No. 14-24-00596-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

MANUEL ARANA
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1668572
From the 262nd District Court of Harris County, Texas

BRIEF FOR APPELLANT

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PRESIDING JUDGE:	Hon. Lori Chambers Gray 262nd District Court Harris County, Texas 1201 Franklin Houston, Texas 77002
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STATEMENT OF THE CASE

October 13, 2020	Manuel Arana was indicted for the offense of continuous sexual abuse of a child. CR at 29.
August 2, 2024	Jury selection began and a jury was impaneled. CR at 385.
August 5–6, 2024	Trial on the merits. CR at 386.
August 12, 2024	Trial on the merits concluded. Mr. Arana was convicted, and the Court sentenced him to life without parole. CR at 387.
August 13, 2024	Notice of appeal was timely filed. CR at 387.

STATEMENT REGARDING ORAL ARGUMENT

The issues in this case are not complex and the Court would not be aided by oral argument. Mr. Arana does not request oral argument.

ISSUE PRESENTED

> The Trial Court Erred in Admitting Evidence in Violation of the Confrontation Clause and Rules of Evidence Because the Complainant was not "Unavailable" Under the Forfeiture by Wrongdoing Statute

STATEMENT OF FACTS

Complainant[1] is Manuel Arana's biological daughter. 3 RR at 24. Mr. Arana and complainant's mother separated when she was a young child. 3 RR at 31. After that, Complainant saw her father a couple of times a year, except during a brief time when she lived with him. 3 RR at 32. According to Complainant, during the time she lived with Mr. Arana, he had a girlfriend, and Complainant slept in her own room. 3 RR at 33.

Complainant's Disclosures to School Counselor

In January 2020, when Complainant was in fourth grade, Complainant's mother contacted Complainant's school counselor, Carvella Stephens. 4 RR at 9–10. Mother requested that Stephens speak to Complainant. 4 RR at 10. Mother found Complainant to be upset with her and not talking to her, and Mother felt Complainant might have been "messed with inappropriately." 4 RR at 10. According to Stephens, when she met with Complainant, Complainant

[1] In compliance with Tex. R. App. P. 9.10(a)(3), the complainant shall be Complainant and members of her family referred to by their relationship to her, i.e. Mother, Maternal Aunt, Paternal Aunt, etc.

said that her father had touched her inappropriately, on several occasions, when Complainant was visiting his house for the weekend. 4 RR at 14.

According to Stephens, Complainant said it happened while they were sleeping, or when she pretended to be asleep. 4 RR at 15–16. Stephens said that Complainant's mother knew, but Mother tried to convince Complainant that her father thought Complainant was someone else and "didn't mean it like that." 4 RR at 17. Complainant testified that, in 2020, she told her school counsel that her father had been tickling her on her upper thigh and touching her vagina when she spent the night at his home. 3 RR at 36. Complainant said that she made the accusation because "my mom manipulated me into saying those things." 3 RR at 34.

Stephens testified that Complainant said that her father no longer touched her inappropriately, he loved her, and she did not want him to go to jail. 4 RR at 15. Stephens felt that this part of their conversation sounded "rehearsed." 4 RR at 15. Complainant said that her dad had previously had an "inappropriate relationship with a child." 4 RR at 15.

Stephens said that she followed up with Complainant in February 2020. Complainant reported that the day before this second meeting, her mother had

picked her up from school and her dad was in the car. 4 RR at 25. Complainant told Stephens that her dad was trying to get her to change her story because he did not want to go to jail. 4 RR at 25. Mother then left Complainant at her father's house while Mother ran errands. 4 RR at 26. Stephens affirmed that Complainant never changed her story during their meetings. 4 RR at 26. At trial, Complainant could not remember meeting with her school counselor a second time, and did not recall telling Stephens about her mother picking her up from school with her father in the car and being taken to his house. 3 RR at 53.

Complainant's Meeting with Child Protective Services

Complainant met with CPS worker Yolanda Alpough the day after her first talk with the school counselor. Alpough testified that Complainant said that her father had touched her on her vagina multiple times when she would spend the night at his house, and it happened while she pretended to be asleep. 3 CR at 38. Alpough related that Complainant said the touching happened when her dad's girlfriend was not home, and Complainant was sleeping in her father's bed when it happened. 4 RR at 47. Alpough said Complainant reported being abused at seven years old but waiting until she was nine to tell her mother because she did not want her dad to go to jail. 4 RR at 46. Complainant reported to Alpough that her dad had touched her "private area" over the clothes but that

he said it was a mistake because he thought he was touching his girlfriend. 4 RR at 46. After Complainant told her mother, her father apologized and said he would not do it anymore. 4 RR at 48.

A few days after speaking with Complainant, Alpough observed Complainant's forensic interview at the CAC. 4 RR at 49. What Alpough observed Complainant disclose in the CAC interview was "consistent with" the accusations made to Alpough. 4 RR at 49.

Alpough called Arana during her investigation. Alpough said Arana told her that what happened was a mistake that occurred over a year before. 4 RR at 50. Arana purportedly told Alpough that he had accidentally touched her because he thought it was his girlfriend, that his mother had put Complainant in bed with him and he mistook her for the girlfriend. 4 RR at 50–51. Alpough told Arana not to tickle Complainant's inner thigh, and he said he told his daughter that he would not do that again because she was growing up. 4 RR at 51.

CPS closed the case because Mother was being protective and cooperative, and a safety plan was in place. 4 RR at 51–52. Part of the safety plan was no contact between Complainant and Arana. 4 RR at 52. Later that

month, Alpough received another referral about Complainant, alleging that Arana had been in contact with her. 4 RR at 53–54. Alpough said that Arana admitted seeing Complainant because she wanted to see him. 4 RR at 55. When Alpough confronted Complainant's mother, Mother said she had allowed Complainant to see her father, and that Mother now doubted Complainant's allegations because Complainant was telling Mother she only said the abuse had continued because she was pushed to say that. 4 RR at 56.

Complainant's Meetings at the Child Assessment Center

Complainant met with a forensic interviewer, Erika Gomez, at the Children's Assessment Center. During that meeting, Complainant told the interviewer that her father had touched her inappropriately over a period of about a year-and-a-half. 3 RR at 48. She testified that she told the interviewer her father had touched her vagina between five and ten times. 3 RR at 50.

Similarly, when Gomez testified, she told the jury that Complainant disclosed that her father had touched her vagina over the clothing about five times. 4 RR at 83. Gomez said that Complainant told her she pushed his hand away, but he would put it back. 4 RR at 83. Complainant reported to Gomez that it happened in her father's bed and on the couch. 4 RR at 85. Gomez testified

that Complainant believed her father mistook her for his girlfriend. 4 RR at 85. Additionally, Complainant told Gomez that once her father put her on top of him when they were on the couch, and he touched her vagina with his hand. 4 RR at 86. Complainant also told Gomez she did not want her father to go to jail. 4 RR at 90.

Complainant also met with, and disclosed abuse to, the physician at the Children's Assessment Center. 3 RR at 50. Complainant remembered telling the doctor that her father had sexually abused her. 3 RR at 51. She told the doctor that her father had touched her on her vagina multiple times. 3 RR at 52. The examiner did not testify, but Dr. Marcella Donaruma testified to the contents of the medical records. Donaruma testified that Complainant said her dad had touched her vagina over the clothes between seven and eight times. 4 RR at 120. A partial external examination was conducted, noting no injuries. 4 RR at 123–24. During the examination, Complainant became upset, and Mother requested the exam not be completed. 4 RR at 124.

Complainant's Meeting with the Assistant District Attorney

Leslie Ventura, a paralegal with the Harris County District Attorney's Office, testified that she sat in on an interview between the prosecutor and

Complainant. 4 RR at 134. Her task was to take notes on what the Complainant—and only the Complainant—said during the meeting. 4 RR at 134. During the meeting, Ventura learned that Complainant had been in contact with Arana. 4 RR at 137. Ventura said that Complainant at first denied being in contact with her father, but later said she had been in touch with him by phone. 4 RR at 138.

Ventura testified that, during the meeting, Complainant told the prosecutor that she had been sexually abused by her father. 4 RR at 138–39. In these disclosures, Complainant said that she would wake having nightmares and go to her father for comfort. 4 RR at 140. He would then touch her vagina with his hands. 4 RR at 140. Ventura said Complainant told them it happened between five and ten times, between the ages of seven and eight years old. 4 RR at 140. She also told the prosecutor that she did not want her dad to go to jail. 4 RR at 141.

Jail Calls

Evidence was admitted that Arana used his and other inmates' System Person's Number (SPN) to place phone calls while in the county jail. 5 RR at 63–65. The jury heard several recorded jail calls. On January 18, 2024, Arana spoke

with a woman who told him "They want to scare you, saying they're going to get [Complainant] there. But [Paternal Aunt] has custody of [Complainant] and she ain't gonna do shit." 5 RR at 69. Later in that call, the voice identified as Arana's said that someone should call CPS on Maternal Aunt, and also said that if Complainant is contacted about the case, she does not have to talk. 5 RR at 69, 71.

On another call, the voice identified by State's witnesses as Arana said that "they told my lawyer they have the witness…So I made some phone calls…They guaranteed me, don't worry about it." 5 RR at 72. On another call, the man said "it doesn't matter, they can't make [Complainant] go regardless. There's no such thing to make a subpoena for you to go testify. They can't." 5 R at 73. There is also discussion of Paternal Aunt filing for custody of Complainant. 5 RR at 73.

In other calls, the jury heard the man purported to be Arana reacting to news that Paternal Aunt had been subpoenaed by saying "she doesn't have to go." 5 RR at 74. He also discussed having someone else pick Complainant up or say Complainant is with someone else. 5 RR at 75–76. On another call, the man suggested getting Complainant her own lawyer so "the Judge doesn't try to make her talk." 5 RR at 78. Another time, this man instructed that Complainant

"can't say I don't want to press charges because I think they will get around it…She needs to have her say it was a lie or it didn't happen…unless [she] says no, it didn't happen, it's a lie" then they will play the "video of her when she was ten." 5 RR at 85–86. He also said that "in [Complainant's] affidavit she needs to say, no, I ended up coming here because I was being forced to testify where I was at." 5 RR at 87.

During one call, the man the State claims is Arana gets on the phone with a young girl, who State witnesses believe to be Complainant. 5 RR at 87. In that conversation, the man says "…hopefully this is done soon. I love you. Just know I can't say much on the call because of the case. If I don't talk to you, it's because I never know if they're listening. Hopefully we get the shit figured out." 5 RR at 88.

Complainant's Personal History

At the time of trial, Complainant was living with Paternal Aunt. 3 RR at 24. Before living with Paternal Aunt, Complainant lived with Maternal Aunt, and before that, with her mother. 3 RR at 25–26. Complainant had to move out of her mother's home when mother's boyfriend "put his hands on" Complainant. 3 RR at 62. Another witness described the altercation as the boyfriend choking

Complainant. 5 RR at 142. During the trial, Mother was incarcerated in another jurisdiction. 3 RR at 26. When the State asked Paternal Aunt about conversations in jail recordings where people discussed not complying with subpoenas for Complainant's appearance in court, Paternal Aunt told the prosecutor that she had "been subpoenaed several times and I have been here every single time…every time I was subpoenaed, I was gonna show up and did show up…by law I had to be here and by law I came." 5 RR at 145–46.

The complainant told the jury that from her disclosures in 2020 until 2023, she grappled with sadness, depression, and anxiety. 3 RR at 54. She had suicidal ideation, was hospitalized, and began medication, but denied these were due to being sexually abused. 3 RR at 54. It may have been due to drug abuse or an overdose. 5 RR at 58. She said her mother sent her to counseling because Complainant was not "doing well mentally." 3 RR at 65. Maternal Aunt testified that, while Complainant lived with her, she took Complainant to therapy. 5 RR at 45. Maternal Aunt said that Complainant was "depressed," felt "unloved and unwanted" and "said she just didn't want to be here anymore…she just didn't want to be alive anymore." 5 RR at 46–46. Complainant was diagnosed with major depressive disorder and prescribed antidepressants. 5 RR at 48.

After learning from the Assistant District Attorney that Arana was restricted from having contact with Complainant, Maternal Aunt blocked Arana's phone number on Complainant's phone and told her to have no communication with her dad. 5 RR at 51–52. Complainant moved out the next day. 5 RR at 52. Before Complainant moved out, Maternal Aunt found recordings on Complainant's phone of Maternal Aunt yelling at her daughter. 5 RR at 52. Complainant was sending the recordings to Paternal Aunt. 5 RR at 53. When Complainant moved out, she began living with Paternal Aunt. 5 RR at 53.

Paternal Aunt confirmed that Complainant had sent her videos of Maternal Aunt abusing her child. 5 RR at 139. This caused Paternal Aunt concern for Complainant, so she picked Complainant up and brought Complainant into her home. 5 RR at 140. Complainant testified that her mother had influenced her to make the allegations against her father. 3 RR at 63.

Arana's Personal and Criminal History

The jury heard that Arana was "a high risk registered sex offender for sexual assault of a child" at the time he was investigated for the sexual abuse of Complainant. 5 RR at 19. In 2001, Arana had been sentenced to eight years in prison for that offense, which occurred when he was seventeen and the

complainant was twelve. 5 RR at 21–22. He had originally been placed on deferred adjudication but had been revoked for violating some of the terms of his community supervision, including "failing to avoid contact with complainant." 5 RR at 21.

The jury also heard that Arana is the father of a son, and the mother of that child, Shanna Hayes, was in a relationship with Arana for five years. 5 RR at 121. During their relationship, Hayes "had a very big hand in raising [Complainant]" with Arana. 5 RR at 124. Most of Complainant's time at her father's house was spent not with Arana, but with Hayes, as Arana worked nights. 5 RR at 124. According to Hayes, Complainant either spent her time with Hayes or her paternal grandmother, as Arana sleep during the day and worked at night. 5 RR at 126. When Hayes worked, she took Complainant and her son to Arana's mother's home. 5 RR at 126. Hayes also testified she never saw Complainant exhibits any signs of trauma, nightmares, attempts to avoid her father, negative changes in behavior, self-harm, or isolation. 5 RR at 124–35. Hayes said that she "got to spend five years with him and our children, and he never showed any signs of being anything other than a loving father," and of Complainant's relationship with Arana said "She loved her father. She loved being around him. She enjoyed her time with him. She was stuck by his side

when we were all together. We were a very close knit family when we were together." 5 RR at 131–32.

SUMMARY OF THE ARGUMENT

After Complainant testified that she did not remember parts of conversations she had with various other witnesses, the State moved over objection that the trial court to allow those witnesses to testify to what Complainant had said to them. Although this testimony would normally violate the Confrontation Clause and the Rules of Evidence, the State alleged that it was admissible under the forfeiture by wrongdoing statute. The State claimed that Complainant's forgetfulness made her "unavailable" due to memory loss and was the result of manipulation by Arana. The trial court erred by finding that Complainant was unavailable under the Rules of Evidence, and Arana was harmed by the admission of otherwise inadmissible testimony by four State's witnesses.

ARGUMENT

The Trial Court Erred in Admitting Evidence in Violation of the Confrontation Clause and Rules of Evidence Because the Complainant was not "Unavailable" Under the Forfeiture by Wrongdoing Statute

The trial court allowed testimony from multiple witness about conversations they had with Complainant, in violation of the rule against hearsay and Arana's right to confrontation. This testimony was admitted by the trial court under the doctrine of forfeiture by wrongdoing.

I. Standard of Review

Because the forfeiture by wrongdoing doctrine concerns the admission of otherwise inadmissible evidence, trial court's rulings are reviewed for an abuse of discretion. *Osbourn v. State*, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002). The trial court's ruling will be upheld under any theory of law applicable to the case, regardless of the reason given by the trial court. *Armendariz v. State*, 123 S.W.3d 401, 405 (Tex. Crim. App. 2003).

"The test for whether the trial court abused its discretion is whether the action was arbitrary or unreasonable." *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). "An appellate court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement." *Id*.

II. Preservation of Error

After Complainant testified as a State's witness, the State asked for a hearing on forfeiture by wrongdoing. The State argued that Complainant was "unavailable" under the forfeiture by wrongdoing statute because she had made statements "regarding forgetting that she said something, that she was manipulated to fabricate it and that she doesn't remember." 3 R at 77. The State believed that her "unavailability to recall those incidents has been the result of the defendant's actions." 3 RR at 72–73. Defense Counsel argued that Complainant was not unavailable under the forfeiture by wrongdoing doctrine because she had appeared at trial, testified, and the State had been able to question her about her conversation with other people. 3 RR at 122. He further argued that "everything else that they want to ask for would be nothing more than bolstering and cumulative," and that for the doctrine to apply "[the State] have to not be able to get their evidence out and they did." 3 RR at 122–23.[2] Over Defense Counsel's objections, the trial court allowed admission of entire

[2] In addition to the objections made during the hearing, Defense Counsel objected to the witnesses' testimony when they testified before the jury—Stephens (4 RR at 11,14); Alpough (4 RR at 45, 56); Linares (5 RR at 53, 59). Objections made at the hearing regarding State's Exhibits 15 and 16, offered through witness Schmidt, were renewed with no new objections (5 RR at 66).

conversations that Complainant purportedly had with four State's witnesses. 3 RR at 123.

The trial court made no finding that the State had established its claim by a preponderance of the evidence. TEX. CODE CRIM. PROC. art. 38.49(c). If the trial court does not issue findings of fact, the evidence is reviewed in the light most favorable to the trial court's ruling and reviewing courts will assume the trial court made findings that are supported by the evidence. *Clifton v. State*, No. 01-22-00641-CR, 2023 WL 5437181, at *15 (Tex. App.—Houston [1st Dist.] Aug. 24, 2023, pet. ref'd) (mem. op., not intended for publication).

While the trial court in this case did not make finds of fact, it did make explicit the reasoning behind its ruling. Instead of basing its decision on whether the State had met its burden, the trial court ruled the contested testimonies admissible because Arana had violated pretrial conditions placed on him by the court:

> It's troubling that in light of when the Court was very clear about no contact and placed it in writing, there was a disregard for the safety of the citizens and to get a fair trial. So I'm going to grant the State's motion for forfeiture of wrongdoing and allow the statements.

3 RR at 123.

III. Relevant Law

A. The Confrontation Clause

"In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. See also TEX. CONST. art. I, § 10. The Confrontation Clause "provides a simple yet unforgiving rule: the State may not introduce a testimonial hearsay statement unless (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant." *Trigo v. State*, 485 S.W.3d 603, 609–10 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), quoting *Lee v. State*, 418 S.W.3d 892, 895 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

Testimonial statements include those made under circumstances which would lead an objective witness to reasonably believe that the statement would be used at a later trial. *Crawford v. Washington*, 541 U.S. 36, 52 (2004); *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App. 2015). "The Court of Criminal Appeals has summarized three kinds of testimonial statements: (1) ex parte in-court testimony or its functional equivalent, i.e., pretrial statements that declarants would expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, or prior testimony; and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial." *Trigo*, 485 S.W.3d at 610 (internal quotations omitted), quoting *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010).

The United States Supreme Court recognizes two forms of testimonial hearsay that may be admitted even though the defendant has no opportunity to confront the declarant: dying declarations and statements made by a declarant whose unavailability the defendant procured. *Giles v. California*, 554 U.S. 353, 358 (2008). The latter is known as the doctrine of forfeiture by wrongdoing. *See Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006); *Colone v. State*, 573 S.W.3d 249, 264 (Tex. Crim. App. 2019).

B. Code of Criminal Procedure and the Rules of Evidence

The forfeiture by wrongdoing doctrine "is based on the principle that 'any tampering with a witness should once [and] for all estop the tamperer from making any objection based on the results of his own chicanery.'" *Colone*, 573 S.W.3d at 264 (quoting *Gonzales*, 195 S.W.3d at 117). The doctrine of forfeiture by wrongdoing is codified in Texas Code of Criminal Procedure article 38.49, whose requirements substantially comply with the U.S. Supreme Court's holding in *Giles*:

> (a) A party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness:

> (1) may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and
>
> (2) forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing.
>
> (b) Evidence and statements related to a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness are admissible and may be used by the offering party to make a showing of forfeiture by wrongdoing under this article, subject to Subsection (c).
>
> (c) In determining the admissibility of the evidence or statements described by Subsection (b), the court shall determine, out of the presence of the jury, whether forfeiture by wrongdoing occurred by a preponderance of the evidence. If practicable, the court shall make the determination under this subsection before trial using the procedures under Article 28.01 of this code and Rule 104, Texas Rules of Evidence.

TEX. CODE CRIM. PROC. art. 38.49(a)–(c).

Federal Rule of Evidence 804(b)(6), which is identical to the Texas statute, codifies the federal version of forfeiture by wrongdoing, stating that a party forfeits a right to object on hearsay grounds to the admission of a declarant's prior statement when that party's wrongdoing procured the unavailability of the witness. *Gonzalez*, 195 S.W.3d at 119; *see* FED. R. EVID. 804(b)(6). One definition of "unavailable" under both Texas and federal rules is a declarant who

"testifies to not remembering *the subject matter*." FED. R. EVID. 804(a)(3); TEX. R. EVID. 804(a)(3) (emphasis added).

IV. Analysis

To begin analysis of forfeiture by wrongdoing, the disputed statements must first be found to be testimonial. Neither the State nor the Defense disputed the testimonial nature of the statements in this case, which all fall under the third type of testimonial statement outlined in *Trigo*: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Trigo*, 485 S.W.3d at 610. Only because the statements were testimonial, and thus otherwise ran afoul of the Confrontation Clause, was a hearing on forfeiture by wrongdoing necessary. There was no dispute at trial that this was the case. The sole disagreement in the forfeiture hearing, and now the sole inquiry for this court, is: How much can a witness testify to and still be found to be "unavailable" due to "not remembering the subject matter?" TEX. R. EVID. 804.

A. Defining "Unavailable"

At trial, the State sited *Cologne v. State* and *Gonzalez v. State* in its arguments, but neither of those cases address the definition of unavailability. 3 RR at 115. Unfortunately, there is a dearth of case law from Texas state courts

defining what makes a witness unavailable due to a lack of memory. Some guidance can be found in the jurisprudence of the other jurisdictions.

1. Texas case law

The trial prosecutor cited three Texas cases in support of her claims, but none of these cases offer that support. First, she cited to *Mitchell v. State,* 238 S.W.3d 405 (Tex. App.—Houston [1st Dist. 2006], pet. ref'd). 3 RR at 117. *Mitchell* dealt with former Code of Criminal Procedure article 38.071 (held unconstitutional in *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011)), and whether a child-witness was unavailable despite having testified in trial. *Mitchell* is distinguishable twice over: first, in the way the complainants testified; second the portion of the Code of Criminal Procedure under which the trial court ruled.

In *Mitchell*, the child, who was six years old at the time of trial, could answer *no* questions about the allegations—she "hid her face and cried and was unable to testify in response to the questions," and was "so emotionally involved she could not testify any further." *Mitchell*, 238 S.W.3d at 410. The complainant did not "respond to [questions]" regarding the allegations and was "unavailable to answer anything." *Id.* at 410–11. The trial court found the complainant "unavailable" under the now-defunct statute, using that statute's—not the

Rules of Evidence—definition of "unavailable."[3] *Mitchell* does not apply to this case, differing in both the testimony of the complainants and the statutes definitions of "unavailable."

The State's second citation, *Clifton v. State*, is an unpublished case out of the First Court of Appeals. 3 RR at 117. In *Clifton*, the complainant did not appear in court. *Clifton*, 2023 WL 5437181, at *13. Indeed, the contention in *Clifton* was not whether the complainant was wrongly found to be unavailable, but whether the defendant's mother's actions, in helping procure the complainant's absence at trial, could be held against the defendant. *Id.* at *22.

The third case replied upon by the trial prosecutor does not support her arguments either. 3 RR at 118. *Dobbins v. State,* an unpublished case from the Amarillo Court of Appeals, dealt with a complainant who testified to receiving her injuries in an entirely different way than previously reported. *Dobbins v.*

[3] Under former Art. 38.071, sec. 8(a), the court determined unavailability by considering factors including "the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because: (1) of emotional or physical causes, including the confrontation with the defendant; or (2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding." Under both the former version of the statute and the current version, the relevant factors applied only to "a determination of unavailability *under this article.*" *Id.* (emphasis added).

State, No. 07-20-0095-CR, 2021 WL 2521564, at *4 (Tex. App.—Amarillo June 18, 2021, no pet.) (mem. op., not designated for publication). The victim of an aggravated assault by a family member, the complainant previously reported to having been shot by the defendant but testified that "she managed to shoot herself in the back of her neck and claimed she lied to her mother, medical personnel, and police officers when she told them Appellant shot her." *Id.* When confronted with evidence that appellant had told her not to testify, the complainant asserted her Fifth Amendment rights and refused to testify further. *Id.*, at *5.

2. Federal cases

Some federal cases address the federal version of Rule 804, which, like the Texas version, addresses a witness lacking memory about "the subject matter" of her statement. The "subject matter" is the acts, events, or conditions described or asserted in the statement. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:112 (4th Ed. 2013). The consistent interpretation from the federal courts it that a witness is available if she remembers the event about which her hearsay statements relate; it is irrelevant whether she remembers the statements themselves.

In *North Mississippi Communications, Inc. v. Jones*, the Fifth Circuit found that a witness was *not* "unavailable" under Federal Rule of Evidence 804(a)(3) when the witness testified at trial but stated that "the specific dialogue of this conversation has faded with the years." 792 F.2d 1330, 1336 (5th Cir. 1996). The court stated that Rule 804(a)(3) "makes hearsay testimony admissible if the witness testifies that he has no memory of the events to which his hearsay statements relate," but that the witness in that case "[remembered] the general subject matter discussed, and *his lack of memory of the details* is not sufficient to make the testimony admissible." *Id.* (emphasis added). The trial court erred in designating the witness "unavailable." *Id.*

The Eleventh Circuit follows this definition of "unavailable"— "Rule 804(a)(3) applies only if the declarant is unable to remember the 'subject matter,' i.e.[,] if 'he has no memory of the events to which his hearsay statements relate.'" *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013) (internal citations omitted). The fact that the witness does not remember making the statements themselves is irrelevant. *Id*., (citing Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:112 (3rd ed. 2007)). The court ruled that a witness was not "unavailable" because he did not remember a conversation, if he remembered the events the conversation was about. *Id.*

The Seventh Circuit, by contrast, found the requirement for unavailability satisfied after the defendant procured the witness's unavailability "by incessant pretrial manipulation," and then the witness professed "a total lack of recall of anything" at trial. *United State v. Jonassen*, 759 F.3d 653, 658 (7th Cir. 2014). In *Jonassen*, the complainant had been cooperative during the investigation and pre-trial proceedings, but changed when called to testify. *Jonassen*, 759 F.3d at 658. The complainant responded, "I don't remember," or something equivalent, in response "to all of the prosecutor's questions." *Id.* at 655. She refused to answer *any* questions posed by the prosecutor, even "simple questions about her age, her date of birth, her nickname, and her parents' names." *Id.* at 658. The trial judge noted that it was "unlike anything he had seen in over 40 years on the bench," and concluded that the complainant's professing "a total lack of recall of anything" made her unavailable as a witness within the meaning of Federal Rule of Evidence 804(a). *Id.*

In the case at bar, Complainant never denied recalling the subject matter—the alleged abuse. Instead, she merely claimed that she fabricated it or that she did not remember certain statements she allegedly made about it. In accordance with the consistent federal interpretation of Rule 804, her inability

to recall making specific statements did not make her unavailable when she was nevertheless able to recall the specific events those statements were about.

3. Cases from other States

Other jurisdictions have grappled with what it means to be unavailable in this context. Uniformly, like the federal courts, they have found a witness's inability to remember statements—the type of testimony given by Complainant—does not satisfy the meaning of "unavailable" as intended by Rule 804.

Illinois courts have found that the state's corresponding evidence rule "applies only if the declarant does not remember the *subject matter* of the statement, i.e., '*the events* to which his hearsay statements relate'." *People v. Ellis*, No. 3-12-0081, 2013 WL 5674985, * at 3 (App. Court Illinois, Third Dist. October 16, 2013) (emphasis added) (citing *North Mississippi Communications Inc.* 792 F.2d at 1336). In that case, the witness did not testify to a lack of memory about the subject matter of his statements (the events that caused his injury), but rather did not remember making certain out-of-court statements. *Id.* The court found he was not "unavailable." *Id.*

Oregon courts have found that a party must "establish that [the witness] lacks memory of his conversations…to a degree that he would be, in effect,

unable to testify at trial…" *Till v. American Family Mut. Ins. Co.* No. 06-CV-1376-BR, 2007 WL 1876511, at *7 (D. Oregon June 26, 2007). In *Til*, a witness denied making statements attributed to him by Plaintiffs in one meeting and was "unable to recall any conversation regarding the subject of his alleged declaration in the two subsequent telephone conversations with plaintiffs." Plaintiffs contended the deposition testimony established that he was unavailable to testify at trial based on lack of memory under Fed. R. Evid. 804(a)(3). *Id*., at 6. The court found Plaintiffs had failed to establish the witness "lacks memory of his conversations with Plaintiffs to a degree that he would be, in effect, unavailable to testify at trial" about the alleged statement. *Id.*, at *7.

In North Carolina, the state's Supreme Court found error in admitting statements of an "unavailable" witness due to lack of memory when the witness failed to remember some details of the offense and "disagreed with [police officer's] account of their out-of-court statements." *State v. Miller*, 408 S.E.2d 846, 850 (N.C. 1991). "If the witness is available to testify at trial, the 'necessity' of admitting his or her statements through the testimony of a 'hearsay' witness very often is greatly diminished if not obviated altogether." *Id.* at 850 (*citing North Mississippi Communications*, 792 F.2d at 1336).

Likewise, a Michigan court found a witness was not unavailable even though the witness was "sometimes evasive, at other times cagey and non-responsive, and certainly a difficult witness." *People v. Chapple*, unpublished per curiam opinion of the Court of Appeals, issued January 11, 2024 (Docket Nos. 355562 & 363656), 2024 WL 132913, at *5. The court found the witness was not unavailable due to lack of memory, as the forfeiture by wrongdoing rule "applies when a party's wrongdoing successfully prevents a witness's testimony altogether, or when due to the defendant's wrongdoing the witness appears but refuses to testify, or professes a complete loss of memory of the subject matter." *Id.* The witness's "testimony was not as clear as the prosecution wanted it to be, but his efforts to dodge the prosecutor's questions did not make him unavailable under MRE 804(b)(6)[4]." *Id.* The trial court erred by finding the witness's lack of memory rendered him unavailable under the Michigan Rules of Evidence.[5] *Id.*

[4] MRE 804(b)(6), *Statement offered Against a Party That Wrongfully Caused or Encourages the Declarant's Unavailability,* A statement offered against a party that wrongfully caused—or encouraged—the declarant's unavailability as a witness, and did so intending the result.

[5] MRE 804(a)(3) *Criteria for Being Unavailable*. A declarant is considered to be unavailable as a witness if the declarant testified to not remembering the subject matter.

B. Complainant was not "Unavailable"

Complainant was called as the State's first witness. 3 RR at 23. During her testimony, Complainant complied with the State's predicate questions on multiple exhibits and admitted that she did not want to be there testifying against her father. 3 RR at 29–30. She testified to her conversations with her school counselor, the CAC interviewer, the CPS worker, and her meeting with the Assistant District Attorney. Complainant never claimed to not remember the subject of these conversations, even if she could not remember everything she said during them.

1. Conversation with Carvella Stephens, School Counselor

Complainant testified that she remembered speaking with the counselor at her elementary school. 3 RR at 34. She admitted that she told the counselor that her dad tickled her on her upper thigh. 3 RR at 34. Although she then said that her mother "manipulated me into saying those things," she did not claim to have no memory of the conversation. 3 RR at 34. Complainant also said she remembered details about who was at the meeting, and that she made accusations about being touched sexually by her father. 3 RR at 37.

> **Q (State):** Okay. Do you remember that on January 21st, 2020, you told her that your dad had been touching you on your private parts, your vagina when you would spend the night at his place? Do you remember telling her that?

A (Complainant): Yes.

Q: Okay. So you don't remember the school counselor's name but you do remember telling her at least, right?

A: Yes.

…

Q: So to that school counselor, you told her that your mom had confronted your dad about him touching you, and he said it was an accident, right?

A: I'm not sure.

Q: Okay. Now if the school counselor comes and says that's what you told her, would she be lying or no?

A: No, she wouldn't.

3 RR at 36–37.

Later in her testimony, Complainant was asked about a second meeting with the school counselor. Complainant testified that she did not remember this second meeting, and did not remember telling the counselor about her mother picking her up with her father in the car and then being dropped off at her father's house. 3 RR at 53. Although Complainant did not recall the second meeting, she did recall the events they discussed, which means she remembered the subject matter of her conversations with the school counselor

even if she could not recall the specific conversation. This does not qualify as being unavailable due to not remembering the "subject matter."

2. Conversation with Yolanda Alpough, CPS case worker

Complainant could not remember all the details about her meeting with CPS, but she did remember the allegations she made about her father. 3 RR at 38. Complainant remembered telling CPS her father touched her on her vagina between five and ten times when she would spend the night at his house. 3 RR at 38. She also remembered telling CPS that she would pretend to be asleep when some of the touching happened. 3 RR at 38. The next page of the record contains six questions from the prosecutor, all beginning with versions of "do you remember telling [CPS]…" followed by various allegations relating to the purported sexual abuse. 3 RR at 39. Complainant affirms "yes," she remembers saying five of the six. 3 RR at 39. The last question she does not "remember ever saying that, no." 3 RR at 40. Thus, for the CPS caseworker, she never even denied remembering the conversation as a whole, much less the subject matter of that conversation.

3. *Conversation with Erika Gomez, CAC interviewer*

When the prosecutor began asking Complainant if she remembered going to the CAC and meeting with "someone about what you had disclosed,"

Complainant answered affirmatively. 3 RR at 48. Complainant testified to remembering details about that meeting and the conversation she had there: She was alone with the interviewer, she was asked to promise to tell the truth, she did promise to tell the truth, and she "disclosed to her that your dad had abused you for a year and-a-half." 3 RR at 48. At this point in her testimony, Complainant's memory became less sure, but not wholly blank. Although Complainant could not recall the exact date of the interview, she knew it was when she was ten years old. 3 RR at 49.

She remembered telling the interviewer that her father had sexually abused her, but not what specifically he had done or where she said it happened. 3 RR at 49. Complainant said she remembered telling the interviewer that her father was in the bed with her "when it was happening," but did not remember telling the interviewer about an incident that took place on the couch. 3 RR at 50. Complainant could not recall telling the CAC interviewer that she had disclosed to her mother that her father was tickling her or that it happened while her father's girlfriend was not home, but did remember telling the interviewer that her father had touched her on her vagina "more than five times but less than ten." 3 CR at 50. Complainant therefore clearly recalled the subject matter of the conversation.

4. *Meeting with Assistant District Attorney and Leslie Ventura*

Complainant remembered meeting with the prosecutor and her assistant, but did not remember much of what was said. 3 RR at 57–59. Again, in this instance, Complainant could remember both the meeting itself, and the subject matter of the meeting, but not what she specifically said during it. This does not meet the requirements for unavailability due to lack of memory about the subject matter.

C. The Ruling was Error

Even viewing the facts in favor of the trial court's ruling the Complainant was not unavailable. She was present, she testified, she testified to the existence—and in many instances the substance—of her meetings with Stephens, Alpough, Linares, and Ventura, and—most importantly—she testified to *the subject matter* of those meetings, namely, the alleged abuse. The trial court could not have reasonably found that Complainant had no memory of the subject matter, as required to make her "unavailable" under Art. 38.49. The trial court abused its discretion in allowing the testimony of these witnesses at trial, in violation of the Confrontation Clause and Rules of Evidence.

V. Harm Analysis

The forfeiture by wrongdoing doctrine bars both confrontation claims and hearsay claims. *Cologne*, 573 S.W.3d at 264. Harm from violations of the Confrontation Clause is analyzed under Rule of Appellate Procedure 44.2(a), while harm from inadmissible hearsay is analyzed according to 44.2(b). Tex. R. App. P. 44.2(a)–(b).

A. Erroneously Admitted Testimony

The trial court erroneously admitted testimony from four witnesses:

1. Carvella Stephens

Stephens was Complainant's school counsel when Complainant was ten years old. 4 RR at 10. Stephens testified, over objection, that Complainant disclosed that her father had touched her inappropriately. 4 RR at 14. Complainant indicated she was touched on her vagina and said it happened on multiple occasions. 4 RR at 14. Stephens told the jury that Complainant had told her the touching happened different times, such as when they were sleeping together in the same bed, and on the living room couch. 4 RR at 15–16. Stephens testified that she had a follow-up meeting with Complainant about a month after their first meeting. 4 RR at 20. At that meeting, Stephens said that Complainant told her that her mother had picked her up from school the day

before and her dad was in the car. 4 RR at 25. According to Stephens, Complainant told her that her parents were trying to convince her to change her story, and then her mother left her at her father's house for a period of time, but nothing inappropriate happened. 4 RR at 25–26.

2. Yolanda Alpough

After receiving the report of suspected sexual abuse, Alpough met with Complainant at her home. Over defense objection (4 RR at 45), Alpough testified that Complainant told her that her father first touched her when she was seven years old, but she did not tell her mother until she was nine. 4 RR at 46. Alpough told the jury that Complainant said her dad touched her "private area" over the clothes more than once, and that it happened when his girlfriend was not home. 4 RR at 46. Alpough said she watched Complainant's forensic interview at the CAC and the disclosures she made were consistent with the ones made to Alpough. 4 RR at 49.

3. Leslie Ventura

Ventura testified that, as a paralegal for the District Attorney's Office, she sat in on the interview between the Assistant District Attorney and Complainant. 4 RR at 136. After the trial court overruled Defense Counsel's objection, Ventura testified that Complaint told them that her father sexually

abused her. 4 RR at 139. According to Ventura, Complainant said it happened in the living room while he played video games and happened more than five times but less than ten. 4 RR at 140.

4. Christina Linares

Christina Linares is Complainant's step-aunt by marriage. 5 RR at 40. For a brief period, Complainant lived with Linares. 5 RR at 42–43. Linares took Complainant in because Complainant was not getting along with her mother's boyfriend and had recently been hospitalized. 5 RR at 44. Linares took Complainant to therapy, concerned about Complainant's reports of feeling unloved and unwanted. 5 RR at 46. Linares was concerned that Complainant was suicidal and testified that Complainant had problems with anger and anxiety. 5 RR at 46–47. While living with Linares, Complainant had contact with her father a few times, until Linares learned that he was forbidden from contacting Complainant. 5 RR at 48–49. Linares took Complainant to the meeting with the district attorney, where Linares was told about Arana's prior conviction for sexual assault and that he was forbidden from contact with Complainant. 5 RR at 51. After this meeting, Linares went through Complainant's phone and found recordings Complainant had made of Linares yelling at her daughter. 5 RR at 52.

B. Harm Standard for Constitutional Error Under Rule 44.2(a)

"A Confrontation Clause violation is constitutional error that requires reversal unless we conclude beyond a reasonable doubt that the error was harmless." *Lee*, 418 S.W.3d at 899; *see also* TEX. R. APP. P. 44.2(a). "The State has the burden, as beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), (citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall v. State*, 184 S.W.3d 730, 746 n. 53 (Tex. Crim. App. 2006)).

"In applying the 'harmless error' test, we ask whether there is a 'reasonable probability' that the error might have contributed to the conviction." *Deck*, 544 U.S. at 635 (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g)). The analysis "should not focus on the propriety of the trial's outcome; instead, we should calculate as much as possible the probable impact on the jury in the light of the existence of other evidence." *Id*., (citing *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)). "[T]he reviewing court must ask itself whether there is a reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Scott v. State*, 227 S.W.3d

670, 690 (Tex. Crim. App. 2007). Relevant factors for a Confrontation violation include:

> (1) the importance of the out-of-court statement to the State's case;
>
> (2) whether the statement was cumulative of other evidence;
>
> (3) the presence or absence of evidence corroborating or contradicting the statement on material points; and
>
> (4) the overall strength of the State's case.

Id.

In performing a harm analysis, a reviewing court may also consider the source and nature of the error, the amount of emphasis by the State on the erroneously admitted evidence, and the weight the jury may have given the erroneously admitted evidence compared to the balance of the evidence with respect to the element or defensive issue to which it is relevant. *Id*. at 690. "[T]he entire record is to be evaluated in a neutral manner and not in the light most favorable to the prosecution." *Kapperman v. State*, No. 01-20-00127-CR, 2022 WL 3970081, at *26 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022, no pet.) (mem. op., not designated for publication).

With the foregoing in mind, the reviewing court must ask whether there is a reasonable possibility that the *Crawford* error "moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Scott*, 227 S.W.3d

at 690. After considering the various factors, this court must "be able to declare itself satisfied, to a level of confidence beyond a reasonable doubt, "that the error did not contribute to the conviction before it can affirm it." *Id.* at 690–91.

The erroneously admitted statements were heavily relied upon by the State in its closing. The prosecutor referred told the jury "You heard testimony from several witness about several different instances. One in the bedroom where the defendant touched [Complainant's] vagina and he later said it was an accident," and "you heard about another incident on the couch where the defendant was sat on her lap and held over his crouch area and touched her vagina in that manner." 5 RR at 179. Summarizing the erroneously admitted testimony of the witnesses formed the bulk of the prosecutor's closing argument—Linares, the paralegal for the District Attorney's Office (about one-third of 5 RR at 196); Stephens, the school counselor (majority of 5 RR at 197, part of 5 RR at 198); Alpough, the CPS worker, and Gomez. the CAC interviewer, (all of 5 RR at 199 and half of 5 RR at 200).

The Court of Criminal Appeals has stated that, even when a jury could have rationally convicted the appellant absent the contested statements, "a constitutional harm analysis does not turn on whether, discounting the erroneously admitted evidence, the remaining evidence was legally sufficient to

convict." *Scott*, 227 S.W.3d at 694. "Instead the question is whether, given the state of the record as a whole, the reviewing court can say, to a level of confidence beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the jury's verdict." *Id.*

Other witnesses' testifying to Complainant's alleged prior statements is undeniably more powerful than hearing the State impeach Complainant with these prior conversations. Having multiple adults, in various positions of authority or expertise on this subject matter, tell the jury what Complainant said to them over a period of time is highly persuasive. It cannot be said beyond a reasonable doubt that the erroneously admitted evidence was not a contributing factor to the jury's verdict. *Scott*, 227 S.W.3d at 690.

C. Harm Standard for Non-Constitutional Error Under Rule 44.2(b)

Non-Constitutional error is reviewed under Tex. R. App. P. 44.2(b). "[A]ny other error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). When performing a harm analysis, an appellate court

should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001). "In determining whether the error was harmless, the test is not whether a conviction could have been had without the improperly admitted evidence, but rather whether there is a reasonable possibility that the evidence might have contributed to the conviction or affected the punishment." *Sinegal v. State*, 789 S.W.2d 383, 388 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (citing *Alexander v. State*, 740 S.W.2d 749, 765 (Tex. Crim. App. 1987)). "Thus, if there is a reasonable possibility that inadmissible evidence might have contributed to either the conviction or punishment assessed, then the error in admission is not harmless error." *Id*.

The State's case consisted of ten witnesses. Of these, one was Complainant. 3 RR at 23. Another was Detective Derek Maier, a detective with the Houston Police Department, whose testimony consisted of discussing Arana's criminal history (5 RR at 19–22), visiting locations relevant to the case, repeating testimony of witnesses the jury had previously heard from, (5 RR at 27–29; 29), and discussing hypotheticals (5 RR at 28–29). The other three were not direct fact witnesses: Mark Schmidt, the custodian for the phone calls made by the county jail (5 RR at 63); Dr. Daonaruma, a doctor at the CAC who never

examined Complainant (4 RR at 129); and Dr. Crowson, a psychologist at the CAC who never met Complainant (5 RR at 117).

The remaining four witnesses were those whose testimony was allowed largely, or almost exclusively, under the forfeiture by wrongdoing ruling. The State heavily relied on the testimony of Stephens, Alpough, Linares, and Ventura to prove its case, as illustrated in the portions of its closing argument excerpted above. Although witness Gomez, the CAC interviewer, did not testify in the forfeiture by wrongdoing hearings, the Court admitted her testimony over objection under the same ruling. 4 RR at 83.

Admitting these out-of-court statements as substantive evidence is prejudicial because the "pre-trial statements of [witnesses] provided "evidence of important facts, not supported by other direct evidence at trial…" *Miller*, 408 S.E.2d at 851. The erroneously admitted evidence formed the bulk of the State's case and most of its argument to the jury, resulting in it having a "substantial and injurious effect or influence in determining the verdict." *Nguyen*, 222 S.W.3d at 542. The trial court's ruling was error, was harmful, and this case should be reversed and remanded for a new trial.

PRAYER

Mr. Arana prays this Court find that Complainant was not unavailable as defined by the Rules of Evidence and, therefore, that trial court erred in admitting otherwise inadmissible evidence under the forfeiture by wrongdoing doctrine. Mr. Arana further prays this Court find the trial court's error harmed Arana, reverse his conviction, and remand this case to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was sent on the same date by first-class mail to:

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i). Exclusive of the portions exempted by Tex. R. App. Proc. 9.4 (i)(1), this brief contains 9,275 words printed in a proportionally spaced typeface.

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