**No. 01-24-00358-CR**

**IN THE COURT OF APPEALS**
**FOR THE FIRST DISTRICT OF TEXAS**
**AT HOUSTON**



**BRIAN ANTHONY CLAUDIO-RUIZ**
*Appellant*

v.

**THE STATE OF TEXAS**
*Appellee*

On Appeal from Cause Number 1729166
From the 184th District Court of Harris County, Texas

# APPELLANT'S BRIEF

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**ORAL ARGUMENT NOT REQUESTED**

## IDENTITY OF PARTIES AND COUNSEL

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| PRESIDING JUDGE: | Hon. Katherine Thomas<br>184th District Court<br>Harris County, Texas<br>1201 Franklin Street, 17th Floor<br>Houston, Texas 77002 |

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## STATEMENT OF THE CASE

On September 29, 2021, a Harris County grand jury returned an indictment charging Appellant with the offense of aggravated sexual assault alleged to have occurred on or about March 1, 2011. (C.R. at 42). On November 16, 2023, the indictment was amended to correct the spelling of the Appellant's name. (C.R. at 114-116). On December 12, 2023 Appellant's first trial ended in a mistrial upon the Appellant's request. (C.R. at 130; 7 R.R. at 58-62). On May 2, 2024, a jury found Appellant guilty as charged in the indictment after a second trial. (15 R.R. at 24). On May 3, 2024, the trial court assessed Appellant's punishment at 35 years in the Texas Department of Criminal Justice – Institutional Division. (C.R. at 245-247; 16 R.R. at 82). The trial court certified Appellant's right of appeal and he timely filed his notice of appeal on May 3, 2024. (C.R. at 251-253).

## STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel does not request oral argument. However, should the State of Texas or the Court request oral argument, Appellant requests the opportunity to participate in oral argument.

## ISSUES PRESENTED

1. **Whether trial counsel rendered ineffective assistance of counsel by failing to properly assert a challenge for cause against Juror Number 45 after she indicated that she could not be fair and impartial in a case like Appellant's?**

2. **This court should modify the trial court's judgment to remove $157.00 in court costs, as the trial court improperly imposed courts costs for the State Consolidated Court Cost and Local Consolidated Court Costs in effect at the time of trial as opposed to at the time of the offense.**

3. **Whether the trial court's judgment should be modified to remove the $100 Child Abuse Prevention fine, as the fine does not apply because Appellant's offense allegedly was committed before January 1, 2020?**

## STATEMENT OF FACTS

### A. Voir Dire

During the trial court's voir dire, she addressed the nature of the subject matter of Appellant's case:

> I understand that the nature of this subject matter is very difficult to talk about, and I don't want to talk about it if you-all have any sort of prior experiences with this. Okay? But here's what I am going to ask you, because I want to be cognizant of the fact that people have lived life before today, and you have experiences that might preclude you from being a fair and impartial juror in this case. First part of my question is: Do you have an experience with this subject matter as a victim, or will you -- or you yourself were accused or you know somebody who has been falsely accused. So that's part one, okay, do you have the experience? And the second part of this question is, if your answer is yes, can you set that aside, listen to the facts in this case, and be fair and impartial to either side. Okay? First part,

> do you have the experience one way or another. You have been affected by it, either you were a victim, you had to testify in a trial, you know someone close to you who has been, and because of that, you can be fair in a case like this, or you can't be fair in a case like this. So two-part. Everybody understand?

(10 R.R. at 104-105)

Ultimately, while Juror No. 45 ultimately answered "no" as to the first part of the question, she also answered "no" as to the second part of the question, i.e. whether she could be a fair and impartial juror in a case like Appellant's (i.e. the allegation being aggravated sexual assault against a child under 14 years of age). (10 R.R. at 110-111) ("No and no."). Despite concerns that trial counsel expressed to the trial court, he failed to either challenge Juror No. 45 for cause or properly present such a challenge. (10 R.R. at 189, 213-214).

**B. Trial on the Merits**

Investigator Isaac Lewis with the Harris County Sheriff's Office was assigned the case on April 23, 2011. (12 R.R. at 28, 43-44). The initial report from the Complainant, D.C., and her sister, M.C., was taken by Deputy Ketrick McCutcheon on August 9, 2019. (12 R.R. at 18-23, 44). Both D.C. and M.C. made statements regarding sexual abuse. (12 R.R. at 44). Appellant, whose date of birth is November 23, 1993, was identified as a

suspect. (12 R.R. at 23, 45-46, 62). Appellant's date of birth was important to the case because the alleged incidents started when he was a juvenile. (12 R.R. at 69). When Investigator Lewis spoke with the Complainant she was 21-years old and she articulated to Investigator Lewis that the abuse occurred from ages 9 through 12, i.e. that it ended at the age of 12. (12 R.R. at 46, 50, 53, 112).[1] She was very consistent with her initial report to Deputy McCutcheon. (12 R.R. at 50-51, 53). The interview was recorded. (12 R.R. at 51). Investigator Lewis also spoke with M.C., who provided statements that were consistent with her initial report to Deputy McCutcheon. (12 R.R. at 52). He agreed that when the Complainant was between the ages of 9 and 11, Appellant would have been under the age of 17, and a minor. (12 R.R. at 54). However, based on his reporting, Investigator Lewis believed Appellant was 17 years or older when the Complainant was 12 years old. (12 R.R. at 54). On cross-examination, Investigator Lewis acknowledged that in his report he put that the Complainant stated that the abuse ended in 2010. (12 R.R. at 64). Although he stood by his report, Investigator Lewis testified that the 2010 date was

[1] In his report, Officer McCutcheon did not have any information of anything occurring after November 22, 2010. (12 R.R. at 24). Complainant's age during the alleged sexual abuse was between 10 until 12 years of age and M.C. was between 5 and 9. (12 R.R. at 25-26).

incorrect because the abuse lasted through age 12, which eventually went into 2011. (12 R.R. at 64, 112). He did not report anything about the year 2011 in his offense report, nor did he allege anywhere that something occurred in 2011. (2 R.R. at 65, 67). His report stated that the Complainant stated the alleged abuse occurred until she was 12. (12 R.R. at 73). Nowhere in Investigator Lewis's report indicated that the Complainant stated she was sure that the Appellant was 17 years old. (12 R.R. at 76, 115-116). He also acknowledged that the range of until age 12 could be any period of time up until November 22, 2010, but testified that the Complainant's statement would not be consistent with the abuse ending on that date. (12 R.R. at 116, 123-124). However, the Complainant did not say it was the entire 12th year. (12 R.R. at 124-125). M.C. told Investigator Lewis that the abuse occurred from age 5 to age 9. (12 R.R. at 46). Appellant would also have been 17 years or older when M.C. was 9 years old. (12 R.R. at 55). Investigator Lewis attempted to contact the Appellant, but was unsuccessful. (12 R.R. at 55, 57).

At the time of trial, Complainant was 25-years old. (12 R.R. at 128). Appellant is her half-brother and M.C. is her sister. (12 R.R. at 133). Appellant and the Complainant share the same father, but Appellant was

one of four children from their father's previous marriage. (12 R.R. at 135). When she was 7-years old, her father brought her half-siblings, including the Appellant, to live with them in the same household. (12 R.R. at 138-139). When she was 8-years old, the entire family moved into a residence located in Spring, Texas. (12 R.R. at 140-141). When Appellant first moved in, Complainant described their relationship as normal. (12 R.R. at 142). However, Complainant testified that things started to change when she was 8 years old, as Appellant was always very sexual. (12 R.R. at 142-143). She testified that while she was sitting on the floor watching TV, Appellant dug through her pants and touched her on her vagina with his hands. (12 R.R. at 143-144). She thought she recalled the Appellant saying something like, this is what you like. (12 R.R. at 144). Complainant asked the Appellant what he was doing and why was he touching her down there? (12 R.R. at 144). No one else was around at that time. (12 R.R. at 145). The next sexual encounter the Complainant recalled occurred when she was 9-years old when the Appellant forced her to perform oral sex on him. (12 R.R. at 145). Complainant described this as her physical mouth on his penis with his hands (nail beds) on her head. (12 R.R. at 146). This was not the only time this occurred, as she testified that it went on for a couple of years, from

the age of 9 to about the age of 12. (12 R.R. at 146-147, 153). More specifically, she testified that Appellant forced her to perform oral sex on him approximately two to three times a week. (12 R.R. at 153). Complainant indicated that this occurred when it was convenient for the Appellant, as her mother was not really present due to one of her brothers being very ill and Appellant being left to baby sit a lot. (12 R.R. at 146-148). These sexual incidents would occur in the laundry mat by the kitchen or in her bedroom. (12 R.R. at 147). When the Complainant was awakened in the middle of the night, she would hear Appellant's toes in the crack of the bottom of the floor and the doorknob being shaken. (12 R.R. at 148). She knew that meant she had to do it (perform oral sex on him) or face the consequences of Appellant being abusive with them. (12 R.R. at 148).

In addition, Complainant testified that Appellant rubbed his penis on her back like in a humping sense on more than one occasion. (12 R.R. at 154). She also recalled Appellant placing her hand on the top of his erect penis over his clothes, just randomly, while they were watching TV. (12 R.R. at 155). Appellant would also show her porn, as he consistently watched porn on his game device. (12 R.R. at 155-156). She would ask the Appellant to stop, but Appellant told her that it was not nasty because they were not

related. (12 R.R. at 150). If the Complainant said no, she would get threatened. (12 R.R. at 150). The last instance she recalled of the Appellant forcing her to perform oral sex on him was around March 2011 when she was 12 years old. (12 R.R. at 164). Regarding this instance, the Complainant testified that she was in the laundry mat and Appellant squeezed her arm to indicate to her to perform oral sex on him. (12 R.R. at 165). When she told Appellant she refused to do it, she was told to give him oral sex or she was going to get beat. (12 R.R. at 165). She then complied. (12 R.R. at 165).

When the Complainant was 11-years old, she told her older half-sister about the abuse, but her half-sister did nothing about it, making her feel empty. (12 R.R. at 157-158). When she was 12-years old, the Complainant told the Appellant's biological mother and her biological mother about the oral sex. (12 R.R. at 158-159, 163-164). After she told her mother, her father could not believe what she was saying and hugged her. (12 R.R. at 160). When Appellant returned home, he was confronted by the Complainant's mother and father, and Appellant's biological mother in the front of the lawn. (12 R.R. at 161). Appellant was still living at their home when this confrontation occurred, but left the next day. (12 R.R. at 161-

162). Her parents did not call the police which made the Complainant feel as if they did not believe her. (12 R.R. at 162). Eventually, the Complainant herself made a report to the police when she was 20 or 21 years old. (12 R.R. at 166-167). She recalled speaking to both Deputy McCutcheon and Investigator Lewis, and that she gave a recorded statement. (13 R.R. at 6-7). Complainant testified she spoke with the first policeman for about three hours, whereas she spoke with Investigator Lewis for about four to five minutes. (13 R.R. at 9). She was aware that when she spoke with law enforcement, they were trying to get all of her story and that both officers gave her an opportunity to give her complete story. (13 R.R. at 7-8). In addition, Investigator Lewis did not rush her. (13 R.R. at 9). She did not recall telling Investigator Lewis that everything ended in 2010. (13 R.R. at 9-10). However, she recalled telling him that she believed Appellant was 17 years old, but she was not real sure of his age and his birth date. (13 R.R. at 10-13). While the Complainant agreed that Appellant had friends who came over to the residence, she did not know their names and did not recognize the name Steven. (13 R.R. at 37).

M.C., the Complainant's sister, testified that when she was 5-years old her mother was oftentimes taking care of her brother because of medical

issues, while her father was always working managing a car dealership. (13 R.R. at 44-45). While her parents were out of the house, her older siblings were left in charge, including the Appellant. (13 R.R. at 45-46). When she was 5-years old, things became inappropriate with the Appellant. (13 R.R. at 46). Appellant was inappropriate with M.C. multiple times and these incidents occurred from when she was 5 until she was 9. (13 R.R. at 46). M.C. testified regarding an incident that occurred when she was 5-years old while she and the Appellant were in the living room playing video games. (13 R.R. at 47). They were on the floor and Appellant got close to her where he started caressing her butt with his hands over her clothes. (13 R.R. at 48). Within days, Appellant became abusive, very aggressive while playing, as Appellant started to hit her with his hands. (13 R.R. at 49). This scared M.C. (13 R.R. at 49). She did not report this incident to her parents. (13 R.R. at 50). When M.C. turned 6-years old, Appellant would get her naked and fondle her body with his hands. (13 R.R. at 50, 52-53). No one was present when this occurred. (13 R.R. at 53). At this point, M.C. told her mom that Appellant was touching her in weird ways. (13 R.R. at 53-54). M.C. also demonstrated to her mother what she meant. (13 R.R. at 54-55). Her mother was in shock, but Appellant pretty much convinced her it was

nothing as he denied the allegations. (13 R.R. at 55). Appellant faced no consequences leaving M.C. feeling lonely and more afraid as the Appellant had previously threatened her. (14 R.R. at 57). After the touching, things continued to escalate and Appellant eventually forced M.C. to perform oral sex on him. (13 R.R. at 57-58). This started to occur when M.C. was 6 years old and it continued until she was 9 years old. (13 R.R. at 59). The first incident occurred at the house in Spring. (13 R.R. at 59). M.C. testified it was nighttime in her bedroom. (13 R.R. at 59-60). Her sisters, including the Complainant, were present in the bedroom but were asleep. (13 R.R. at 59-60). Appellant grabbed her by the head and pulled her down to her knees, next to her bed. (13 R.R. at 60-61). Afterwards, he forced M.C. to put his penis in her mouth and then she jumped back. (13 R.R. at 62). One of her sisters then woke up and Appellant left. (13 R.R. at 62-63). The forced oral sex continued between the ages of 6 and 9, about four times a week on a daily basis. (13 R.R. at 63, 65). In addition, Appellant also began putting his penis on M.C.'s vagina, eventually escalating into penetration. (13 R.R. at 66-72). This also became a normal thing that occurred when she was between the ages of 6 to 9. (13 R.R. at 72). Appellant would threaten her to not tell anyone, engaging in physical acts of violence on a daily basis. (13

R.R. at 64). Sometimes the physical aggression was random and sometimes it was related to the sexual abuse. (13 R.R. at 66). M.C.'s understanding was that all of the inappropriate stuff with the Appellant stopped as a result of an intervention that involved the Complainant. (13 R.R. at 73-74). M.C.'s testimony at trial was the first time she went into detail about the sexual abuse. (13 R.R. at 96-97).

Theresa White knew the Appellant through her son, Steven. (13 R.R. at 175). She described the Appellant as her son's best friend since elementary school that then became part of her family. (13 R.R. at 175). Ms. White testified that when her father-in-law came to live with her, Appellant would stay over many times to help out. (13 R.R. at 176). Appellant stayed at her residence permanently after Ms. White's father-in-law passed away on September 9, 2010. (13 R.R. at 177-179). From September 25, 2010, Appellant continuously lived at her residence. (3 R.R. at 180). Appellant moved in with Ms. White's family because he was there all the time and he never wanted to go home. (3 R.R. at 183).

Steven White testified that at the time of trial he was 31 or 32 years of age, as he could not remember. (14 R.R. at 50). He testified he has known Appellant his whole life after meeting him in fourth or fifth grade. (14 R.R.

at 51-52). They hung out every day and Appellant was at his residence all the time. (14 R.R. at 52). Appellant came to live with Mr. White permanently on September 9, 2010, and he was absolutely certain that from September 25, 2010, Appellant lived at his residence. (14 R.R. at 53-54).

## SUMMARY OF THE ARGUMENT

Appellant contends that trial counsel rendered ineffective assistance of counsel through his failure to either challenge Juror No. 45 for cause or properly present such a challenge. Trial counsel's failure to properly challenge Juror Number 45 for cause constituted deficient performance given that trial counsel noted his concerns to the trial court that Juror Number 45 had indicated that she could not be fair and impartial in a case like Appellant's. Based on her statement, Juror Number 45 demonstrated an actual bias and should have been challenged for cause. As a result of trial counsel's deficient performance in failing to challenge Juror Number 45 for cause, Appellant suffered prejudice because Juror Number 45 sat on the jury.

In addition, Appellant contends that this Court should modify the trial court's judgment to remove $157.00 in court costs, as the trial court improperly imposed courts costs for the State Consolidated Court Cost and

Local Consolidated Court Costs in effect at the time of trial as opposed to at the time of the offense. Finally, Appellant contends that the $100 Child Abuse Prevention fine should be stricken from judgment, as this particular fine was not in effect at the time of Appellant's offense.

## ARGUMENT

**1. Whether trial counsel rendered ineffective assistance of counsel by failing to properly assert a challenge for cause against Juror Number 45 after she indicated that she could not be fair and impartial in a case like Appellant's?**

### A. Applicable Law and Standard of Review

Under *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffective assistance of counsel claim is subjected to a two-step analysis whereby the appellant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687. An Appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). When the record is silent, a reviewing court may not speculate to find trial counsel ineffective. *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must

affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994), citing *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Thompson*, 9 S.W.3d at 813. "An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluation the effectiveness of counsel." *Id.*, citing *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

"In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test – that trial counsel's representation fell below an objective standard of reasonableness-because the record on direct appeal is undeveloped." *Lopez v. State*, 565 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd), citing *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). "When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance

unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id*., quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). "That is, the record must show that counsel's performance fell below an objective standard of reasonableness as a matter of law and that no reasonable trial strategy could justify his deficient performance." *Dryer v. State*, 674 S.W.3d 635, 647 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd), citing *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Courts "generally will assume that counsel had a reasonable strategic motive if any reasonable trial strategy can be imagined." *Id*., citing *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). "[I]t is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance." *Thompson*, 9 S.W.3d at 813, citing *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985). "A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole." *Dryer*, 674 S.W.3d at 647, citing *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

"The Sixth Amendment to the United States Constitution guarantees a trial before an 'impartial jury.'" *Drake v. State*, 465 S.W.3d 759, 763 (Tex.

App.—Houston [14th Dist.] 2015, no pet.), citing U.S. CONST. AMEND. VI. "A defendant's right to a fair trial before an impartial jury is ingrained within our fundamental precepts of justice." *Id.*, citing *Armstrong v. State*, 897 S.W.2d 361, 368 (Tex. Crim. App. 1995). "The voir dire process is designed to effectuate a defendant's right to a fair trial by insuring, to the fullest extent possible, that the jury will be intelligent and impartial." *Id.*, citing *Armstrong*, 897 S.W.2d at 368 and *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. [Panel Op.] 1978). "The importance in selecting a jury cannot be overestimated in our judicial system since both the State and defendant have an interest in assembling a jury free of bias and prejudice." *Id.*, quoting *Price v. State*, 626 S.W.2d 833, 835 (Tex. App.—Corpus Christi 1981, no pet.).

The law provides that a juror is challengeable for cause under the following circumstance:

> That the juror has a bias or prejudice in favor of or against the defendant….

TEX. CODE CRIM. PROC. ART. 35.16(a)(9)

In addition, "a challenge for cause may be made by the defense" for the following reason:

> That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

TEX. CODE CRIM. PROC. ART. 35.16(c)(2)

"Bias" means "an inclination towards one side of an issue rather than to the other…(which) leads to a natural inference that (a juror) will not or did not act with impartiality." *Anderson v. State*, 633 S.W.2d 851, 853 (Tex. Crim. App. [Panel Op.] 1982), quoting *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963). See also *Mount v. State*, 217 S.W.3d 716, 722 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Bias is an inclination toward one side of an issue rather than to the other."). "Prejudice" means "prejudgment." *Id*. "Bias, by itself, is not sufficient for a challenge for cause. Instead, an appellant must show that the juror was biased to the extent that he or she was incapable of being fair." *Henson v. State*, 173 S.W.3d 92, 99 (Tex. App.—Tyler 2005, pet. ref'd), citing *Anderson*, 633 S.W.2d at 853. "Disqualification of a venire member extends to bias or prejudice against the subject matter of the suit as well as against the litigants." *Mount*, 217 S.W.3d at 722. "Under Article 35.16(a)(9), it is not necessary to show a particular bias or prejudice in favor of or against the defendant." *Tran v.*

*State*, 221 S.W.3d 79, 83 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd), citing *Sosa v. State*, 769 S.W.2d 909, 918 (Tex. Crim. App. 1989). "It is sufficient that the prospective juror states that she cannot be fair and impartial." *Id*. "Bias is established as a matter of law when a prospective juror admits that he is biased for or against the defendant." *Id*, citing *Anderson*, 633 S.W.2d at 854. "When a prospective juror is shown to be biased as a matter of law, she must be excused when challenged, even if she states that she can set aside her bias and provide a fair trial." *Id*. "However, it is left to the discretion of the trial court to initially determine whether such a bias exists and the court's decision will be reviewed in light of all of the answers given." *Id*.

**B. Analysis**

*1. Trial Counsel's performance was deficient*

"Counsel's performance is deficient when his representation falls below an objective standard of reasonableness." *Cueva v. State*, 339 S.W.3d 839, 857-858 (Tex. App.—Corpus Christi-Edinburg 2011, pet. ref'd), citing *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005) and *Strickland*, 466 U.S. at 687-688. "In determining whether there is a deficiency, we afford great deference to trial counsel's ability, indulging 'a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and that counsel's actions were the result of sound and reasonable trial strategy." *Id*. at 858, citing *Strickland*, 466 U.S. at 689 and *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi-Edinburg 2006, no pet.). "[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008).

Appellant acknowledges that the Court of Criminal Appeals and other appellate courts have rejected ineffective assistance of counsel claims for the failure to move to challenge for a cause a venire person when confronted with a silent record. See *Delrio v. State*, 840 S.W.2d 443, 446 (Tex. Crim. App. 1992) (per curiam) ("Although we would certainly expect the occasion to be rare, we cannot say, as the court of appeals did, that under no circumstances could defense counsel justifiably fail to exercise a challenge for cause or peremptory strike against a venireman who deemed himself incapable of serving on the jury in a fair and impartial manner."); *Jackson*

*v. State*, 877 S.W.2d 768 (Tex. Crim. App. 1994) (The record in the instant case is also silent as to why appellant's trial counsel failed to challenge venire member Supinski. We could speculate as to why appellant's trial counsel decided not to challenge or strike Supinski, as we did in *Delrio*, but there is no need to do so…To hold trial counsel's decision not to strike or challenge venire member Supinski in the instant case as ineffective assistance would also call for speculation. The record in the instant case lends no support for such holding."); *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008) ("If it is permissible for trial counsel to retain a juror who is *actually* biased for strategic or tactical reasons, then *a fortiori*, trial counsel must be permitted to make a strategic or tactical decision to retain a juror who is only *presumably* biased by virtue of her status as an assistant district attorney."); *Notias v. State*, 491 S.W.3d 371 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (apply *Delrio* and holding that with a record that was "otherwise silent regarding the motivations of counsel for not challenging or striking" a venireperson indicated that he could not follow the law regarding not holding it against a defendant who does not testify); and *Jackson v. State*, 617 S.W.3d 916 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (same).

Having said that, Appellant contends that trial counsel's failure to challenge Juror Number 45 for cause constituted deficient performance and that his case is distinguishable from *Delrio,* as the record is not silent as to trial counsel's belief that Juror Number 45 stated that she could not be fair. During the trial court's voir dire, she addressed the nature of the subject matter of Appellant's case:

> I understand that the nature of this subject matter is very difficult to talk about, and I don't want to talk about it if you-all have any sort of prior experiences with this. Okay? But here's what I am going to ask you, because I want to be cognizant of the fact that people have lived life before today, and you have experiences that might preclude you from being a fair and impartial juror in this case. First part of my question is: Do you have an experience with this subject matter as a victim, or will you -- or you yourself were accused or you know somebody who has been falsely accused. So that's part one, okay, do you have the experience? And the second part of this question is, if your answer is yes, can you set that aside, listen to the facts in this case, and be fair and impartial to either side. Okay? First part, do you have the experience one way or another. You have been affected by it, either you were a victim, you had to testify in a trial, you know someone close to you who has been, and because of that, you can be fair in a case like this, or you can't be fair in a case like this. So two-part. Everybody understand?

(10 R.R. at 104-105)

Ultimately, while Juror Number 45 answered "no" as to the first part of the question, she also answered "no" as to the second part of the question, i.e. whether she could be a fair and impartial juror in a case like

Appellant's (i.e. the allegation being aggravated sexual assault against a child under 14 years of age). (10 R.R. at 110-111) ("No and no.").[2] Like the venireperson in *Delrio*, Juror Number 45 demonstrated an actual bias and should have been challenged for cause. See *Tran*, 221 S.W.3d at 83 ("Under Article 35.16(a)(9), it is not necessary to show a particular bias or prejudice in favor of or against the defendant. "It is sufficient that the prospective juror states that she cannot be fair and impartial."). Juror Number 45's statement did not go unnoticed by trial counsel. When discussing venirepersons whom likely were susceptible to a challenge for cause at the bench, Appellant's he brought up Juror Number 45:

> [Trial Counsel]: Judge, I have – I have – I have also No. 45 saying they couldn't be fair.
>
> [Trial Court]: You have what number?
>
> [Trial Counsel]: No. 45.
>
> [State's Counsel]: The State does not have that, Your Honor.
>
> [Trial Court]: I do not have 45 either.

---

[2] Although the trial court's specific inquiry to Juror Number 45 did not involve the trial court restating its question in the same detail as it initially did, the record establishes that the jurors who answered understood the context of what the trial court was asking. See *Lee v. State*, 206 S.W.3d 620, 624 (Tex. Crim. App. 2006) ("we do not view the questioning of each juror in isolation. In context, these later questions appear to be merely short-hand renditions of the original question that properly elicited whether the venire persons could follow the law, and we think it reasonable to presume the venire persons understood the later questions in this manner.").

[Trial Counsel]: Okay. Okay.

(10 R.R. at 189)

Trial counsel again brought up Juror Number 45's statement during the bench conference:

> [Trial Counsel]: It was one more, Judge. Let me see. I'm sorry, Your Honor. Judge, on my note pad, I have No. 45 saying or at least implying that they couldn't be fair.
>
> [Trial Court]: We're not going based on implications. Are there any cause questions that were asked from either the Court's, the State's, or the Defense's voir dire where this witness – this panel member said that he could not be fair?
>
> [Trial Counsel]: I have it written down, Judge, that they did it during the State's voir dire that he said he couldn't be fair.
>
> [Trial Court]: I don't have that. I don't have that. And I remember 44 raising their hand when I asked fair and impartial, and I said who is raising their hands, is it 44 or 45? 44 did not raise -- excuse me. 45 did not raise her hand. It was only 44.[3]

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[3] The trial court's comments appear to refer to this portion of its voir dire regarding these questions:

> [Trial Court]: Anybody I missed? Did I miss somebody? Raise your hand.
>
> [Venireperson]: Yes and No.
>
> [Trial Court]: What? 44, what that your response, or 45?
>
> [Venireperson]: I was yes and no, and also for you, she did not answer.

(10 R.R. at 109)

[Trial Counsel]: Okay…

(10 R.R. at 213-214)

Despite trial counsel's concerns, he failed to either challenge Juror No. 45 for cause or properly present such a challenge, even though he made several other challenges for cause regarding other jurors.[4] While a motion for new trial was not filed, this is not a case where trial counsel's motivations were unknown. On two separate occasions during the bench conference after the initial questioning of the venire panel had concluded, trial counsel expressed his reservations regarding Juror No. 45. (10 R.R. at 189, 213-214). Trial counsel clearly told the trial court that he had Juror

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However, the trial court's comments omit that it followed up with Jurors 44 and 45 regarding its questions regarding whether someone can be fair in a case like Appellant's and Juror 45 indicated that she could not be fair and impartial through her answer ("No and no"). (10 R.R. at 110-111).

[4] Assuming for the sake of the argument that trial counsel statements regarding Juror Number 45 put the trial court on notice that he sought to make a challenge for cause regarding Juror Number 45, the issue is still not preserved for appellate review, as trial counsel did not use a peremptory challenge on Juror Number 45, among other reasons. See *Davis v. State*, 329 S.W.3d 798 (Tex. Crim. App. 2010) ("To preserve error for a trial court's erroneous denial of a challenge for cause, appellant must show that: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury."). If this Court concludes that trial counsel asserted a challenge for cause against Juror Number 45, then Appellant alternatively contends that trial counsel rendered ineffective assistance of counsel for failing to properly preserve a challenge for cause against Juror Number 45 based upon the same reasons stated within this issue.

Number 45 indicating that she could not be fair, even though he was mistaken as to when that answer was given. (10 R.R. at 213). And it cannot be said that there was some strategic reason trial counsel kept her on the jury based upon his concerns expressed to the trial court regarding what Juror Number 45 indicated given he contended that she said she could not be fair. As such, there is no scenario under which trial counsel's failure to challenge Juror Number 45 for cause could be considered "sound trial strategy." Thus, trial counsel's failure to challenge Juror Number 45 for cause was deficient performance, as there was no reasonable strategy to not challenge Juror Number 45, who demonstrated an actual bias in the case when she indicated that she could not be fair and impartial in a case like Appellant's.

*2. Appellant was prejudiced by trial counsel's deficient performance*

"[T]o show prejudice, the appellant 'must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different.'" *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009), citing *Strickland*, 466 U.S. at 694. "Reasonable probability is a probability sufficient to undermine confidence in the

outcome, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

"It is fundamental to our system of jurisprudence that an accused is entitled to an impartial jury composed of people who have not prejudged the merits of the case." *Alaniz v. State*, 937 S.W.2d 593, 596 (Tex. App.—San Antonio 1996, no pet.), citing *Shaver v. State*, 162 Tex. Crim. 15, 280 S.W.2d 740, 742 (Tex. Crim. App. 1955) and TEX. CONST. ART. 1, § 10. "The presence of one biased juror destroys the impartiality of the entire jury and renders it partial." *Id.* See also *Delrio*, 840 S.W.2d at 445 ("[A] single partial juror will vitiate a conviction.").

Juror Number 45 demonstrated an actual bias and should have been challenged for cause when she indicated that she could not be fair and impartial in a case like Appellant's. Instead, she sat on the jury. (10 R.R. at 215; C.R. at 223). A juror, who by their own admission cannot be fair and impartial in a case like Appellant's, rendered the outcome "unreliable" under *Strickland*. *Delrio*, 840 S.W.2d at 445 ("[A] single partial juror will vitiate a conviction."). As a result, trial counsel's deficient performance in failing to challenge Juror Number 45 for cause prejudiced the Appellant.

**2. This court should modify the trial court's judgment to remove $157.00 in court costs as the trial court improperly imposed courts costs for the State Consolidated Court Cost and Local Consolidated Court Costs in effect at the time of trial as opposed to at the time of the offense.**

An appellate court reviews the assessment of court costs to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost. *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014). When a trial court improperly includes amounts in assessed court costs, the proper appellate remedy is to reform the judgment to delete the improper fees. *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). The Court of Criminal Appeals has held that challenges to court costs can be raised for the first time on appeal and "[c]onvicted defendants have constructive notice of mandatory court costs set by statute and the opportunity to object to the assessment of court costs against them for the first time on appeal or in a proceeding under Article 103.008 of the Texas Code of Criminal Procedure." *Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014). See also *Johnson*, 423 S.W.3d at 390-391 (an "Appellant need not have objected at trial to raise a claim challenging the bases of assessed costs on appeal[]" as cost bill is most likely unavailable at the time of the judgment).

"Section 133.102 [of the Texas Local Government Code] authorizes imposition of certain costs and fees against a person convicted of an offense." *Wiggins v. State*, 622 S.W.3d 556, 561 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd). Under the current version of this provision, the state consolidated court cost is $185.00 for a person convicted of a felony. TEX. LOCAL GOV'T CODE § 133.102(a). Appellant was assessed this cost. (C.R. at 248). However, the current version of Section 133.102 applies only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of the act, which was January 1, 2020." *Wiggins*, 622 S.W.3d at 561, citing Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 5.01, 5.04. The date of offense was March 1, 2011, which was prior to the effective date of the legislative changes to Section 133.102. (C.R. at 245). The prior version of Section 133.102 which imposed a court cost of $133.00 should have been assessed instead of $185.00. See TEX. LOCAL GOV'T CODE § 133.102(a)(1) (2011). Therefore, Appellant requests that this Court modify the judgment to reduce the assessed court costs by $52.00. See *Wiggins*, 522 S.W.3d at 561 (modifying trial court's judgment to reduce $52 in court costs).

In addition, Appellant was assessed a $105.00 the Local Consolidated Court Cost. (C.R. at 248). The $105.00 for "Consolidated Court Cost – Local was added by amendment in 2019 and applies only to offenses committed on or after January 1, 2020. TEX. LOCAL GOV'T CODE § 134.101. Again, the date of offense was March 1, 2011, which was prior to the effective date of Section 134.101. (C.R. at 245). This Court should modify or order that the Bill of Costs be modified by deleting the Consolidated Court Cost – Local. See *Rhodes v. State*, 676 S.W.3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (in *Anders* context, modifying trial court's judgment to remove certain erroneous court costs).

**3. Whether the $100 Child Abuse Prevention fine should be removed from the judgment, as the current provisions of Article 102.0186 do not apply because Appellant's offense occurred before January 1, 2020?**

"Senate Bill 346, effective January 1, 2020, reclassified the child abuse prevention fund cost as a fine[.]" *Shuler v. State*, 650 S.W.3d 683, 688 (Tex. App.—Dallas 2022, no pet.). Senate Bill 346 also contained a savings provision:

> Except as otherwise provided by this Act, the changes in law made by this Act apply only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was

committed, and the former law is continued in effect for that purpose.

*Id*., quoting Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 5.01

Currently, Texas Code of Criminal Procedure Article 102.0186 provides: "A person convicted of an offense under Section…22.021(a)(1)(B)…, Penal Code, shall pay a fine of $100 on conviction of the offense." TEX. CODE CRIM. PROC. ART. 102.0186(a). Prior to January 1, 2020, Article 102.0186 provided: "A person convicted of an offense under Section…22.021(a)(1)(B)…, Penal Code, shall pay $100 on conviction of the offense." TEX. CODE CRIM. PROC. ART. 102.0186 (2011).[5]

Appellant's offense was alleged to have been committed on or about March 1, 2011, prior to the effective date of Senate Bill 346. (C.R. at 24). The trial court's judgment also reflects that the offense was committed on March 1, 2011. (C.R. at 245). As a result, the $100 Child Abuse Prevention Fine as authorized by the current provisions of Article 102.0186 does not apply. Because this fine cannot be assessed against him, Appellant respectfully requests that this Court modify the trial court's judgment and

[5] Prior to January 1, 2020, Article 102.0186 was entitled "Additional Costs Attendant to Certain Child Sexual Assault and Related Convictions". Under the current version of Article 102.0186 the statute is entitled "Fine for Certain Child Sexual Assault and Related Convictions."

remove the $100 Child Abuse Prevention Fine from the trial court's judgment.

## PRAYER

Appellant, Brian Anthony Claudio-Ruiz, prays that this Court reverse the trial court's judgment and remand this case back to the trial court for a new trial. Alternatively, Appellant prays that this Court remove $157.00 in courts costs from the trial court's judgment and bill of costs, and delete the $100 Child Abuse Prevention Fine from the trial court's judgment. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on Jessica Caird of the Harris County District Attorney's Office on November 8, 2024 to the email address on file with the Texas E-filing system.

/s/ Nicholas Mensch
**Nicholas Mensch**
Assistant Public Defender

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/s/ Nicholas Mensch
**Nicholas Mensch**
Assistant Public Defender

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