No. 01-24-00138-CR

In The Court of Appeals
For the 1st District of Texas

Juan Alberto Castro,
Appellant

v.

The State of Texas,
Appellee

On Appeal from Cause Number 1564724
From the 180th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant's arguments are based on settled Texas law; Appellant does not request oral argument but would welcome the opportunity should the Court determine argument would be helpful to its deliberations and decision.

STATEMENT OF THE CASE

On February 14, 2024, a jury found Appellant guilty of continuous sexual abuse of a child. On February 15, 2024, the court assessed punishment at 30 years in prison. Notice of Appeal was filed on February 15, 2024. Appellant filed a motion for new trial on March 15, 2024 which the trial court denied without hearing on April 2, 2024.

ISSUES PRESENTED

1. When the State presented no evidence to support that hearsay statements within medical records were statements for medical treatment or diagnosis, and when those hearsay statements referenced extraneous offenses not previously introduced by any other witness, did the trial court commit reversible error?

2. Appellant's Motion for New Trial and affidavits from three witnesses were presented according to proper procedures and raised reasonable grounds upon which Appellant would be entitled to relief based on his trial attorney's failure to investigate or call mitigation witnesses. Did the trial court err in denying Appellant's motion for new trial without a hearing?

3. After objecting to six of the State's improper arguments in closing, and after making escalating requests for relief to cure the prejudice caused by those arguments, did the trial court err in denying Appellant's motion for a mistrial after his sixth objection?

4. When the Prosecutor repeatedly resorted to improper arguments at least

thirteen times in closing argument, did this pattern of prosecutorial misconduct deprive Mr. Castro of a fair trial?

5. Trial counsel provided inadequate representation in multiple ways during trial; he failed to confront the Complainant with a statement directly contrary to her trial testimony, failed to inform himself of the proper punishment range at trial, failed to investigate or call witnesses in mitigation at trial, and failed to object to numerous improper arguments in the State's closing argument; did these examples of deficient performance individually or cumulatively deprive Mr. Castro of effective assistance of counsel and a fair trial?

STATEMENT OF FACTS

Background

This was a case of delayed outcry with no corroborating physical or forensic evidence.

The accused, Juan Castro is a father of four and the owner of a small automotive business. Mr. Castro was in a relationship with Complainant's[1] mother Dulce Vidal from 2011 to around 2015 (3 R.R. 52). Complainant is Dulce's oldest daughter (3 R.R. 62). Dulce and her three daughters moved out of her parents' house and into Mr. Castro's two-bedroom apartment around 2011 when Complainant was 10 (3 R.R. 123). Juan and Dulce had another daughter together in 2013 (3 R.R. 64). Juan continued to support and care for the four girls when Dulce began working an 11pm-7am night shift in 2013 (3

[1] To protect her privacy, Complainant N.S. is referred to in this brief either by the pseudonym Complainant, or occasionally by her initials.

R.R. 58-59). Relationship problems caused Dulce to move out of Juan's apartment in 2015 (3 R.R. 78).

In 2017 Complainant and her younger sister B.S.,[2] then both in high school, sat down in a park to discuss sex—first B.S. told Complainant about her sexual activities, then Complainant told B.S. that their mother's ex-boyfriend Juan Castro had touched her inappropriately while they were living with him (3 R.R. 138). Complainant asked her sister not to tell anyone, but B.S. later "blurted out" the allegations to their mother (3 R.R. 138-139). When Dulce asked Complainant if it was true, she answered "yes," and they all went to the police station to make a report (Id.). That report was made at approximately 1 a.m. on February 26, 2017 (3 R.R. 24-25),

State's Emphasis on Complainant's Consistency

Complainant testified that before trial she told her story "[s]everal times… [m]ore than I can count" (3 R.R. 137), and the State highlighted her consistency in closing argument, (4 R.R. 109), but no witness other than Complainant testified about the details of her allegations at trial.

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[2] Complainant's sister was an adult when she testified at trial, but because she was also a minor at the time of the allegations, this brief will also refer to her using only her initials.

Complainant's mother testified in a hearing[3] outside of the presence of the jury that she only heard the outlines of Complainant's allegations, and waited outside while Complainant first gave details to Officer Torres. (3 R.R. 71-73). Officer Torres, who took Complainant's initial report at the police station, testified at trial but was not designated as an outcry witness and did not testify about the details of Complainant's disclosures (3 R.R. 22-33). Dr. Reena Isaac performed a medical exam on Complainant and recorded her observations and Complainant's statements about her alleged abuse in a report (6 R.R. 16-31), but the State did not call Dr. Isaac to testify at trial. The State also designated Children's Assessment Center Interviewer Erika Gomez as an outcry witness but did not call her to testify at trial (C.R. 92, 407). Instead, the State called Dr. Whitney Crowson, a general expert in the dynamics of child sexual abuse who had not met complainant or reviewed her records (4 R.R. 6, 28) and offered Dr. Isaac's records through her as State's Exhibit 7 (4 R.R. 9).[4]

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[3] The Prosecutor, and thus the court reporter, mistakenly labeled this hearing as a "38.37" hearing (3 R.R. 68-69), referring to C.Cr.P. 38.37, "Evidence of extraneous offenses or acts," but the parties and the trial court conducted the hearing as one concerning an "outcry," a proceeding regarding hearsay statements of a child complainant described under C.Cr. P. 38.072. There was no actual 38.37 hearing on the record.

[4] The admission of this exhibit is discussed at length in Point of Error One, below.

Complainant's Testimony

Complainant testified at trial that she and her younger sisters slept in a room together—her younger sisters in bunk beds, and herself in a queen bed (3 R.R. 127-128). She testified that Appellant began coming into her room in 2011 and she woke up to him rubbing her vagina with her shorts and underwear pulled down (4 R.R. 127). She testified that he also touched her vagina under her clothes on the couch while watching movies more than ten times and once in his automotive shop (3 R.R. 129, 132). She testified that another instance occurred in the morning before school, and that time Appellant left a hickey on her neck (3 R.R. 131). During her testimony, she also testified that she had just recalled mid-testimony that one time "he tried to penetrate me," she did not specify how or with what, but she testified that she "pushed him off" and he left (3 R.R. 140).

Evidence Inconsistent with Complainant's Testimony

Complainant claimed that she told her mother about the abuse after the time that Appellant left a hickey on her neck; she testified that she and her mother confronted Appellant together and he "kept saying 'no'" (3 R.R. 131). In contrast, Complainant's mother testified that she first learned of the abuse in 2017 (3 R.R. 83), and that in 2013 Complainant's sister B.S. was the one to

tell her that Complainant had a hickey on her neck (3 R.R. 76-77). Dulce did not testify that she learned who caused the hickey or that she ever confronted Appellant, only that she had a "gut feeling of that situation" and started to lose interest in him as a partner (3 R.R. 78). B.S. did not testify about seeing or reporting a hickey. Consistent with Dulce's testimony, Appellant testified that he did not recall ever being caught or confronted by Dulce about anything, and only recalled in the years pending trial that they had once discussed a hickey (4 R.R. 83-84).

Dulce also testified that she continued working the night shift and continued living with Appellant until 2015 when she found her own place to live (3 R.R. 77-78). Even after she moved out, Dulce testified that she allowed Appellant to come and stay at her new place while she was working (3 R.R. 82).

Outside of the presence of the jury, defense counsel informed the court of another inconsistency—that he had a report in which Complainant told a Child Protective Services interviewer in 2017 that she had not been touched inappropriately (3 R.R. 90). Counsel ultimately did not confront the Complainant with this report in front of the jury. Instead, defense counsel only asked Complainant a single question: whether she ever moved to Kansas with her mother and another boyfriend (3 R.R. 141).

Appellant's Testimony

Mr. Castro testified in his own defense and gave a timeline of his relationship and living arrangements with Dulce and her family that was generally consistent with the other witnesses. The only contrast was that he testified he kicked Dulce and her daughters out of his apartment in 2014, but later felt bad and rented and paid for another apartment for Dulce as an apology for kicking them out (4 R.R. 64-65).

During his testimony, Mr. Castro testified "there was no touching," and that he had never touched or grabbed Complainant inappropriately (4 R.R. 66, 70-71), he also testified that "it couldn't have happened," that there was never an occasion when he was alone with just Complainant, but that he was always caring for all four girls together when Dulce was working (4 R.R. 63, 73-74).

Mr. Castro testified that on one single occasion, he was exhausted and fell asleep on the queen bed while watching tv together with the girls in their room (4 R.R. 60). When the State attempted to say he lied to Detective Greenhaw about this incident, Mr. Castro clarified that he told the Detective the truth when asked if there was ever an occasion when Dulce came home and caught him asleep in bed with Natalie, because there was no such incident (4 R.R. 83-84). Dulce also did not testify about such an occasion.

The State's Closing Arguments

In closing argument,[5] the prosecutor argued that Mr. Castro had "lied to the detective multiple times" (4 R.R. 113). He told the jury that in case of delayed outcry, the accused will misdirect and blame the child (4 R.R. 106); he claimed "they," referring the Mr. Castro and his lawyer, "don't want you to pay attention…" (4 R.R. 109). He compared Mr. Castro to Jared Fogle, a public figure notoriously convicted of distributing child pornography and travelling across state lines to sexually assault multiple minors (4 R.R. 111).

The prosecutor vouched for the credibility of the Complainant's testimony, giving his own testimony about what the District Attorney's Office does and does not do to prepare their witnesses, and personally assuring the jury that he had not influenced or incentivized the Complainant's testimony (4 R.R. 105, 107, 109, 111). He also testified that if he personally were to serve as a juror, "we'd take care of a lot of people like Juan Castro." (4 R.R. 105).

The prosecutor argued outside the record that 82 or 83 percent of children never report sexual abuse (4 R.R. 106-108), and that jurors were selected to represent their community's rejection of child molesters in their midst (4 R.R. 112, 114). He concluded by arguing that if he had asked the jury

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[5] The State's closing and rebuttal argument is quoted in detail in Table 1, page 36.

and their fellow venire members "what we should do with people that molest children, I'm sure I'd have gotten a million different answers during that jury selection: Castrate them, kill them, throw them under the jail." (4 R.R. 114).

Appellant's Conviction and Sentence

Mr. Castro was convicted of continuous sexual abuse shortly thereafter and the court sentenced him to 30 years in prison.

SUMMARY OF THE ARGUMENT

Throughout Mr. Castro's trial, the State broke the rules and created unfair advantages that undermined the fairness of the proceedings, and the trial court failed in its role as gatekeeper against such impropriety and prejudice. Further, several examples of defense counsel's deficient representation hindered Mr. Castro's ability to put up a defense, even though the evidence of his guilt was far from overwhelming. In light of these faults, this Court cannot be confident that Mr. Castro received the trial our system of laws guarantees for the accused.

Point of Error 1:

State's Exhibit 7, containing hearsay statements, was improperly admitted into evidence under the medical treatment exception. The State failed to establish the necessary foundation for its admission, as Dr. Crowson, their expert witness, had no

personal knowledge of the complainant's treatment or medical records. This lack of foundation made the trial court's decision to admit the evidence an abuse of discretion. Furthermore, the erroneously admitted Exhibit 7 introduced new, harmful details not presented by the complainant or other witnesses at trial, including allegations of abuse involving other children. This extraneous evidence was inherently prejudicial.

The harm caused by admitting Exhibit 7 into evidence was amplified by the trial court's direction to the State to read from Exhibit 7 in closing arguments, giving undue weight to the hearsay statements without cross-examination. The combination of improper admission, prejudicial content, and emphasis during closing arguments likely influenced the jury's verdict.

Point of Error Two:

The trial court abused its discretion by denying Mr. Castro's motion for a new trial without a hearing. After being convicted, Mr. Castro filed a timely motion for a new trial, alleging that his attorney, Mr. Radosevich, was ineffective for not investigating or calling witnesses who could have provided important mitigation evidence. Mr. Radosevich did not call any witnesses during the punishment phase, instead only reading the names of family members and supporters, without presenting

any mitigating information other than a desire that Mr. Castro receive the minimum sentence.

In his Motion for New Trial, Mr. Castro submitted affidavits from three individuals—Daisy Castro Rejmaniak, Terrence Fletcher, and Robert Lozano—who stated that they were not contacted by Mr. Radosevich but would have testified to Mr. Castro's good character, moral behavior around children, and family-oriented nature, which could have mitigated his sentence. These affidavits raised matters outside the trial record, satisfying the procedural prerequisites for a hearing.

Under Strickland v. Washington, ineffective assistance of counsel occurs when counsel's performance is deficient and prejudices the defendant. By failing to investigate or present mitigating evidence, Mr. Radosevich's actions were deficient. The trial court's denial of a hearing deprived Mr. Castro of the opportunity to address this issue, thus the court should have granted a new trial.

Point of Error Three

The trial court erred in denying a mistrial despite multiple sustained objections to improper arguments by the prosecution. During rebuttal argument, the prosecutor made numerous improper statements, including appeals to unproven community sentiments, misstatements of facts, personal opinions, and inflammatory references. Despite six objections and instructions to recall the evidence or disregard the

improper arguments, the prosecutor persisted in resorting to inflammatory and improper comments.

The trial court abused its discretion by denying a mistrial, as the prosecutor's repeated improper arguments compromised the jury's ability to disregard the constant injection of impermissible and inflammatory information from outside the record. Given the nature of the arguments, the persistence of the prosecutor, and the lack of overwhelming evidence of Mr. Castro's guilt, the jury could not have disregarded the improper arguments. Thus, the trial court's denial of a mistrial caused harm and warrants a reversal.

Point of Error Four

The prosecutor's repeated inflammatory and improper arguments to the jury created a pervasive pattern of prosecutorial misconduct that in itself denied Mr. Castro a fair trial. These improper arguments, which included references to extrajudicial punishments like castration and death, were not based on the trial's evidence and were meant to inflame the jury's emotions and biases. While the defense did not object to every improper argument, this type of pervasive misconduct can violate due process rights by making the trial fundamentally unfair, which creates an exception to the need for timely objections. The prosecutor's comments were not merely undesirable but were calculated to influence the jury unfairly, affecting the

verdict. Given the cumulative effect of these improper arguments, which stirred the jury's emotions rather than focusing on the evidence, there is grave doubt whether the jury would have convicted without such misconduct. This merits reversal and a new trial untainted by prosecutorial misconduct.

Point of Error Five

Mr. Castro's trial counsel provided ineffective assistance by providing deficient representation in multiple ways, which individually and cumulatively prejudiced him and undermined confidence in his trial's outcome.

5A When defense counsel asked only a single question of the Complainant on cross-examination, he failed to confront her with a 2017 statement denying inappropriate touching, a key inconsistency in her testimony. Despite knowing about this statement and discussing it on the record earlier in trial, even mentioning his intent to cross-examine the Complainant about it, counsel ultimately failed to do so, weakening Mr. Castro's defense. This omission was harmful, as the complainant's credibility was critical and without the evidence to the contrary, the State was able to argue to the jury that the Complainant had been consistent in her allegations for years.

5B In the years prior to trial, and after Mr. Castro's conviction, defense counsel repeatedly requested a sentence of community supervision for which Mr. Castro was unquestionably ineligible. Counsel's failure to understand the legal eligibility for

community supervision after a conviction for continuous sexual abuse of a child or the lesser of indecency with a child by contact means that counsel cannot have given Mr. Castro adequate advice, and the record shows that Mr. Castro relied on the idea that he could possibly receive probation if convicted. Mr. Castro's reliance on this misinformation in his decision-making caused him harm and merits reversal.

5C The examples of deficient representation in 5A and 5B, along with others discussed in previous points of error, cumulatively undermined Mr. Castro's right to effective counsel and resulted in an unfair trial. The multiple deficiencies, including failure to investigate mitigation witnesses and failure to make objections to improper closing arguments, amounted to a significant lapse in professional representation, warranting a new trial.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

THE COURT ERRED BY ADMITTING INADMISSIBLE AND HARMFUL HEARSAY CONTAINING MULTIPLE EXTRANEOUS ALLEGATIONS WHEN THE STATE HAD NOT OFFERED A SINGLE FACT TO PROVE THAT ANY HEARSAY EXCEPTION APPLIED.

A. Relevant Facts

Before the State had asked their expert Dr. Whitney Crowson even a single question, the State moved to introduce medical records of two sisters,

Complainant N.S. (State's Exhibit 7, 6 R.R. 22-31),[6] and her sister, B.S. (State's Exhibit 6)(4 R.R. 6). Trial counsel objected that each record "contains hearsay, inability to confront, and as far as Exhibit 6 goes, completely unrelated to the case at hand" (4 R.R. 7). The State argued that "the medical record's [sic.] exception allows these documents to come in for treatment and diagnosis, and the business record affidavit authenticates these documents…" (4 R.R. 9).

The records in question were made by Dr. Reena Isaac, who did not testify at trial (6 R.R. 31). Complainant had testified the day prior, and the State did not ask her any questions about her medical treatment with Dr. Isaac (3 R.R. 113-141). Before ruling, all the court had heard from the State's sponsoring witness was her response to Appellant's three voir dire questions: that she had "no personal knowledge of [Complainant]'s case" (4 R.R. 6). She later also admitted that, to remain "objective," she had not even reviewed any of Complainant's records (4 R.R. 28).

The trial court sustained the objection to Exhibit 6 containing the sister B.S.'s medical records (4 R.R. 7) but admitted State's Exhibit 7 over Mr. Castro's objection (4 R.R. 9).

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[6] For ease of reference, this brief refers to exhibits by their PDF page numbers in Reporter's Record Volume 6.

New Evidence in State's Exhibit 7

Consistent with Mr. Castro's objection, State's Exhibit 7 contained multiple hearsay statements from the complainant, particularly the sections "Referral Report;" and "Questions to the Child" (6 R.R. 19-20).

No witness other than Complainant testified about any details of the abuse alleged at trial. Although the records included details from complainant's testimony about allegations that Appellant touched her on her front part under her clothes with his hands, the hearsay statements in State's Exhibit 7 also included allegations of other instances of sexual contact, (making her touch him "on his penis…[w]ith my hand") and even more serious allegations that would constitute extraneous uncharged sexual assaults[7] (touching her "front part…sometimes with his penis…less than 10 times") (6 R.R. 20).

The exhibit also contained hearsay regarding extraneous offenses against other children that had not been mentioned by Complainant or any other witness at trial:

> DID YOU EVER SEE HIM TOUCH ANTHER YOUNG PERSON INAPPROPRIATELY? 'my sister, she [sic] it was weird being around him' IS THERE ANYTHING ELSE YOU WANT TO TELL ME

[7] Penal code 22.011 (2)(C)

> THAT I DIND'T [sic] THINK TO ASK YOU BUT YOU THINK IS IMPORTANT FOR ME TO KNOW? Patient reports that he has 2-3 young daughters but they for some reasons [sic] never wanted to be around him, she questions if he had abused or attempted to abuse them.

(6 R.R. 20).

After State's 7 was admitted into evidence, Defense counsel objected again to the State asking Dr. Crowson any questions about an Exhibit she testified she had never seen before (4 R.R. 9). The State responded that the relevance of their questions was to "have [Dr. Crowson] read those documents to the jury but not ask her any questions pertaining to the information in there 'cause we can't read the documents ourselves" (4 R.R. 10). The court did not allow the witness to read the documents into the record (Id.), but instead instructed the prosecutor to *read them himself* during closing arguments: "They're in evidence. You'll be able to refer to them in closing argument. You can read from them in closing argument. You can put them in whatever context you want to in closing argument" (4 R.R. 12).

B. Applicable Law:

An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion; such abuse occurs when the trial court's decision was "so clearly wrong as to lie outside the zone of reasonable disagreement." *Perez v. State*, 695 S.W.3d 843, 850 (Tex. App.—Houston [1st Dist.] 2024, pet. ref'd) citing *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

1. *Hearsay statements are generally inadmissible without a specific exception under which the facts guarantee their reliability.*

Hearsay is a statement, other than one made by the declarant while testifying at trial or a hearing, offered in evidence to prove the truth of the matter asserted— hearsay is generally inadmissible at trial. Tex. R. Evid. 801(d), 802. "Once the opponent of the hearsay evidence makes the proper objection, it becomes the burden of the proponent of the evidence to establish that an exception applies that would make the evidence admissible in spite of its hearsay character" *Taylor v. State*, 268 S.W.3d 571, 578-79 (Tex. Crim. App. 2008).

2. *A business record affidavit is not sufficient to support the admission of hearsay contained within the record.*

Even when a document is admissible as a business record, hearsay statements from someone outside the business require a separate hearsay exception to be admissible. Tex. R. Evid. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."). As the Court of Criminal Appeals has explained:

> The State laid a proper foundation for admission of the shelter's business records under Rule 803(6). The records themselves were admissible, but that does not mean that all information, from whatever source or of whatever reliability, contained within those business records is necessarily admissible.

> When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception. Those statements must independently qualify for admission under their own hearsay exception—such as statements made for medical diagnosis or treatment…

Garcia v. State, 126 S.W.3d 921, 926-927 (Tex. Crim. App. 2004) (footnotes omitted).

State's Exhibit 7, offered through State's witness Dr. Whitney Crowson, was a document made by Dr. Reena Isaac, and contained statements made by Complainant. Where the State offered a medical report as a business record authenticated by affidavit under Rule 902(10) (4 R.R. 6, 9) the Complainant's statements in the report nevertheless constituted an additional layer of hearsay and were inadmissible without their own applicable hearsay exception.

3. The trial court may not admit hearsay as a "statement for medical diagnosis or treatment" if the proponent of the hearsay evidence has not established predicate facts to prove the exception applies.

TEX. R. EVID. 803(4) provides an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

"In order for statements to be admitted under rule 803(4), the proponent of the evidence must show that (1) the declarant was aware that the statements

were made for the purposes of medical diagnosis or treatment and that proper diagnosis or treatment depended on the veracity of the statement and (2) the particular statement offered is also 'pertinent to treatment,' that is, it was reasonable for the health care provider to rely on the particular information in treating the declarant." *Mbuga v. State*, 312 S.W.3d 657, 670-671 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd), citing *Taylor v. State*, 268 S.W.3d at 589, 591.

The medical treatment exception assumes "that the patient understands the importance of being truthful with health-care providers so as to receive an accurate diagnosis and treatment." *Burns v. State*, 122 S.W.3d 434, 438 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)., citing *Beheler v. State*, 3 S.W.3d 182, 188 (Tex. App.—Fort Worth 1999, pet. ref'd).

C. Analysis:

1. *The State did not establish a single predicate fact that would permit the court to admit State's Exhibit 7 under the medical treatment exception.*

Because the State did not establish a single predicate fact for the admission of a hearsay statement for the purpose of medical treatment, the facts in this case place the trial court's ruling to admit Exhibit 7 in contravention to *every* authority cited above.

Without referring to the records themselves, Dr. Crowson could not testify to any facts about them because she admitted on the record that she had never looked at them and had no personal knowledge about them or Complainant's specific situation (4 R.R. 6, 28). The State therefore could not establish that Dr. Crowson had treated Complainant, or that she had even reviewed or relied on any of Complainant's treatment records from another doctor to form the basis of her expert opinions. Dr. Crowson did not and could not testify that any statement from Complainant was taken for the purpose of reaching a medical diagnosis or providing medical treatment. She did not and could not testify that the declarant knew the statement was being made for the purpose of reaching a medical diagnosis and further could not testify about any facts to support that the declarant knew her medical treatment or diagnosis depended on the veracity of her statements.

In *Burns* and *Beheler*, the State's sponsoring witnesses were testifying directly about treatment and questioning that they had conducted themselves, *Burns*, 122 S.W.3d at 438; *Beheler*, 3 S.W. 3d at 188-189. Although it is feasible that another doctor or nurse with personal knowledge of the predicate facts might have been an appropriate sponsoring witness for Dr. Isaac's records, Dr. Crowson testified directly that she did not have any such personal knowledge.

Dr. Crowson could not and did not establish any foundation for the admissibility of Complainant's hearsay statements in Dr. Isaac's records.

In actual fact, the State did not even attempt to ask their sponsoring expert even a single question before offering their hearsay exhibit into evidence. The trial court did hold the State to its burden to prove admissibility, but allowed the Exhibit to be admitted into evidence and even encouraged the State to read and rely upon the Exhibit in closing argument. This was a clear abuse of discretion.

D. The admission of State's Exhibit 7 harmed Mr. Castro.

Appellate courts should only confirm a conviction if there is "a fair assurance from the examination of the record as a whole that the error did not influence the jury, or had but slight effect." *Taylor v. State,* 268 S.W.3d at 592 (applying Texas Rule of Appellate Procedure 44.2 (B)). The Court of Criminal appeals has listed a number of factors to be considered in making a harm assessment:

> In assessing the likelihood that the jury's decision was adversely affected by the error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments and even voir dire, if applicable. We have also recognized that whether the State emphasized the error can be a factor.

Motilla v. State, 78 S.W.3d 352, 355–56 (Tex. Crim. App. 2002)(footnotes omitted).

1. *The hearsay statements contained in Exhibit 7 differ from any details offered elsewhere in trial.*

Erroneous admission of hearsay "does not constitute reversible error if other evidence proving the same fact is properly admitted elsewhere." *Lamerand v. State*, 540 S.W.3d 252, 256–57 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd)(internal quotations omitted).

The statements in Exhibit 7 went beyond Complainant's own trial testimony and alleged other instances of indecency by contact and other extraneous allegations. These allegations were never mentioned by the complainant or any other witness during the entire trial—they were presented to the jury for the first time in this erroneously admitted Exhibit.

2. *The erroneously admitted hearsay statements about extraneous abuse or attempted abuse against Complainant, her sister and Mr. Castro's young daughters were inherently harmful.*

In evaluating harm, this court has recently stated "extraneous offense evidence is "inherently prejudicial" *Toombs v. State*, No. 01-23-00229-CR, 2024 WL 5126852, at *11-12 (Tex. App.—Houston [1st Dist.] Dec. 17, 2024, no pet. h., not designated for publication) citing *McGee v. State*, 725 S.W.2d 362, 366 (Tex. App.—Houston [14th Dist.] 1987, no pet.). Erroneously admitted evidence of extraneous offenses has "significant potential to lure the factfinder into declaring guilt on a ground different from the proof specific to the offense charged." Id. citing *Old Chief v. United States* 519 U.S. 172, 180 (1997).

The effect of the jury cannot be discounted when, as in this case, the court hands the jury multiple statements about extraneous sexual offenses against both the complainant and other children.

3. *The risk of harm is greater when the State's case relies on the reliability of the Complainant's testimony.*

As described above, the only witness to provide any detail about the allegations at trial was the Complainant herself. Trials involving allegations of sexual assault or abuse "may raise particular evidentiary and constitutional concerns because the credibility of both the complainant and defendant is a central, often dispositive, issue." *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009).

When the State provided the jury with an additional source of details describing complainant's allegations, and when those details were recorded by a doctor and introduced through another doctor testifying as an expert witness, it cannot be said that this new evidence did not influence the jury's decision.

4. *The Court and the State emphasized the erroneously admitted evidence.*

The trial court specifically instructed the State to read Exhibit 7 to the jury in his closing argument (4 R.R. 12). Following these instructions the prosecutor stated in closing argument, "The medical records: Well, here's what Exhibit 7 says. And you'll get a copy of Exhibit 7. I want you to take that in the back. I want you to ask for it immediately when you go back there." The court interjected "You do not need to make a request for any evidence" (4 R.R. 110).

Then, the state read the complainant's statements in the Exhibit directly and in paraphrase to the jury, highlighting "fondling and genital-to-genital contact multiple times…More conversations about genital-to-genital contact, touching…" concluding "this [sic] what the medical records say. That's what they talked about" (4 R.R. 110-111).

Though the trial court was correct to prevent Dr. Crowson from answering questions about State's Exhibit 7, but by erroneously admitting the Exhibit at all, the Court gave the state the unusual and exceptional opportunity to reveal evidence for the first time to the jury during closing, free from any testimony or cross-examination of a single witness. This compounded the harm caused by admitting the exhibit in the first place, emphasizing the error to the jury moments before they retired to deliberate.

Because the trial court abused its discretion in admitting hearsay without any evidence that an exception applied, and because that hearsay evidence harmed Mr. Castro, he respectfully asks this Court to reverse his conviction and grant him a new trial.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED WITHOUT HEARING MR. CASTRO'S MOTION FOR NEW TRIAL, WHICH AROSE DUE TO HIS ATTORNEY'S FAILURE TO PRESENT MITIGATION AT PUNISHMENT.

After his conviction and sentence to 30 years in prison, Mr. Castro filed a

timely motion for new trial on March 15, 2024 (C.R. 523-539). Trial Judge DaSean Jones denied the motion without a hearing (C.R. 540). The facts and law included in Mr. Castro's Motion are incorporated elaborated here in support of this Point of Error.

A. Relevant Facts

1. *At trial, Mr. Radosevich did not call any witnesses or present any specific facts in mitigation of Mr. Castro's sentence.*

The trial record shows that, though Mr. Radosevich asked to begin punishment the morning following Mr. Castro's conviction so he could prepare witnesses, and the trial court encouraged Mr. Radosevich to do so (4 R.R. 120), he did not call any witnesses at all. Counsel chose only to make what he called,

> a formal motion for being allowed to read the names of Juan's family, and friends, and supporters --there are [sic] even dozen 12 -- and argue that each would testify that he is a member -- or a family member, or friend of Juan, or supporter, and urges the Court to consider the lowest sentence, which, by law, is 25 years, and we will address that after this motion, and that I be allowed, on Juan's behalf, to read the names into the record, and, again, repeat that they're urging the Court to consider the lowest sentence by law in this case.

(5 R.R. 4-5). The trial court allowed Mr. Radosevich to read the names,

> Julio Castro, Martha Castro, Perla Arias, Shanna Willett -- two "l's," two "t's" -- Luis Cazarez, Yadira Cazarez, Baback Mirandu [sic] -- Mirandi, Brenda A. Lendens [sic], Julio C. Partino Figueroa, Alicia Patino, Alex Cruz, and the 12th is Eduardo Manuel Cruz.

(5 R.R. 5). Mr. Radosevich did not detail any mitigation testimony that any of these witnesses could provide and did not include Daisy Castro Rejmaniak, Terrence

Fletcher, or Robert Lozano in his list of supporters. He argued only that the witnesses would testify that,

> that they are a friend, family, and/or supporter of Juan Castro and that they urge the Court to consider the lowest sentence in this case and consider the argument of counsel regarding counsel's motions on Juan Castro's behalf for community supervision.

(5 R.R. 6).

Mr. Castro's Motion for new trial followed, and raised a single issue:

> Mr. Castro was denied his right to effective counsel at trial. Trial counsel Tom Radosevich. failed to properly investigate for the punishment phase of the trial proceedings, and failed to call witnesses at the punishment phase of trial to testify on behalf of Mr. Castro. This negligence resulted in the failure of Mr. Radosevich to present readily available mitigation evidence about Mr. Castro to the court in the punishment phase of the trial.

(C.R. 524). In support of his motion, Mr. Castro submitted affidavits from three witnesses, Daisy Castro Rejmaniak, Terrence Fletcher, and Robert Lozano. Daisy Castro swore in her affidavit that she was not contacted or asked to testify by Mr. Radosevich, but if she had, she would have testified to Juan Castro's character as a trustworthy and family-oriented man, his caretaking of her own children, his caretaking of her uncle, and the fact that Mr. Castro has never been in trouble before (C.R. 533-534). Terrence Fletcher swore in his affidavit that he was not contacted or asked to testify in trial or punishment by Mr. Radosevich, but that he would have testified about Juan's auto shop and about Juan's character as a helpful family man who he considered as part of his own family (C.R. 535-536). Robert Lozano swore in his affidavit that he was not contacted or asked to testify by Mr. Radosevich, but that

he would have testified that he has known Juan Castro since childhood and has always known him to be "a good man with no issues," "a successful business owner with many employees," and someone who is never angry or abusive (C.R. 539).

The trial court denied Mr. Castro's motion for new trial without a hearing (C.R. 540).

B. Relevant law

A hearing on a motion for new trial is required when the motion and accompanying affidavit raise matters that: 1) are not determinable from the record; and 2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *See Robinson v. State*, 514 S.W.3d 816, 825 (Tex. App. – Houston [1st Dist.] 2017).

Denying a motion for new trial is an abuse of discretion when the motion raises matters outside the trial record, is properly verified, and is timely filed and presented. *See Reyes v. State,* 849 S.W.2d 812, 816 (Tex. Crim. App. 1992).

The guarantee of effective assistance of counsel does not belong solely to the innocent, nor does it attach only to matters affecting the determination of actual guilt. *See Lafler v. Cooper,* 566 U.S. 156, 169 (2012), *citing Kimmelman v. Morrison,* 477 U.S. 365, 380 (1986). Counsel's performance is measured against "an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). Both the

performance and prejudice components of an ineffectiveness inquiry are mixed questions of law and fact.

In *Strickland*, the Court provided a two-prong analysis for claims of ineffective assistance of counsel. To show ineffective assistance of counsel, a defendant must demonstrate both that his trial counsel's performance was deficient, and that there is a reasonable probability that the results of the trial would have been different but for counsel's unprofessional errors. *Strickland,* 466 U.S. at 681, 687). However, "[t]he reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for [the] error things would have been different " *United States v. Dominguez Benitez* 542 U.S. 74, 83 n.9 (2004); see also *Strickland,* 466 U.S. at 694-696 ("the result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.")

The sentencing process consists of weighing mitigating and aggravating factors and then adjusting the severity of the sentence consistent with this calculus. *See Vela v. Estelle,* 708 F.2d 954, 966 (5th Cir.1983). "An 'attorney who represents a criminal defendant is 'bound by professional duty to present all available evidence and arguments in support of (the client's) positions and to contest with vigor all adverse

evidence and views.'" *Lopez v. State,* 462 S.W.3d 180, 185 (Tex. App. - Houston [1st Dist.] 2015 no pet.) (citations omitted).

Counsel also cannot rely solely on the defendant to provide a defense or to relay facts of the case. "The delegation of the important task of developing mitigation evidence [is] inconsistent with trial counsel's professional obligation to conduct a reasonable investigation into his client's background and to evaluate whether the information discovered would be helpful in mitigating against the State's evidence on punishment." *Lopez v. State,* 462 S.W.3d at 187 (motion to adjudicate proceeding); See also *Ex parte Wellborn,* 785 S.W.2d 391, 395 (Tex. Crim. App. 1990) (counsel charged with a duty to independently investigate the case).

When an appellant's claim of deficient performance is based on counsel's failure to call a particular witness,

> an appellant must show: (1) that witness would have been available to testify; and (2) that witness's testimony would have been of some benefit to the defense. To meet the availability requirement, proposed witnesses must testify or swear in an affidavit that they were available to testify at the defendant's trial.
>
> An ineffectiveness claim based on the failure to call witnesses may be established through either testimony on the record or an affidavit from the uncalled witness.

Ex parte Sanchez, 667 S.W.3d 324, 329 (Tex. App.—Houston [1st Dist.] 2022, pet. ref'd)(internal citations omitted).

Although courts often give deference to any imaginable strategic justification for deciding not to call a witness, such a decision cannot be sanctioned as "strategic" with no investigation, because counsel can only make a reasonable decision to forego calling such witnesses *after* evaluating their testimony and determining that it would not be helpful. *Milburn v. State,*15 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) *citing Wiggins v. Smith,* 539 U.S. 510, 521 (1989). A sound trial strategy is one that is informed by a reasonable investigation into the facts and controlling authority. A "tactical" decision not to present witnesses, either at guilt-innocence or punishment, is objectively unreasonable when it is informed by an unreasonable investigation, or lack thereof. *See Freeman v. State,* 167 S.W.3d 114, 121 (Tex. App.-Waco 2005, pet. refd.) (failure of trial counsel to perform an adequate pretrial investigation of potential mitigating evidence prejudiced defendant during punishment phase and necessitated a new punishment hearing).

C. Analysis

1. *Mr. Castro's motion satisfied both the procedural prerequisites and the substantive requirements for a hearing.*

First, Mr. Castro's Motion: 1) raised matters outside the trial record; 2) was properly verified; and 3) was timely filed and presented (C.R. at 532). For these reasons alone, denying Mr. Castro's motion and refusing to hold an evidentiary hearing was an abuse of discretion, s*ee Reyes v. State*, 849 S.W. 2d 812, 816 (Tex. Crim. App. 1992).

Second, the motion raised matters not determinable by the record – specifically, Counsel's ineffectiveness in failing to investigate or call witnesses who could provide mitigation testimony in the punishment phase at trial. Mr. Castro's Motion for New Trial Counsel followed exactly the protocol outlined in *Sanchez,* 667 S.W.3d at 329. His motion and affidavits showed that Mr. Radosevich failed to contact willing and available mitigation witnesses Daisy Castro Rejmaniak, Terrence Fletcher, and Robert Lozano, and that they had specific facts to offer in mitigation of Mr. Castro's sentence.

The Court's record shows only that counsel offered a list of names of people present in the courtroom who merely wanted the minimum sentence for Juan. This is not a recognized means of presenting evidence at sentencing, nor is it evidence of any investigation of actual mitigating information.

Third, Mr. Castro's Motion raised reasonable grounds to show that Mr. Castro might be entitled to relief. The affidavits of Ms. Rejmaniak, Mr. Fletcher, and Mr. Lozano established that they each had relevant facts to present on Mr. Castro's behalf. Evidence of good character and moral behavior around children is relevant and beneficial to the defense of someone accused of sexually abusing a child; such testimony has at times constituted the sole defense of the accused, see e.g. *Wilson v. State*, 451 S.W.3d 880, 883 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

The witnesses' affidavits also established that none of them had been contacted or asked by Mr. Radosevich to testify on behalf of Mr. Castro, but with reasonably

diligent investigation, Motion for New Trial counsel secured their affidavits within mere weeks of Mr. Castro's conviction and sentence. Where counsel failed in his duty to investigate mitigating information on behalf of his client and the decision not to call certain witnesses cannot be found to be strategic when it is based on a lack of investigation, and where the record shows that Mr. Radosevich did not call a single witness to testify on behalf of Mr. Castro in punishment, this failure was ineffective assistance of counsel. Mr. Castro's motion and the evidence in his affidavits raised reasonable grounds to show that Mr. Castro could be entitled to relief.

Although a decision based on lack of investigation cannot be strategic, testimony from trial counsel or other mitigation witnesses at a hearing could have nevertheless given the trial court additional facts upon which to evaluate the first *Strickland* prong as it pertained to the witnesses present in the courtroom. By denying Mr. Castro's motion without a hearing, the trial court disregarded the testimony of the witnesses who signed affidavits in the motion for new trial, and deprived Mr. Castro of the opportunity to develop additional facts in a hearing on his motion. This deprived Mr. Castro of relief at the time when the trial court would have been best situated to evaluate the evidence and determine whether counsel had indeed been ineffective.

Because the trial court denied Mr. Castro's timely, valid, and well-supported plea for a hearing and relief in his Motion for New Trial, the trial court abused its discretion.

Mr. Castro respectfully prays that this court sustain his second point of error and order a new trial, as the trial court should have done.

POINT OF ERROR NUMBER THREE

THE COURT ERRED IN DENYING A MISTRIAL AFTER SEVERAL SUSTAINED OBJECTIONS FOR IMPROPER ARGUMENTS THAT INTERFERED WITH THE JURY'S ABILITY TO DISREGARD THE STATE'S PERSISTENTLY IMPROPER ARGUMENTS.

A. Relevant Facts

Before trial began, defense counsel filed a lengthy motion requesting that the court order the State to abide by the law of proper argument— this motion put the state on notice regarding objectionable subjects of closing argument to which counsel would object in order to protect Mr. Castro's "rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 19 of the Texas Constitution, and Articles 1.04 and 1.05 of the Texas Code of Criminal Procedure." (C.R. 231-236).

During rebuttal argument in guilt/innocence, the prosecutor made at least *thirteen* such improper arguments— the voluminous list of improper arguments is represented in **Table 1** below (at page 36) along with the law that establishes that the argument is improper, whether Appellant objected, and the Court's response.

Defense counsel objected to six of the prosecutor's improper arguments and, after the sixth objection that had been sustained and instructed upon, Appellant moved for a mistrial (4 R.R. 106, 107, 108, 109, 112, 113).

After Appellant's objections, the trial court instructed the jury three times to be guided by the evidence they heard during trial (4 R.R. 106, 107, 108-9) and twice to disregard the prosecutor's improper statements (4 R.R. 112, 113). Although the court had sustained or given instructions to the jury five times about the prosecutor's repeatedly improper arguments, and although the prosecutor persisted in making improper arguments, the trial court denied Appellant's motion for a mistrial after his sixth objection (4 R.R. 113). After the mistrial was denied, the prosecutor concluded his parade of improper arguments with a grand finale: a call to fulfill community fantasies about extrajudicial castration or killing of people who molest children: "If I had asked everybody what we should do with people that molest children, I'm sure I'd have gotten a million different answers during that jury selection: Castrate them, kill them, throw them under the jail. There is a person who molests children. What is Harris County gonna do?" (4 R.R. 114).

Table 1

I. Arguments based on an appeal to unproven sentiments of the community or prosecutor's own private opinion		
Improper argument	Authority	Objection
4 R.R. 112-13 "We selected you all because you represent different ethnicities, different areas of town, different occupations. When we—when you find him guilty of sexual assault of a child, we want him to know, and we want everybody else out there to know that they can't go anywhere in Harris County and touch kids."	That the people are asking the jury to convict the Defendant. *Cox v. State*, 247 S.W.2d 262 (Tex. Crim. App. 1952); That the community would want the Defendant sent to prison if the people knew what he had done. *Prado v. State*, 626 S.W.2d 775 (Tex. Crim. App. 1982).	4 R.R. 113 Appellant objected; objection sustained; jury instructed to disregard, motion for mistrial denied.
4 R.R. 114 "If I had asked everybody what we should do with people that molest children, I'm sure I'd have gotten a million different answers during jury selection: Castrate	It is manifestly improper to argue that any particular punishment was required to satisfy the community. *Cortez v. State*, 683 S.W.2d 419 (Tex. Crim. App. 1982); It is also manifestly improper to discuss punishment	No objection.[8]

[8] Although this brief argues in Point of Error Four that the Prosecutor should be chiefly responsible for his own bad-faith pattern of argument, defense counsel also has a duty to object and preserve error on behalf of his client. Insofar as counsel failed to fulfill that duty in approximately half of the instances of improper argument described in Table 1, counsel's failure to object would constitute deficient performance under the standard described in *Strickland,* 466 U.S. 668, and the damage of the unchallenged arguments worked to prejudice Appellant. This is discussed further in Point of Error 5C.

them, kill them, throw them under the jail." There is a person who molests children. What is Harris County gonna do? You're Harris County, by the way."	ranges during guilt-innocence because it encourages the jury to convict the defendant based on the punishment rather than the facts of the case. *Wright v. State*, 178 S.W.3d 905, 930 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); Further, the only punishment authorized for continuous sexual abuse of a child is twenty-five years to life in prison. Tex. Penal Code §21.02(h).	
4 R.R. 105 "If why [sic] I knew I can come to be on a jury, it'd be – we – we'd take care of a lot of people like Juan Castro."	"It is well settled that a prosecutor cannot inject his personal opinion of guilt into his argument; to do so is sufficient cause for reversal of the case" *Penrice v. State*, 716 S.W.2d 107, 109 (Tex. App.—Houston [14th Dist.] 1986, no pet.)	No objection
II. Misstating or mischaracterizing the facts in the record		
Improper argument	Authority	Objection
4 R.R. 106 "It's unrefuted that the only person in that house when Dulce was gone was the defendant."	An improper argument that misstates the facts can serve as a basis for reversal if it also affects the defendant's substantial rights. *Molina v. State*, 587 S.W.3d 100, 109 (Tex. App.—Houston [1st	4 R.R. 106 Appellant objected; limiting instruction; prosecutor rephrased argument.

	Dist.] 2019), aff'd, 632 S.W.3d 539 (Tex. Crim. App. 2021) citing *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011).	
4 R.R. 108 "[In cases of delayed outcry] we shift the focus from the sexual abuse, and then we blame the child. Why didn't you say anything? Why didn't you speak up immediately when it happened?"	The State may not, however, use closing argument to "strike" at a defendant over the shoulders of his counsel or accuse counsel of bad faith. *Williams v. State*, 417 S.W.3d 162, 174 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) citing *Magana v. State,* 177 S.W.3d 670, 674 (Tex. App.-Houston [1st Dist.] 2005, no pet.); *see also Mosley v. State,* 983 S.W.2d 249, 258–59 (Tex.Crim.App.1998).	Appellant objected; motion for jury instruction about requesting readbacks; jury instructed to be guided by the evidence, but request for readback instruction denied.
4 R.R. 109 "I try these cases every week. In fact, I'm meeting with somebody on Friday. They don't want you to pay attention to the defendant putting his fingers on [Complainant]'s vagina	Even if the record shows that Appellant lied about something, using the word "they" to imply that counsel and the accused have colluded to mislead the jury is improper argument. *See Williams v. State*, 417 S.W. 3d 162, 177 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).	Appellant objected "Who doesn't want somebody to pay attention?" disregarded by court as lacking legal basis, prosecutor repeated "they don't want you to pay attention" two more times. (4 R.R. 110)

III. Arguing facts outside the record		
Improper argument	Authority	Objection
4 R.R. 106-107 "There are a bunch of stats I could throw out to you about when children disclose. I can tell you that 83 percent—"	"Improper references to facts that are neither in evidence nor inferable from the evidence are generally designed to arouse the passion and prejudice of the jury and, as such, are inappropriate" *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011), citing *Borjan v. State*, 787 S.W.2d 53, 57 (Tex.Crim.App.1990).	Objection, sustained with limiting instruction, Prosecutor repeated same improper argument at 4 R.R. 108 "…she didn't outcry, 82 percent of children don't."
4 R.R. 112 "It couldn't have been him. Hear [sic] the same thing about Jared Fogle, the Subway guy."[9]	A reference comparing the Appellant to a well-known criminal is improper. *See Thompson v. State*, No. 01-14-00862-CR, 2015 WL 9241691, at *3 (Tex. App.—Houston [1st Dist.] Dec. 17, 2015, no pet.; not designated for	Objection sustained; jury instructed to disregard statement.

[9] The State also referred to Jared the subway guy in voir dire (2 R.R. 100); Jared Fogle admitted in a plea agreement to receiving and distributing child pornography that caused the victimization of 12 minors in Indiana, and to repeatedly traveling to other states to engage in commercial sex acts with victims he knew were minors. "Press Release: Jared Fogle charged with child pornography distribution and repeatedly engaging in commercial sex acts with minors." https://www.justice.gov/usao-sdin/pr/jared-fogle-charged-child-pornography-distribution-and-repeatedly-engaging-commercial (accessed 12/20/2024)

	publication) (collecting examples in Texas Caselaw of arguments found improper for comparing the Appellant to notorious criminals.)	
IV. Prosecutor vouching for witness's credibility based on personal knowledge of District Attorney's Office procedures		
Improper argument	Authority	Objection
4 R.R. 105 "We don't, you know, hand people the script to say on the stand to the jury."	A prosecutor cannot testify about the credibility of a witness if his argument constitutes unsworn testimony and is not based on reasonable deductions from the evidence. *Stout v. State*, 426 S.W.3d 214, 220 (Tex. App.—Houston [1st Dist.] 2012, no pet.) citing *Gonzalez v. State*, 337 S.W.3d 473, 483 (Tex.App.-Houston [1st Dist.] 2011, pet. ref'd)	No objection
4 R.R. 107 "we didn't offer her a scholarship"	See above, *Stout v. State*, 426 S.W.3d 214, 220 (Tex. App.—Houston [1st Dist.] 2012, no pet.	No objection
4 R.R. 109 "What does she win for doing this? She gets nothing except for justice for what happened at the hands	See above, *Stout v. State*, 426 S.W.3d 214, 220 (Tex. App.—Houston [1st Dist.] 2012, no pet.	No objection

of the defendant, because I assure you we – we gave her nothing."		
4 R.R. 111 "We don't tell our witnesses what to say. We don't feed them information. We don't make them read the paper that they wrote the first time."	See above, *Stout v. State*, 426 S.W.3d 214, 220 (Tex. App.—Houston [1st Dist.] 2012, no pet.	No objection

B. Relevant Law

Trial counsel has a duty to contain argument to the four general areas of proper summation: "(1) summary of the evidence; (2) reasonable deductions from the evidence; (3) response to opposing counsel's argument; or (4) plea for law enforcement." *Brown v. State 220 S.W.3d 564, 570 (Tex. Crim. App. 1994)*. Reversible error exists when facts not supported by the record are interjected in an extreme or manifestly improper argument. *Id.*

When Appellant objects to an improper argument and secures an instruction to disregard, but the court denies Appellant's request for a mistrial, "the proper analysis is whether the trial court abused its discretion by denying the motion for mistrial." *Williams v. State*, 417 S.W.3d 162, 175 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) citing *Archie v. State,* 340 S.W.3d 734, 738–39 (Tex.Crim.App.2011). Courts must overturn the trial court's ruling when it is not "within the zone of reasonable disagreement" *Id.* Generally jurors are presumed to follow the court's limiting

instructions *except* when the impropriety of the State's argument is "clearly calculated to emotionally inflame the juror's minds and is of such a character as to suggest the impossibility of withdrawing the impression produced on the jurors' minds;" then a mistrial is required *Id. citing Hinojosa v. State,* 4 S.W.3d 240, 253 (Tex.Crim.App.1999). When determining whether an instruction to disregard is sufficient to cure prejudice, courts "look to the nature of the [improper comment]; the persistence of the prosecutor; the flagrancy of the violation; the particular instruction given; the weight of the incriminating evidence; and the harm to the accused as measured by the severity of the sentence."[10] *Owens v. State,* 381 S.W.3d 696, 707 (Tex.App.-Texarkana 2012, no pet.), cited favorably in *Williams v. State*, 417 S.W.3d at 176.

C. Application

1. Counsel's motion for a mistrial was part of a series of objections and escalating requests for relief in the face of the State's continued improper arguments.

In this case, defense counsel made a series of objections in the face of an onslaught of improper argument from the State. After each objection to the State misstating the facts (4 R.R. 106), arguing facts not in evidence (4 R.R. 107), and mischaracterizing the defendant's testimony (4 R.R. 108), the court responded, "the jury's heard the evidence and will be guided thereby." After the

[10] Here, Mr. Castro was sentenced by the court, not the jury.

third such instruction, counsel requested further relief: to remind jurors that if they had a dispute in the jury room about the evidence they heard, they could request a readback of that evidence (4 R.R. 109). This request was denied because "The court has instructed the jury in the charge as to what the jury will do in the jury room."[11] After objecting to a fourth ("they don't want you to pay attention"; 4 R.R. 109) and then a fifth improper argument (referring to Jared Fogle; 4 R.R. 112), the trial court finally instructed jurors to disregard the fifth (Id.). The sixth improper argument came only a few sentences later:

> We selected you all because you represent different ethnicities, different areas of town, different occupations. When we -- when you find him guilty of sexual assault of a child, we want him to know, and we want everybody else out there to know that they can't go anywhere in Harris County and touch kids.

(4 R.R. 113).

In the sixth improper argument that raised an objection, the State recruited the jury as representatives of their ethnicities, communities, and occupations, to send a message to "everybody else out there." (Id.) While courts have found that arguments that remind jurors their verdicts "send messages" are generally valid pleas for law enforcement, *see e.g. Borjan v. State*, 787 S.W. 2d 53, 56 (Ct. Crim. App. 1990), the same courts have found that arguments that

[11] The jury charge (C.R. 471-480) did not include instructions about how to request a read-back of evidence if the jurors have a dispute pursuant to Tex Crim. Pro. Art 36.28

appeal to unproven community expectations are patently improper, *see e.g. Cox v. State*, 247 S.W.2d 262 (Tex. Crim. App. 1952), *Prado v. State*, 626 S.W.2d 775 (Tex. Crim. App. 1982). The State's identification of jurors as chosen representatives of their communities put his argument in the latter category. This is especially apparent in context of the State's other arguments about unproven community expectations (see Table 1, section I above), and the prosecutor's statement of his personal opinion that if he were on a jury he'd "take care of a lot of people like Juan Castro," (particularly noting that the prosecutor also initially included himself in the group of people expected to find Mr. Castro guilty: "When we-- when you find him guilty…").

Because of the rapid succession of improper arguments and objections, and the escalating nature of counsel's requests for relief, it could be understood from the context of counsel's motion for a mistrial that he was requesting the mistrial not only in response to that single argument, but as a response to the repeated improper arguments mounting to a level that risked dominating the jury's attention and overtopping the their ability to focus on the evidence instead of the other improper focuses introduced and urged by the State's continued improper arguments. Counsel was clearly concerned that the court's instructions were not sufficient to allow the jury to think for themselves using the evidence they remembered from trial rather than the prosecutor's persistent improper arguments.

2. The jury's ability to disregard improper arguments was increasingly at risk as the State's improper arguments continued.

Considering the factors laid out in *Owens, supra*: the nature of the [State's argument]; the persistence of the prosecutor; the flagrancy of the violation; the particular instruction given; [and] the weight of the incriminating evidence," the jury's ability to disregard these arguments was certainly at risk at the time, *Owens v. State,* 381 S.W.3d at 707. It was decreasingly likely that the jury could disregard what they were hearing from the prosecutor or remember which parts to consider and which parts to disregard. Not only did the State continue making *new* improper arguments, the prosecutor also repeated improper arguments even after drawing objections (4 R.R. 108, 110). When the court sustains an objection and instructs the jury to focus on the evidence, but moments later the prosecutor repeats the very same improper reference (see 4 R.R. 108), this is the definition of persistent and flagrant.

Because the court's instructions to disregard were insufficient in the face of the State's repeated reliance on improper arguments to inflame the jury, it was an abuse of discretion for the trial court to deny Appellant's motion for a mistrial after his sixth sustained objection.

3. Mr. Castro was harmed by the court's denial of a request for a mistrial when the jury had been compromised by the State's persistent and flagrant return to improper arguments.

To evaluate harm caused by a prosecutor's improper jury argument, Texas courts apply a Tex. R. App. P. 44(b) standard for non-constitutional harm, and have adopted a three-factor evaluation considering:

> (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction).

Mosley v. State, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), citing *United States v. Millar,* 79 F.3d 338, 343 (2nd Cir.1996); and citing *United States v. Palmer,* 37 F.3d 1080, 1085 (5th Cir.1994).

As discussed above, the prosecutor's misconduct in each individual argument was serious and his pattern of repeatedly improper argument was persistent. The prosecutor resorted to arguments that have long drawn courts' "special concern," *see e.g. Orona v. State*, 791 S.W.2d 125, 128 (Tex. Crim. App. 1990) (referring to arguments that result in uninvited and unsubstantiated accusation of improper conduct directed at a defendant's attorney). Before certain changes to the rules of appellate procedure, this type of argument merited immediate reversal. *See Dinkins v. State*, 894 S.W.2d 330, 357 (Tex.

Crim. App. 1995) ("prior to the enactment of Rule 81(b)(2), such comments amounted to automatic reversible error, despite an instruction to disregard.") The State's argument also repeatedly injected new and harmful facts into the record, directing the jury's attention to the prosecutor's personal opinion about guilt, his assurances about the District Attorney's Office's non-interference with complainant's testimony, and comparison of the Appellant to a notorious child predator.

As discussed above, both the seriousness of these improper arguments, and the prosecutor's flagrance in persistently resorting to improper arguments threatened to overtop the jury's ability to focus on the evidence or disregard the arguments as instructed by the trial court.

The court's denial of a mistrial was also particularly harmful in the face of the fact that the evidence at trial was not overwhelmingly pointing towards Mr. Castro's guilt. On one hand, Complainant accused him of abusing her multiple times over the years, on the other, Mr. Castro himself testified and repeatedly denied the allegations. When there was no forensic or physical evidence, and the remainder of the testimony at trial was based on what Complainant told other people, the jury could choose to believe either the Complainant or Mr. Castro. Because the State's arguments mischaracterized the defendant's testimony and motives, misstated the facts, and injected new improper facts multiple times, it cannot be said that the sixth improper and

objected-to argument, in the context of the others, did not have an effect on the jury's decision when the jury retired to deliberate immediately thereafter.

POINT OF ERROR NUMBER FOUR

THE PROSECUTOR'S PERSISTENTLY INFLAMMATORY AND IMPROPER ARGUMENTS FORMED A PERVASIVE PATTERN OF MISCONDUCT THAT IN ITSELF CONSTITUTES REVERSIBLE ERROR.

A. Relevant Facts

This argument references the facts and law recounted in Point of Error Three and Table 1, above.

B. Standard of Review and Relevant Law

The facts and law stated above in Point of Error Three and Table 1 detail thirteen improper and even manifestly improper arguments.

A pervasive pattern of such improper and inflammatory comments can amount to prosecutorial misconduct, which can take on a constitutional dimension — "it is well settled and self-evident that an improper argument may present a fourteenth amendment due process claim if the prosecutor's argument so infected the trial with unfairness as to make the result a denial of due process." *Thompson v. State*, 89 S.W.3d 843, 852 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (citing *Miller v. State* 741 S.W. 2d 382, 391 (Tex.Crim.App.1987)). This occurs when the prosecutor's argument "stoked

the jury to disregard the rule of law and consider matters not before them." Id. at 852. With such serious and continuous prosecutorial misconduct,

> error is so pervasive throughout the entire trial as to be fundamental because it denied the appellant a fair and impartial trial. [On such a record] because fundamental fairness was vitiated, [there is] an exception to the general rule that improper questions and arguments by a prosecutor cannot constitute reversible error unless the error is properly preserved.

Rogers v. State, 725 S.W.2d 350, 360 (Tex. App.—Houston [1st Dist.] 1987, no pet.)

The prosecutor's arguments in this case managed to invoke several manifestly improper arguments at once—in addition to the objected-to comments discussed above in Point of Error Three, to inflame the jury in favor of conviction, the prosecutor also argued that the jury should convict Mr. Castro because certain members of the community believe that "child molesters" should be castrated, killed, or buried under the jail (5 R.R. 126). This was a grossly improper argument. It discussed extrajudicial punishments not allowed by our system of laws during the guilt-innocence phase of the trial. *Wright v. State*, 178 S.W.3d 905, 930.[12] This implied that the jury should find Appellant guilty because some members of the community would want him to be castrated or killed. *Cortez v. State*, 683 S.W. 2d 419, 420-21 (Tex. Crim. App.

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[12] The only punishment authorized for continuous sexual abuse of a child is twenty-five years to life in prison. Tex. Penal Code § 21.02(h).

1984). Further, this argument "arouse[d] the passion or prejudice of the jury by matters not properly before them." *Milton v. State*, 572 S.W.3d 234, 240 (Tex. Crim. App. 2019) (internal quotations and citation omitted).

None of the prosecutor's improper arguments were based on the facts or evidence presented to the jury. Instead, they were calculated to inflame the jury to convict based on beliefs, biases, and assumptions entirely outside the record. The argument had the cumulative effect of encouraging the jury to focus on facts and motivations to convict that derived from completely outside the record, and to consider extrajudicial punishment—the State's closing was a rallying cry rather than a closing argument and it was fit to stoke mob justice, not a jury deliberating on the specific facts presented by witnesses at trial.

C. *Preservation and harm*

Normally, to preserve error for appeal, a defendant must object to the violation of a constitutional right at trial. *Glover v. State*, 496 S.W.3d 812, 816 (Tex. App.—Houston [14th Dist.] 2016, pet ref'd). While counsel in this case did not object to approximately half of the State's inflammatory arguments, a pervasive pattern of egregious comments made in bad faith can undermine the reliability of the factfinding process to such an extent that it deprives the accused of fundamental fairness and due process of law. *Rogers v. State*, 725 S.W.2d 350, 358 (Tex. App.—Houston [1st Dist.] 1987, reh'g denied); See also *Joyner v. State*, 548 S.W.3d 731, 739 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd)

(acknowledging the continued validity of the *Rogers* exception but not applying it when it was not argued by appellant). If fundamental fairness is vitiated, there is an exception to the general rule that improper questions and arguments by a prosecutor cannot constitute reversible error unless the error is properly preserved—"there exist cases where a serious and continuing prosecutorial misconduct undermines the reliability of the fact finding process, resulting in deprivation of fundamental fairness and due process of law." *Rogers* 725 S.W.2d at 360. Under such circumstances, appellant can raise prosecutorial misconduct for the first time on appeal and the court "will not hesitate to reverse a judgment when the prosecutor engages in conduct calculated to deny the accused a fair and impartial trial." *Johnson v. State*, 604 S.W.2d 128, 135 (Tex. Crim. App. 1980) (reh'g denied 1980). This exception is and should be rare because such pervasively improper arguments should be avoided by professional prosecutors. Unfortunately, with this prosecutor in particular, pervasively improper argument is not rare at all.[13]

[13] There are at least three other appeals before this court and the 14th Court of Appeals raising errors based on nearly the exact same "castration argument" from the same prosecutor. These issues are awaiting appellate review, but examples such as those in this brief, continue to mount. *See* Appellant's Brief, *Roman v. State,* No. 01-23-00826-CR (Tex. App. Houston [1st Dist.] March 6, 2024); Appellant's Brief, *Rodriguez v. State,* No. 01-23-00803-CR (Tex. App. Houston [1st Dist.] June 10, 2024); Appellant's Brief, *Lopez v. State*, 14-23-00885-CR, (Tex. App. Houston [14th Dist.] June 24, 2024).

The constitutional nature of the error injected by the prosecution's argument also invokes a constitutional harm analysis. As in *Thompson,* "although most jury argument error is non-constitutional, here, the improper argument so infected the . . .trial with unfairness as to constitute a violation of due process." *Thompson v. State*, 89 S.W.3d 843, 852-53 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Confronted with an error of constitutional magnitude the court "must reverse a judgment of conviction or punishment unless the court can determine that the error did not contribute to the conviction or punishment. Tex.R.App. P 44.2(a).

The harm in this case would also satisfy the standard under Texas Rule of Appellate Procedure 44.2(b) for non-constitutional harm. Under Rule 44.2(b), a non-constitutional error "must be disregarded" unless it affected a defendant's "substantial rights." 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 jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Under non-constitutional error analysis, in order to determine whether argument affects substantial rights, courts look at the entire record of final arguments to determine if there was a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial. *Brown v. State*, 270 S.W.3d 564, 573 n. 3(Tex. Crim. App. 2008). "It is not enough that the prosecutors' remarks were undesirable or even universally condemned.... The

relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1870 (1974)). "[A]n error had a substantial and injurious effect or influence if it substantially swayed the jury's judgment." *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The proper inquiry is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239. But if "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 764, 66 S.Ct. 1239.

The cumulative effect of the State's arguments, both objected-to and not, is addressed above in Point of Error 3, and incorporated here by reference.

In sum, faced with this "they said / they said" testimony, the jury was free to believe the State's witnesses or Appellant's. The State's closing argument put a thumb on the scale in a way that cannot be dismissed and that

creates grave doubt as to whether the defendant would have been convicted had the jury been less inflamed when they retired to deliberate.

Having exposed the jury to facts outside the record, asked them to consider the community's desire for extrajudicial punishment, and encouraged them harbor resentment toward counsel for not "wanting [jurors] to pay attention" to abuse, the prosecutor's outrageous argument did more than substantially influence the jury's decision—it was calculated to do so, denying the accused a fair and impartial trial.

Because the pervasive pattern of impropriety in the State's argument constituted prosecutorial misconduct undermining the integrity of the trial itself, this court should reverse Mr. Castro's conviction and order a new trial.

POINT OF ERROR NUMBER FIVE

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN VARIOUS WAYS WHICH SEPARATELY AND CUMULATIVELY PREJUDICED MR. CASTRO AND UNDERMINES CONFIDENCE IN THE OUTCOME OF HIS TRIAL.

Because Mr. Castro raises multiple points of ineffective assistance of counsel, this brief will address them individually as Points of Error 5A and 5B, then cumulatively as Point of Error 5C.

A. General Law and Standard of Review pertaining to ineffective assistance of counsel

This Point of Error also applies the same general law and standard of review for ineffective assistance of counsel from *Strickland v. Washington* outlined above in Point of Error Two, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

While the Court of Criminal Appeals has been hesitant to "designate any error as per se ineffective assistance of counsel as a matter of law," it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance. *Jackson v. State*, 766 S.W.2d 505, 508 (Tex. Crim. App. 1985) (failure of trial counsel to advise appellant that judge should assess punishment amounted to ineffective assistance of counsel); See also *Ex parte Felton*, 815 S.W.2d 733 (Tex. Crim. App. 1991) (failure to challenge a void prior conviction used to enhance punishment rendered counsel ineffective); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 2046 n.20, 80 Led.2d 657 (1984); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

POINT OF ERROR 5A: COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO IMPEACH THE COMPLAINANT WITH HER 2017 STATEMENT THAT SHE HAD NEVER BEEN TOUCHED INAPPROPRIATELY.

A. Relevant Facts

During cross examination of Complainant's mother, trial counsel attempted to introduce evidence that Complainant had been interviewed regarding a situation the drew the attention of Child Protective Services in 2017,

two years after Dulce and her children had moved out of Mr. Castro's apartment (3 R.R. 90). The trial court found that it was not relevant "to ask this witness about some unrelated CPS matter" (3 R.R. 98).

Defense counsel made an offer of proof, indicating that the evidence he intended to present would show that

> in 2017 [Complainant] told a CPS worker named Ms. Galabana . . . that she had not been inappropriately touched. . .I got the record right here . . . and we'll discuss that with [Complainant] – that she told CPS that she had not been touched.

(3 R.R. 97-98). The State also acknowledged "I anticipate the defense will get into that statement that was made, and that's fine. It's just not with this particular witness. It'll be with the Complainant" (3 R.R. 98).

However, when trial counsel had the opportunity to cross-examine the Complainant, he only asked her a single question: "Ms. S[.] did you and your three sisters go to Kansas with your mother and Luis Cazarez?" (3 R.R. 141).

Although counsel had already offered evidence to the court that Complainant had denied abuse and although he had argued that Mr. Castro had the right to present that evidence to the jury, counsel did not present that evidence to the jury when he had the chance with an appropriate witness—he did not confront the Complainant with her inconsistent statement before the jury.

B. Relevant Law and Analysis

1. Counsel has a duty to raise reasonable doubts about the State's evidence.

The confrontation clause of the Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the opportunity for effective cross-examination, see *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986). Trial counsel had a constitutional duty to present "available evidence and arguments" to support Mr. Castro's defense. *Jackson v. State*, 857 S.W.2d 678, 683 (Tex. App. –Houston [14th Dist.] 1993, pet. ref'd). This duty encompasses presenting evidence to demonstrate Mr. Castro's innocence, undermine the prosecution's case, or raise a reasonable doubt as to guilt. *See Ex parte Amezquita*, 223 S.W.3d 363, 368 (Tex. Crim. App. 2006).

2. The record shows that counsel was aware of a crucial inconsistent statement, yet he failed to confront Complainant with that inconsistency.

In this case, the complainant was the most critical witness for the State and their case hinged on her credibility. Counsel was aware that Complainant had made a statement directly contrary to her trial testimony. He had previously attempted to offer the same evidence through a different witness and made an offer of proof to the court to support his belief that the statement was relevant and admissible. When the court ruled that the statement was not admissible through the mother, defense counsel and the State both acknowledged that the Complainant was the appropriate witness to confront with her own statements.

Despite knowing of the existence of the statement and having attempted once to introduce it for the jury to hear, counsel failed to confront Complainant directly with that inconsistency. In fact, he failed to cross examine the Complainant in any substantial way when he asked her only a single question about moving to Kansas. Counsel did not address any of the issues with the Complainant that he had raised with other witnesses. These are decisions that cannot be justified by any explanation.

3. Mr. Castro was prejudiced by counsel's failure to confront Complainant with her inconsistent statement.

Counsel's failure to effectively cross-examine the State's central witness prejudiced Mr. Castro precisely because of the importance of this witness to the State's case. As discussed at length in previous Points of Error, the jury's decision to convict Mr. Castro relied on their ability to believe that Complainant's testimony was credible.

Without this crucial information about a directly inconsistent statement denying she had ever been touched inappropriately, the State was able to tell the jury that the Complainant *was* consistent. Complainant testified that she had told her story "several times . . . more than I can count." 3 R.R. 137. Indeed, the State emphasized the importance of the credibility of the complainant and the consistency of her statements during summation "from 2017 to 2024 [Complainant] remained consistent about the sexual abuse" (4 R.R. 109).

These facts demonstrate that but-for counsel's unprofessional error, the outcome of the case may have been different.

Because this was unjustifiably ineffective assistance of counsel and because it harmed Mr. Castro's defense, this court should overturn Mr. Castro's conviction and order a new trial.

POINT OF ERROR 5B: COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO KNOW THE RANGE OF PUNISHMENT FOR CONTINUOUS SEXUAL ASSAULT OF A CHILD. APPELLANT'S RELIANCE ON TRIAL COUNSEL'S MISUNDERSTANDING OF THE LAW IS REFLECTED FROM THE RECORD AND THAT RELIANCE HARMED HIM.

A. Relevant Facts

Mr. Castro first requested that the court rule on an application for community supervision in his motion in limine filed before a trial setting on May 26, 2022 (C.R. at 342). The trial date was continued multiple times and did not begin until February 12, 2024 (1 R.R. 1).

In the interim, Mr. Castro agreed to enter a guilty plea for a lesser charge. Mr. Castro requested community supervision in his guilty plea to the lesser offense of a single instance of indecency by contact on June 21, 2022 (C.R. 353). The record is not clear as to why Mr. Castro's plea agreement foundered.

Over a year later, Mr. Castro filed another Motion for Community Supervision on July 24, 2023 swearing that he had never been convicted of a felony and stating "I request that the judge presiding place me on community

supervision." (C.R. 377). Seven months after that, when Mr. Castro's case was finally tried, and after Mr. Castro's conviction, counsel asked the court again to place him on community supervision,

> MR. RADOSEVICH: Your Honor, we move for a sentence of community supervision. A motion has been filed, and we ask the Court -- and sworn to -- and we ask the Court to take that into consideration during its deliberation."

(5 R.R. 4)

> THE COURT: All right. It's the Court's understanding that the request, first, is in spite of the fact there's no statute which would permit it, that you're asking the Court to grant community supervision to the defendant.
> MR. RADOSEVICH: We are, Your Honor.

(5 R.R. 5).

B. Relevant Law and Analysis

1. **Trial counsel asked the trial court to impose a probation sentence against Appellant after the continuous sexual abuse conviction.**

During his closing argument at the punishment phase, Appellant's trial counsel, asked the Court to sentence him to community supervision. (5 R.R. at 5).

2. **Appellant was not legally eligible for a probation sentence after the continuous conviction.**

Article 42A.053 of the Texas Code of Criminal Procedure provides that:

> (a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty of nolo contendere, may:
>
> (1) Suspend the imposition of the sentence and place the defendant on community supervision

TEX. CODE CRIM. PROC. art. 42A.053(a)(1), but further explains that that "a defendant is not eligible for community supervision under this article if the defendant is sentenced to serve. . . a term of imprisonment that exceeds 10 years." Id. The minimum sentence available for continuous sexual abuse of a child is 25 years. Tex. Penal Code § 21.02(h).

Article 42A.054 further explains that:

> (a) Article 42A.053 does not apply to a defendant adjudged guilty of an offense under:
> (7) Section 21.11, Penal Code (Indecency with a child)

TEX. CODE CRIM. PROC. Art 42A.054(a)(7)

Appellant faced a continuous sexual abuse charge under Texas Penal Code 21.02, and was adjudged guilty by the jury on that charge with a finding that Appellant had committed two or more acts of indecency with a child under Texas Penal Code Section 21.11; therefore, he was doubly ineligible to receive community supervision from either the Court or the jury.

3. Trial counsel's performance was deficient per the standard set forth in *Strickland*.

Trial Counsel's decision to ask the trial court for probation was not the product of a strategic or tactical decision—it is not strategy to request a sentence for which Appellant is not eligible. That decision was the product of not being aware that Appellant was not legally eligible for probation on the continuous conviction. It was unreasonable and manifestly improper to ask the Court to consider probation and it could not have been the product of any legitimate trial strategy.

Mr. Radosevich's misunderstanding of the law preceded his erroneous argument at the punishment phase. Mr. Radosevich submitted Motions for Community Supervision on multiple separate occasions preceding trial for the continuous charge. These motions included Appellant's signature along with attestations that he had no felony convictions, had never been on community supervision for a felony offense, and that he requested the "judge presiding place me on community supervision." (Id.). A year and nine months after his first Motion, Mr. Radosevich was still requesting community supervision for Appellant at the punishment hearing after Mr. Castro's conviction.

A reasonable lawyer would know whether their client is eligible for community supervision. Here, Mr. Radosevich did not understand the consequences of a continuous conviction based on multiple instances of indecency with a child from the very beginning of trial and through the

punishment phase. No competent attorney would have engaged in this conduct. Thus, Mr. Radosevich's "performance fell below an objective standard of reasonableness as a matter of law." See *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

4. The record reflects that Appellant believed he would be eligible for probation, and he therefore suffered prejudice due to trial counsel's misunderstanding of the law.

The issue of deficient performance through bad advice was addressed in *Swinney v. State*, 663 S.W.3d 87, at 89 (Tex. Crim. App. 2022), the Court of Criminal Appeals emphasized that the focus is on "the impact of the bad advice on the defendant's decision making and does not require a showing of a different outcome." Although the circumstances were different in Swinney, where bad advice about punishment election may have caused the appellant to miss out on probation available only from the jury, the record in this case shows that Appellant relied on his trial counsel's misunderstandings of the law for years leading up to the decision to take his case to trial, this reliance in turn impacted his decision making.

After hearing the arguments of trial counsel and the State, the trial court sentenced Appellant to 30 years confinement in the Texas Department of Criminal Justice (C.R. 485). Although the record does not make the appellate court privy to the private conversations between trial counsel and Appellant, the record nonetheless affords sufficient information to show that Appellant

believed community supervision was a possibility. From the Motions for Community Supervision to the numerous requests of the same by trial counsel at the punishment stage, this Court must acknowledge that a man depending on an attorney – signing off on the motion for community supervision and hearing his attorney in open court argue for probation – would have held out hope for a probation sentence. Appellate counsel acknowledges that when the record is silent, a reviewing court may not speculate to find trial counsel ineffective. *See Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). Here, the record cannot be said to be silent based on the foregoing and there is no need to speculate when trial counsel himself misunderstood and consistently asserted his misunderstanding of the law before the trial court over the course of a year and nine months. Nothing in the record supports that trial counsel would have told Appellant any differently. Appellant must have relied upon it both behind closed doors and before the tribunal when his own advocate argued for it.

Because the record shows that defense counsel failed to know that Mr. Castro was ineligible for community supervision, and that Mr. Castro was harmed by his detrimental reliance on the idea that he might be eligible for probation, this court should reverse his conviction and order a new trial.

POINT OF ERROR 5C: THE TOTALITY OF TRIAL COUNSEL'S MULTIPLE PROFESSIONAL ERRORS PREJUDICED MR. CASTRO'S RIGHT TO COUNSEL AND UNDERMINED CONFIDENCE IN THE OUTCOME OF HIS TRIAL.

A. Relevant Facts

This Point of Error incorporates the facts from Point of Error Two relating to counsel's failure to investigate or call mitigation witnesses, from Point of Error 5A relating to counsel's failure to confront the Complainant with inconsistent statements and from Point of Error 5B regarding counsel's failure to be reasonably informed and to reasonably advise Mr. Castro as to the proper range of punishment available for the charged offense. It also incorporates the facts relating to Counsel's failure to object to nearly half of the State's improper closing arguments outlined in Point of Error Three, Table 1 and discussed in page 36, Footnote 8.

B. Relevant Law and Analysis

As described above, to establish the first prong of *Strickland*, Mr. Castro must show by a preponderance of the evidence that trial counsel's performance fell below the objective standards of prevailing professional norms. Counsel's performance is judged by "the totality of the representation." 466 U.S. 668, 669. The deficiencies in counsel's representation of Mr. Castro permeated the proceedings. Several examples are provided above. Even if this Court were to consider each insufficient to establish that Mr. Castro received ineffective assistance of counsel, the totality of these unprofessional errors had a

cumulative effect to undermine confidence that Mr. Castro could have received a fair trial under the circumstances. The many instances of professional neglect and mistreatment work to paint a picture of an extremely unprofessional course of representation in a very serious case, and Mr. Castro was prejudiced thereby. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006).

CONCLUSION AND PRAYER

For the reasons stated above, Juan Castro prays that this Honorable Court sustain his points of error, reverse the judgement of conviction entered below, and order a new trial.

Alexander Bunin

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/s/Amanda Koons

_____

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

/s/ Amanda Koons
_____
Amanda Koons

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 14,840 words printed in a proportionally spaced typeface.

/s/ Amanda Koons
_____
Amanda Koons

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