “Do you know what the signs of deception are?” (T.V., 165)

Defense counsel again objected by saying: “Judge, he’s not qualified,” (T.V., 166) later adding, “His testimony is being used to—in reference to a video where he is acting like a lie detector. It is inadmissible. It’s not relevant. And he is no expert in deception. He has no qualifications, no certificate of being a lie detector or having any skilled training in deception since 2016, if there was any training.” (T. V., 168)

The judge at first sustained the objection, telling the state to “Lay the foundation.” (T.V., 166)

Detective Remmert testified as to his training in criminal investigations and conducting interviews, saying that he “attended a Kinesic interviewing school in 2016, a behavior analysis school in 2019 (T. V., 166-167) an intermediate child abuse investigative training,” (T. V., 169-170) and that he had “utilized those trainings over the course of his career

on many occasions.” (T. V., 166-167)

The state again asked the detective about signs of deception? (T.V., 167)

When the defense objected, the court said: “I think the foundation has been laid, so I’m going to overrule the objection.” (T. V., 168) (The judge’s ruling qualified the officer as an expert on recognizing signs of deception, thereby invading the province of the jury.)

The state asked: “What kind of body language are you looking for in an interview?” (T. V., 171)

Detective Remmert testified that (to recognize signs of deception in body language) he “was looking for people who either stare directly into my eyes and don’t break contact, or people who won’t look at me; things that are abnormal; people who will stiffen their body up and hold tight with their top body so that I don’t see movement. But the energy they have ends up being dispelled, and you’ll see movement through the feet and legs. Typically suspects will occasionally point their feet toward the door if they are nervous and trying to get out and hoping to leave. Energy

has got to leave and you'll find it in tics and repetitive actions. (T. V, 171)

“When (gum chewers) get nervous they will start chewing on the gum like crazy. (T. V, 172) People sit and lock their arms to the arms of chairs and hold onto their hand in front of them so they aren't moving. Nervous energy in the way of shakes that are invisible to the interviewer, *they think.*” (T. V, 172) That is a subconscious response. Their mouth is saying one thing and their brain is saying something else and they can't separate those two actions.” (T. V, 172-173)

A video of Nathan Garza's interview with Detective Remmert and Lt. Kelcie Mille (State's Exhibit 40) was at that point played for the jury. It is noted that 'Mutt and Jeff' interrogation techniques, long forbidden, were used in questioning Mr. Garza. *Miranda v Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 694 (U.S. Supreme Court, 1966) (T. V., 174)

Defense counsel renewed her objection to Detective Remmert's ongoing testimony, saying that he was “attempting to testify as an expert in

human deception, whether somebody is telling the truth or a lie.” (T. V., 175)

The judge instructed the jury that the “testimony you’ve heard will be considered in the context in which it was given, that being the experience of this particular officer, his training and his experience, but not as an expert.” (T. V., 175-176) (The judge’s words contradict his just having accepted the state’s ‘laying the foundation’ for Detective Remmert being qualified as an expert.)

The jury having just watched the video, the state asked Detective Remmert: “Did you notice any signs of deception (in Mr. Garza)?” (T. V., 176)

Detective Remmert testified: “The first major sign was Lt. Miller asked him a question about—he answered ‘No’ but nodded, ‘yes’ when she asked him.” (T. V., 176) “There were times he became rigid while we were talking to him. You really can’t see it on the video because of the placement of the desk.” (T. V., 177) “Lt. Miller was again questioning him, kind of accusing him; he started chewing gum like crazy. I mean, he

had been casually chewing on it through the deal, but once she got to accusing him, he started chewing on it like crazy.” (T. V., 177)

The defense objected again. (T. V., 179)

Commenting on an “odd” statement of Mr. Garza, the detective testified: “He did not deny. He stated to the Lt. Miller that for him to believe the allegations, (Ms. Parish) would have to describe his genital area.” (T. V., 180)

Detective Remmert testified that “he was not a human lie detector,” (T. V., 182) but said he “was accusing Mr. Garza of being defensive and a liar.” (T. V., 183) “I’m not claiming to know what he’s lying about, just that he’s not being truthful.” (T. V., 183) “The direct statements he’s making to Lt. Miller are the things he’s not being truthful about.” (T. V., 183) “I felt that he was being deceitful on...the answers he was giving Lt. Miller... for the most part in that he was mostly deceptive.” (T. V., 184) “Just in watching his body language and the way he’s speaking...I felt he was being deceptive. That is not the way someone will normally answer. They wouldn’t say, ‘I would only believe it if you show me she knows

what my genitalia looks like.” (T. V., 184-185)

Detective Remmert testified “that he wanted the jury to believe that Mr. Garza was deceptive. No more, no less.” (T. V., 187)

Detective Remmert was not a proper lay nor expert witness in discerning signs of deception or truthfulness in a witness but after the state “laid its foundation,” he was allowed to testify as if he were.

Even “psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients’ credibility.”

*State v Moran*, 151 Ariz. 378, 728 P. 2d 248, 255 (1986). “Experts on child sexual abuse are not human lie detectors. Nor are they clairvoyant.”

John Meyers *et al*, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 121 (1989).

Texas Rule of Criminal Evidence Rule 701 allows an officer to testify “if his opinion or inferences are rationally based on his opinions and helpful to the clear understanding of the testimony or the determination of the fact in issue. *Fairow v State*, 943 S.W. 2d 895, 898 (Tex. Crim. App.



1997).

Detective Remmert pointed out Mr. Garza's "deceptive body language" during his interview, concluding that Mr. Garza was being untruthful. "The first major sign," the detective testified, "was Lt. Miller asked him a question--Mr. Garza answered 'No' but nodded, 'yes' when she asked him." (T. V., 176) The detective further testified that "he became rigid while we were talking to him and he started chewing gum like crazy." (T. V., 177)

Detective Remmert testified that he was able to see "shakes that are invisible to the interviewer, they think;" (T. V, 172) and that he could tune into Mr. Garza's "subconscious responses--his mouth saying one thing while his brain is saying something else." (T. V, 172)

Rigidity and chewing gum as signs of deception; knowing a witnesses' subconscious responses, their thoughts--"when their brains are saying something else," can hardly be called rationally based. They do not clear up anyone's understanding of testimony nor are they in any way helpful in the jury's determination of the fact in issue.

Detective Remmert's opinions became more overt when he testified that "Mr. Garza was being "defensive and a liar;" (T. V., 183) that "he's not being truthful;" (T. V., 183) that "the direct statements he's making to Lt. Miller are...not truthful;" (T. V., 183) and that "he was being deceitful and for the most part deceptive." (T. V., 184)

On the video played to the jury, Nathan Garza denied his guilt, saying: "It never happened; that he was being accused of something he didn't do; that Alexis is lying and that he did not know why." (St. Ex 40, cites supra)

Detective Remmert testified that when an accused suspect does not "get mad, cuss at him, get up and walk out and demand an attorney, but only sits there, listening and taking it (which describes Mr. Garza exactly)—that tells me that they are trying to convince me of their story and that leads me to believe that they are being untruthful." (T. V, 173-174)

The threshold determination for admitting lay or expert testimony is whether such testimony, "if believed, will *assist* the untrained layman trier of fact to understand the evidence or determining a fact in issue. *Duckett v State*, 797 S.W. 2d 906, 914, 918-19 (Tex. Crim. App. 1982).

Making a determination as to whether a witness is truthful based on observations of his demeanor and character is in no way beyond the intelligence of an average juror. Jurors are just as capable as an expert in drawing conclusions concerning the credibility of the parties in issue,” *Moran*, supra, at 255. Neither experts nor lay witnesses should ever replace the jury as the ultimate arbiters of credibility.” John Meyers *et al*, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 121 (1989).

Expert testimony which *decides* an ultimate fact for the jury such as the truthfulness of a witness, crosses the line and is not admissible. *Duckett*, supra at 918-19; Goode, *Guide to the Texas Rules of Criminal Evidence* 702 at 13 (2<sup>nd</sup> ed. 1993).

Detective Remmert’s opinions went much farther than “assisting of the trier of fact to understand the evidence or to determine a fact in issue.” His testimony gave a direct negative opinion as to Mr. Garza’s truthfulness-- *deciding* the issue of Mr. Garza’s veracity for the jury. This was not aiding the jury in its decision, it was *supplanting* their decision and

replacing them. *Cohn v State*, 849 S.W. 2d 817 at 818 (Tex. Crim. App. 1993).

The jury are the exclusive judges of the facts in every criminal cause. *Bishop v State*, 43 Tex. 390, 397 (1875) The trial court abused its discretion when, over repeated, timely and strenuous objection, it permitted Detective Remmert's unlawful and highly prejudicial testimony to invade the province of the jury. The court was so clearly wrong as to lie outside that zone which reasonable persons might disagree. *Shaw v State*, 122 S.W. 3d 358, 363 (Tex. App.—Texarkana 2003, no pet.)

Detective Remmert's testimony crossed the line, denying Nathan Garza his right to due process of law, to equal protection and a right to a fair trial under the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution as well as the Texas Constitution.

## **CONCLUSION**

Defendant-Appellant Nathan Gerardo Garza respectfully requests that this court reverse the final judgment entered against him and remand his case to the trial court below with instructions to hold a new trial.

## **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing Appellant's Brief has been furnished through e-mail to rebecca.klaren@galvestontx.gov at the Office of the Galveston Criminal District Attorney, 600 59<sup>th</sup> Street, Suite 1001, Galveston, Texas 77551, (409) 766-2355 on or before July 23, 2024.

/s/ Robert Finlay

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