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1st COURT OF APPEALS  
HOUSTON, TEXAS

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DEBORAH M. YOUNG  
Clerk of The Court

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

**VICTOR HUGO PRADO**

**V.**

FILED IN  
1<sup>st</sup> COURT OF APPEALS  
HOUSTON, TX  
FEB 20, 2025  
DEBORAH M. YOUNG,  
CLERK OF THE COURT

**THE STATE OF TEXAS**

**Appealed from the 208th District Court  
of Harris County, Texas  
Cause Numbers 1855792 and 1855793**

**BRIEF FOR APPELLANT**

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**ORAL ARGUMENT  
NOT REQUESTED**

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Trial Judge:

Beverly Armstrong  
208th District Court of Harris County  
1201 Franklin, 17th Floor  
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## **STATEMENT OF THE CASE**

Appellant pled not guilty to intentionally and knowingly causing serious bodily injury to a child by commission and by omission in cause numbers 1855792 and 1855793 in the 208th District Court of Harris County before Judge Beverly Armstrong. The jury convicted him in both cases, and the court assessed two life sentences on July 1, 2024. George Powell and Dennis Powell represented appellant at trial.

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant does not request oral argument.

## **ISSUES PRESENTED**

1. Whether the trial court's failure to instruct the jury that it had to be unanimous as to whether appellant committed injury to a child by commission or by omission caused egregious harm where the children sustained multiple distinct injuries in multiple distinct incidents.
2. Whether the evidence was legally insufficient to establish that appellant intentionally or knowingly caused serious bodily injury to the children by omission.
3. Whether the evidence was legally insufficient to corroborate the accomplice testimony of Elizabeth Ramirez.
4. Whether the trial court erred by imposing court costs and fees on two convictions obtained in one trial.

## **STATEMENT OF FACTS**

### **A. The Indictments**

The amended indictment in cause number 1855792 alleged that, on or about May 19, 2020, appellant intentionally and knowingly caused serious bodily injury to R.F., a child younger than 15 years of age, by striking him with a blunt object, against a blunt object, with his hand, or tying him with an unknown object; and, “while having assumed care, custody, and control” of R.F., appellant intentionally and knowingly by omission caused serious bodily injury to R.F. by failing to provide adequate nutrition or supervision (1 C.R. 137).<sup>1</sup>

The amended indictment in cause number 1855793 made the same allegations with regard to G.F. (2 C.R. 128).

### **B. The Voir Dire Examination**

A prosecutor told the jury panel, “Not all of you have to believe that the serious bodily injury occurred from being struck with a blunt object and not all of you have to believe that it happened from failure to provide adequate nutrition. But as long as each one of you believes that at least one of these happened at the hands of the defendant, and (sic) we have proven our case to you beyond a reasonable doubt” (2 R.R. 110).

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<sup>1</sup> 1 C.R. refers to the Clerk’s Record in cause number 1855792. 2 C.R. refers to the Clerk’s Record in cause number 1855793.

### C. The State's Case

Elizabeth Ramirez, the mother of the complainants, testified that she, her nine-year-old son, R.F., and her seven-year-old daughter, G.F., left their father, Joshua Funes, and moved from San Antonio to Houston in 2018 (5 R.R. 29, 32-33).<sup>2</sup> She was introduced to appellant for the purpose of buying a car (5 R.R. 34-35). He asked her out; she declined because he was married, but they texted daily (5 R.R. 35, 37).

Ramirez testified that she was charged with DWI with a child passenger (R.F.) in June 2018, pled guilty, was placed on probation, violated her probation, and was sentenced to one year in a state jail (5 R.R. 39-41). She lost her job, had financial problems, and was kicked out of the apartment of her friend, Deborah Montes, where she and the children had been living (5 R.R. 41-42, 185).

Ramirez testified that appellant, who owned a moving company, said that she and the children could live in his office as long as she needed (which turned out to be 18 months) (5 R.R. 38, 44, 185-86). They became intimate and occasionally went out for dinner and drinks (5 R.R. 45-46).<sup>3</sup> She and the children had an air mattress, air conditioning unit, and television in their living space but had to use a public bathroom at the office building (5 R.R. 49, 52). The children called appellant “Vic,”

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<sup>2</sup> Ramirez testified that she pled guilty to intentionally and knowingly causing serious bodily injury to both children and had been in jail awaiting sentencing for three years (5 R.R. 23-24, 26-27).

<sup>3</sup> Ramirez described their relationship as a “booty call” (5 R.R. 200).

but he wanted them to call him “Daddy” (5 R.R. 60). He played with them (5 R.R. 61). Ramirez never saw him hurt them (5 R.R. 63, 209-10). She occasionally asked him to take care of them while she was at work (5 R.R. 64). He rarely was alone with them (5 R.R. 64).

Ramirez testified that appellant sent her a text that R.F. fallen down the stairs (5 R.R. 66). She went home and observed R.F. unconscious on the floor (5 R.R. 67). She said that they needed to go to the hospital (5 R.R. 68). Appellant refused but changed his mind when he could not wake R.F. (5 R.R. 68-69). R.F. had a seizure on the way to Texas Children’s Hospital (TCH) (5 R.R. 69). Appellant told Ramirez to tell hospital personnel that she was on the computer when R.F. fell (5 R.R. 70-71). R.F. was in the hospital for two days (5 R.R. 70).

Ramirez testified that she and appellant asked Montes to let the children and her move back in with Montes so that Children’s Protective Services (CPS) would not know that they were living in an office (5 R.R. 72-73). They moved in with Montes in January or February 2019 but moved back to the office a week later (5 R.R. 73-74).

Ramirez testified that appellant’s behavior toward the children changed (5 R.R. 75). He installed a lock on his personal office door to keep them out and took away their toys (5 R.R. 75-76, 78). He did not want food on his table, so Ramirez bought a table and kept snacks in the refrigerator in their living space (5 R.R. 77,

79). Appellant spent a lot of time with them at the office (5 R.R. 90).

Ramirez testified that, in May or June 2019, a dentist had to extract R.F.'s tooth (5 R.R. 94-96). Ramirez was suspicious of appellant's explanation that R.F.'s tooth was injured in a fall (5 R.R. 94, 97).

Ramirez testified that she and appellant argued with and hit each other, and that their relationship was "very rocky" (5 R.R. 97-98). He became aggressive and punished the children by making them stand against the wall for hours (5 R.R. 98). He took away her debit card so she could not buy food and got mad when she did (5 R.R. 101, 107-08). He would not let her go anywhere, and she had no friends (5 R.R. 110). She and the children moved to the adjacent office (5 R.R. 111).

Ramirez testified that she started working at a bakery,<sup>4</sup> lost her governmental daycare benefits, and decided to leave the children home alone (5 R.R. 188-89). Appellant told her that he would stop by to feed and watch them (5 R.R. 116, 226). He initially watched them by camera from another location (5 R.R. 117).

Ramirez testified that appellant frequently wrapped the children in saran wrap from the shoulders to the ankles and tied them to the air conditioning unit so they could not leave the office (5 R.R. 120-22). When they were able to get out, he put zip ties on their hands and feet (5 R.R. 121). Ramirez and appellant argued about

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<sup>4</sup> Giselle Fonseca, the manager of the bakery, testified that Ramirez worked five or six days per week between February 3 and May 7, 2020 (5 R.R. 8-9, 16-19).

appellant's actions (5 R.R. 122). The children had swollen elbows, one child had a swollen ankle, and they would go to the bathroom on themselves (5 R.R. 123). Appellant told Ramirez that, if she told anyone, he would say that she did it (5 R.R. 123). Some days he would not allow them to eat until he gave permission (5 R.R. 135). He told Ramirez that he did not want to give them food because they made a mess (5 R.R. 146).

Ramirez testified that Laura Mandala<sup>5</sup> saw R.F., who was malnourished and had marks from the zip ties, and asked appellant what happened (5 R.R. 147). Appellant said that R.F. fell down a slide at a park (5 R.R. 147). Mandala responded that those injuries were not from a fall and threatened to call the police (5 R.R. 147).

Ramirez testified that, in May 2020, appellant took the children and her to a hotel; they stayed for a week, and she stopped going to work (5 R.R. 148-149). Appellant joined them when he was not at work (5 R.R. 149-50). She did not call the police because he threatened to blame her for the childrens' injuries if she did (5 R.R. 150).

Ramirez testified that R.F. refused to eat and had deep wounds on his wrists and feet (5 R.R. 150-51). G.F. ate but had deep wounds from the zip ties (5 R.R. 152). Ramirez was afraid that she would be blamed if she took them to the hospital (5 R.R. 151). Appellant referred her to an apartment complex, and she signed a lease

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<sup>5</sup> Mandala's father owned the office building (4 R.R. 70-71).

in May 2020 (5 R.R. 153-54, 156). She did not have much food for herself and the children (5 R.R. 158).

Ramirez testified that she learned that CPS was trying to contact her (5 R.R. 159). Appellant told her to return the call and gave her clay to use as makeup to conceal the childrens' injuries (5 R.R. 159-61, 163). Isaac Rodriguez, Montes's son, accompanied her and the children to CPS (5 R.R. 163). Ramirez told Rodriguez that appellant was responsible for the injuries (5 R.R. 165).

Ramirez testified that Montes took the children to the hospital (5 R.R. 166). Appellant told Ramirez to send Montes a text message that she had lied to Rodriguez (5 R.R. 168). Appellant said that he would get her a lawyer, make sure she was all right, and get the children back (5 R.R. 168-70). Ramirez told a detective at the hospital that appellant had nothing to do with the injuries and that she wanted a lawyer (5 R.R. 171).<sup>6</sup>

Ramirez testified that the children knew that Funes—who was not in Houston during the period of the abuse—was their father but referred to appellant as “Daddy” (5 R.R. 175-76). Ramirez further testified that she gave birth to appellant’s child in December 2020, that a court found that he is the biological father, and that CPS is “involved” with that child (5 R.R. 176-79).

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<sup>6</sup> Ramirez testified that she was pregnant with appellant’s child and was scared of him (5 R.R. 170-72).

Deborah Montes testified that Ramirez and the children moved in with her in 2018 (3 R.R. 49-50, 52). She introduced Ramirez to appellant for the purpose of buying a car (3 R.R. 54). Ramirez started hanging out with appellant and neglecting her children (3 R.R. 55).

Ramirez was charged with felony DWI with a child passenger in June 2018 (3 R.R. 56-57). During that period of time, Ramirez did not pay her share of the bills but had new clothes, which she said were gifts from appellant (3 R.R. 57-58). Montes was unhappy that Ramirez was in a relationship with a married man who abused her (3 R.R. 59). In August 2018, Ramirez had a bruise on her cheek and said that appellant was responsible (3 R.R. 59). Ramirez moved out of Montes's home in September 2018 (3 R.R. 58). Montes learned that Ramirez and the children were living in appellant's office (3 R.R. 63).

Montes testified that, in January 2019, Ramirez told her that R.F. had fallen down the stairs and might have some fractures in the brain area (3 R.R. 73-74). Appellant asked Montes's boyfriend if Ramirez and the children could move back in with Montes (3 R.R. 74). Montes agreed but, a day or two later, Ramirez said that appellant wanted her back at the office, and they left (3 R.R. 75).

Montes testified that she and Ramirez rekindled their relationship in December 2019 (3 R.R. 78). The children looked fine to her at that time (3 R.R. 79). In February 2020, Ramirez told Montes that appellant verbally abused her,

controlled her diet so she would not be fat, and slashed her tires (3 R.R. 88-90).

Montes testified that, in April 2020, Ramirez sent her a series of text messages stating that she and the children were “missing hair”; that appellant had lied about pulling hair; that Ramirez needed help; that Ramirez’s children deserve better; that appellant would blackmail Ramirez; that Ramirez had “many bruises” defending the children; and that R.F. had a swollen arm (3 R.R. 93-95, 101-03; 9 R.R. SX 10).

Montes testified that, on May 19, 2020, a CPS worker asked her to pick up the children (3 R.R. 107). She had Isaac Rodriguez pick them up because she was at work (3 R.R. 108). Rodriguez called her and expressed concern that the children were malnourished (3 R.R. 108-09).

Montes testified that a CPS worker came to her home and told her to take the children to the hospital (3 R.R. 109). R.F. had a sunken face and lacerations on his wrist (3 R.R. 110-13; 9 R.R. SX 12-14). Ramirez sent Montes a series of text messages stating that Ramirez had become overwhelmed and spanked the children; that Ramirez had lied to Rodriguez by blaming appellant; that Ramirez was “fucked up mentally”; that Ramirez felt bad because appellant “didn’t do shit”; and that Ramirez had “lost it,” was “dead inside,” and was “fucking lost” (3 R.R. 115-20; 9 R.R. SX 11). Ramirez closed with, “I just know the kids are better off without me” (3 R.R. 121). Montes responded that she knew that Ramirez did not do “all this” and that appellant was an accomplice if he knew about it (3 R.R. 123). Ramirez

responded, “Vic [appellant] wasn’t around there, Deb. He had enough problems of his own. I’m sorry. I’m just an ugly person. I need help” (3 R.R. 124). Montes broke off contact with Ramirez because she “was taking the blame and she wasn’t telling me the truth” (3 R.R. 124-25). Montes knew only what Ramirez had told her (3 R.R. 129-30). Montes never saw appellant hit the children or deprive them of food (3 R.R. 131-32).

Stephanie Pierre testified that she took care of R.F. and G.F. at her daycare in 2018 and 2019 (3 R.R. 156-57, 164). The children were fine at first but started arriving dirty and without coats (3 R.R. 158). Ramirez told Pierre that she lost her housing (3 R.R. 159). Pierre noticed marks on the children, and Ramirez said that they fell (3 R.R. 161). Appellant picked up the children three or four times, and they called him “Dad” (3 R.R. 170-71).

Pierre testified that R.F. had a seizure and was hospitalized in January 2019 (3 R.R. 169). He acted differently when he returned to daycare (3 R.R. 171). Both children continued to have injuries (3 R.R. 172). They told her what had happened, and she called CPS (3 R.R. 174). She made a video recording in which she asked R.F. how he got bruises on his neck, back, and arms; he responded that “Daddy” hit him (3 R.R. 174-75, 186; 9 R.R. SX 32).

Isaac Rodriguez, who worked for appellant as a mover from 2018-20, testified that Montes kicked Ramirez and the children out of her home, and they moved into

appellant's office (4 R.R. 8-10, 16). Appellant and Ramirez then started seeing each other (4 R.R. 22-23). In March 2020, Rodriguez picked up the children from daycare at Ramirez's request and observed that G.F. had marks on her face and R.F. had a broken tooth (4 R.R. 23-25; 9 R.R. SX 15). In May 2020, Rodriguez went to the office and observed that R.F. could not stand up or talk (4 R.R. 29-30). Ramirez told Rodriguez that appellant was responsible and to keep his mouth shut (4 R.R. 31). Rodriguez took the children to Montes's home, and Montes took R.F. to the hospital (4 R.R. 31, 33). Ramirez sent Rodriguez a text message blaming appellant for the injuries (4 R.R. 33-37). Rodriguez never saw appellant hit the children (4 R.R. 60). He knew only what Ramirez had told him (4 R.R. 66).

Laura Mandala testified that she used to work at her father's office building and knew appellant as a tenant (4 R.R. 71-72).<sup>7</sup> She testified that Ramirez and the children lived in the office, which did not have a kitchen or a bathroom, and used a bathroom in the common area (4 R.R. 79-80).

Mandala testified that the children had bruises and did not talk much (4 R.R. 84). She brought them food but stopped because appellant did not want her to talk to them (4 R.R. 84-85). They called him "Daddy" (4 R.R. 84).

Mandala testified that she made two reports to CPS in 2019 because the

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<sup>7</sup> Mandala was convicted of burglarizing her father's office and went to jail in 2022 (4 R.R. 73-74, 96).

children had marks on their wrists and ankles (4 R.R. 86-87). Thereafter, Ramirez and the children immediately moved out of the office (4 R.R. 86-87). Mandala told appellant that she was going to call the police, and he told her not to (4 R.R. 88). She told appellant to feed them, and he said no because they were not potty-trained and would poop in their diapers (4 R.R. 89). She never saw appellant or Ramirez injure the children (4 R.R. 92).

Carlos Melendez, a tenant at the office building, testified that he knew that a mother and two children were living in an office (4 R.R. 104-05). In May 2020, Melendez called CPS because the boy was “really thin” (4 R.R. 106). He did not see anyone injure them (4 R.R. 109).

Donald Ritchie, an investigator for the Texas Department of Family Protective Services, testified that he met with Ramirez and her children on May 19, 2020, and observed that R.F.’s wrists appeared to have been bound and he had makeup on a mark on his face (4 R.R. 112, 115, 119-20). G.F. had the same injury, and her belly was distended as if she had not eaten for a long time (4 R.R. 120, 132). Ramirez said that R.F. had been sick and had fallen at a park (4 R.R. 118-19). When Ritchie got stern, Ramirez asked for a lawyer (4 R.R. 119-20). Ritchie called CPS and the Houston Police Department (HPD) (4 R.R. 120).

Destiny Harper, a CPS investigator, testified that there had been three unsubstantiated reports regarding the children in 2019 (4 R.R. 140-44). In May

2020, she went to the office building to look for them (4 R.R. 144, 150-51). Appellant said that they were no longer there and that he did not know where they were (4 R.R. 150). Harper later located the children at a hospital with marks and bruises on their ankles and wrists (4 R.R. 153-54).

Amanda Rocha, a forensic interviewer at the Children's Assessment Center (CAC), testified that she interviewed the children on June 1, 2020 (4 R.R. 176, 185). G.F., age three, did not disclose abuse (4 R.R. 186-87). R.F., age five, said that he had been hit many times by his "daddy" and pointed to marks on his arm and leg (4 R.R. 189-92). He said that "Victor" was his daddy and that his mommy did not hit him (4 R.R. 193-94).

HPD Sergeant Derek Maier testified that he went to the hospital in May 2020 (6 R.R. 7). He believed that the children had been tortured and almost starved to death (6 R.R. 19). He spoke to Ramirez, who acted like she would take the blame (6 R.R. 24). He went to the office building and spoke to Mandala, who said that appellant had moved everything, including the childrens' bedding, the day before (6 R.R. 35-36). The room smelled, and blood or feces stains were on the wall (6 R.R. 37). Maier believed that appellant tampered with the evidence based on what Mandala told him (6 R.R. 41, 51). On July 7, 2020, Ramirez told Maier that she was responsible for what happened (6 R.R. 44-45). He believed that she was covering for appellant, as she could not provide specific details of the abuse (6 R.R. 45). He

filed charges on Ramirez because she confessed and filed charges on appellant because the “evidence suggested that appellant was responsible for both the omission and commission of the acts,” as Ramirez was too small to cause these injuries (6 R.R. 47-48, 50).<sup>8</sup>

Dr. Angela Bachim, a child abuse pediatrician at TCH, testified that both children were admitted to the hospital on May 19, 2020 (6 R.R. 122-23). She testified that R.F. was malnourished and showed signs of starvation; had scars, abrasions, bruises, and sores as well as ligature marks around his arms, ankles, and feet; had lost hair and brain tissue; and had broken bones in his hand, wrist, feet, and pelvis (6 R.R. 137-69). She opined that R.F. had sustained serious bodily injury from a loss of brain tissue resulting from starvation and abuse and was at risk for stunted growth (6 R.R. 162, 164, 171-73). She further testified that G.F. had ligature marks, bruises, a distended belly, a duodenal hematoma caused by blunt force trauma, multiple healing pelvic and rib fractures, and was malnourished (6 R.R. 173-87). She opined that G.F. had sustained serious bodily injury, as the duodenal hematoma and other wounds created a risk of infection and death, but G.F. was not emaciated like R.F. (6 R.R. 180, 182, 185-87). By the time of the childrens’ follow-up visits, they had regained weight, their hair was growing, and their injuries were

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<sup>8</sup> Defense counsel asked on cross-examination whether Detective Maier knew 100 percent that appellant was guilty (6 R.R. 53). Maier responded, “I believe 100 percent he’s guilty.”

healing (6 R.R. 187-92). She concluded that the children had been starved and tortured (6 R.R. 193).

Jamie Richard, R.F.’s and G.F.’s foster mother, testified to their behavioral problems since they moved in with her in September 2020 (6 R.R. 213-29).

R.F. testified that “Victor” taped G.F. and him to the door with duct tape while their mother was at work, which caused scars on his wrist (6 R.R. 242-46). He was not hit (6 R.R. 245).<sup>9</sup> During his testimony, he did not identify appellant as “Victor.”

G.F. testified that “Victor” tied her with zip ties, tied R.F. with tape, and “didn’t really give us any food” (6 R.R. 256-58). She did not remember being hit (6 R.R. 259). During her testimony, she did not identify appellant as “Victor.”

Whitney Crowson, a psychologist at the CAC, testified that she never met the children but reviewed their forensic interviews and medical records and watched them testify in court (7 R.R. 7-10). Crowson testified about why victims of domestic violence do not leave their abuser, “grooming,” disclosures, how trauma affects memory, and “coaching” (7 R.R. 11-25).

#### **D. The Defense’s Case**

Robert Mandala, Laura Mandala’s father, testified that he rented an office to appellant’s company (7 R.R. 63). Appellant usually was not there (7 R.R. 63). Ramirez and her children lived there (7 R.R. 64). Mandala never saw appellant hit

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<sup>9</sup> R.F. testified that his parents told him what to say in court (6 R.R. 249-50).

them, nor did Ramirez say that appellant did (7 R.R. 64). Ramirez left the children alone in the office (7 R.R. 67). When appellant kicked Ramirez out of the office, she asked Mandala to rent her an office, but he refused (7 R.R. 69).

Jose Avila, who worked part-time for appellant, testified that Ramirez and her children were living in the office (7 R.R. 85, 89-90). He never saw appellant injure them (7 R.R. 91). Appellant would bring food to them (7 R.R. 98).

Maria Vasquez, appellant's mother, testified that he lived with his wife, children, and her at that time (7 R.R. 103-04).

Appellant testified that Montes introduced him to Ramirez in 2018, and he sold Ramirez a car (7 R.R. 118-19). Ramirez started texting him, and they became friends (7 R.R. 120-21). Ramirez lived with Montes (7 R.R. 121). After Ramirez and Montes had a disagreement, Ramirez asked appellant if she could stay at the office for a couple of nights—which turned into almost two years (7 R.R. 122-23).

Appellant testified that, after R.F. fell down the stairs, he told Ramirez to move, but she refused (7 R.R. 125). Appellant and Ramirez started having sex (7 R.R. 126). She and the children called him “Vic” (7 R.R. 126).

Appellant testified that he told Ramirez not to leave the children alone in the office while she was at work (7 R.R. 127). When he found R.F. on the floor by the stairs, he called Ramirez and took R.F. to the hospital (7 R.R. 128-29). The hospital contacted CPS, which released the children to Ramirez (7 R.R. 129).

Appellant testified that, after he and Ramirez began a sexual relationship, she became possessive and wanted him to be her boyfriend (7 R.R. 131). Montes let Ramirez move back into her home at appellant's request (7 R.R. 138). Ramirez moved back into appellant's office after she and Montes had another disagreement (7 R.R. 138-39).

Appellant testified that he occasionally brought Ramirez and the children food (7 R.R. 138). He denied injuring them and never saw Ramirez injure the children (7 R.R. 130, 140). Eventually, the children called him "Daddy" (7 R.R. 159). Ramirez gave birth to appellant's child (7 R.R. 171).

#### **E. The Jury Charge<sup>10</sup>**

The court instructed the jury that it could convict appellant of injury to a child by commission either acting alone or as a party with Ramirez (1 C.R. 191-94); that it could convict him of injury to a child by omission if, "while having assumed care, custody, or control" of the child, he failed to provide adequate nutrition or supervision, either acting alone or as a party with Ramirez (1 C.R. 194-95); and that, if the jury believed or had a reasonable doubt that Ramirez was an accomplice, it could not convict appellant based on her testimony unless it was corroborated (1

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<sup>10</sup> Appellant cites to the Clerk's Record in R.F.'s case. The jury charge in G.F.'s case is the same except for the name of the complainant.

C.R. 196-97).<sup>11</sup>

## F. The Closing Arguments

The prosecutors argued that:

R.F. and G.F. told the forensic interviewer that “Daddy” taped them to the door and put zip ties on them while mommy was at work (7 R.R. 211, 239, 242);

G.F. said that “Daddy” did not give her any food (7 R.R. 211);

the jury did not have to be unanimous on how appellant caused serious bodily injury (7 R.R. 215);

Appellant was guilty as a party if he encouraged Ramirez to injure the children (7 R.R. 216);

Ramirez was an accomplice witness because she pled guilty to these offenses, but her testimony was corroborated (7 R.R. 216-17);

Ramirez previously took the blame and covered for appellant (7 R.R. 240); and

defense counsel asked Detective Maier for his opinion regarding appellant’s guilt so, “I don’t really know what defense counsel expected” (7 R.R. 241).

Defense counsel argued that:

Ramirez used appellant for a place to live, and he used her for sex (7 R.R. 223);

Ramirez, not appellant, injured the children (7 R.R. 221);

Ramirez got food stamps from the government but did not have

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<sup>11</sup> The court did not instruct the jury that it had to be unanimous as to whether appellant committed injury to a child by commission or omission.

food in the office (7 R.R. 223, 230);

Ramirez told investigators that appellant was not involved in the abuse (7 R.R. 227);

Ramirez then told the children to blame appellant so she would not get in trouble (7 R.R. 231);

the children couldn't describe appellant (7 R.R. 224); and

no one, including Ramirez, saw appellant injure the children or testified that he was alone with them or helped Ramirez injure them (7 R.R. 227, 231).

### **SUMMARY OF THE ARGUMENT**

First, the trial court erred by failing to instruct the jury that it had to be unanimous as to whether appellant committed injury to a child by commission or by omission where the children sustained multiple distinct injuries in multiple distinct incidents. Appellant suffered egregious harm because the prosecutor emphasized that the jury did not have to be unanimous as to how he injured the children. The lack of a unanimity instruction, combined with the prosecutor emphasizing that unanimity was not required, could have resulted in a non-unanimous verdict.

Second, the evidence was legally insufficient to establish that appellant assumed care, custody, and control of the children and, therefore, had a legal duty to provide them with nutrition. The children did not live with appellant. He did not assume care, custody, and control of them even if he told their mother that he would stop by to feed and watch them while she was at work.

Third, the evidence was legally insufficient to corroborate the accomplice testimony of Elizabeth Ramirez. Assuming *arguendo* that Ramirez's testimony that appellant agreed to stop by to feed and watch the children while she was at work established that he assumed care, custody, and control of them, that testimony was uncorroborated. Because this Court cannot determine whether the jury convicted appellant of injury to a child by omission or by commission, the remedy is to reverse and remand for a new trial on injury to a child by commission.

Finally, the trial court erred by imposing court costs and fees in both judgments. When the defendant receives multiple convictions in one trial, court costs and fees may be imposed on only one conviction. This Court should delete the court costs and fees from the judgment in cause number 1855793.

### **ISSUE ONE**

#### **THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT IT HAD TO BE UNANIMOUS AS TO WHETHER APPELLANT COMMITTED INJURY TO A CHILD BY COMMISSION OR BY OMISSION CAUSED EGREGIOUS HARM WHERE THE CHILDREN SUSTAINED MULTIPLE DISTINCT INJURIES IN MULTIPLE DISTINCT INCIDENTS.**

### **STATEMENT OF FACTS**

The amended indictments alternatively alleged that appellant intentionally and knowingly caused serious bodily injury to R.F. and G.F. by striking them in four different ways; and, in addition and alternatively, alleged that "while having

assumed care custody, and control" of the children, appellant intentionally and knowingly by omission caused serious bodily injury to them in two different ways (1 C.R. 137; 2 C.R. 128).

A prosecutor told the jury panel during the voir dire examination that the jurors did not have to agree on whether serious bodily injury resulted from being struck with a blunt object or from inadequate nutrition "as long as each one of you believes that at least one of these happened at the hands of the defendant" (2 R.R. 110).

The State presented expert opinion testimony that R.F. sustained serious bodily injury from a loss of brain tissue due to starvation and abuse, and G.F. sustained serious bodily injury from a duodenal hematoma and other wounds (6 R.R. 162, 164, 171-72, 180, 185-87).

The trial court instructed the jury in the charge that it could convict appellant of injury to a child by commission or by omission (C.R. 191-95). The court did not instruct the jury that it had to be unanimous as to whether he committed the offense by commission or by omission.

A prosecutor argued during the closing argument that the jury did not have to be unanimous on how appellant caused serious bodily injury (7 R.R. 215).

## **ARGUMENT AND AUTHORITIES**

### **A. The Standard Of Review**

When the defendant did not object to an erroneous jury charge at trial, an appellate court will reverse the conviction only if the error was so egregious and harmful that he did not have a fair trial. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). The appellate court must evaluate harm based on the entire jury charge, the evidence, the arguments, and any other relevant information in the record. Id.

### **B. Injury To A Child By Commission And By Omission Are Different Offenses In These Cases.**

A person commits the offense of injury to a child under Texas Penal Code §22.04(a)(1) if he “intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child ... serious bodily injury.” An omission that causes serious bodily injury constitutes an offense under subsection (b)(2) if “the actor has assumed care, custody, or control of a child ....” The actor “has assumed care, custody, or control” of a child under subsection (d) if he has, “by act, words, or course of conduct acted so as to cause a reasonable person to conclude that the actor has accepted responsibility for protection, food, shelter, or medical care for a child ....”

Appellant was charged with committing injury to a child *by commission* in four different ways: by striking the child with a blunt object, against a blunt object,

with his hand, or by tying the child with an unknown object. Appellant was charged with injury to a child *by omission* in two different ways: by failing to provide adequate nutrition and supervision.

**C. The Trial Court Violated The Federal And State Constitutional Guarantees Of Jury Unanimity By Failing To Instruct The Jury That It Had To Be Unanimous As To Whether Appellant Committed Injury To A Child By Commission Or By Omission Where The Children Sustained Multiple Distinct Injuries In Multiple Distinct Incidents.**

Texas law and the United States Constitution require a unanimous jury verdict in criminal cases. TEX. CONST. art. V, §13; U.S. CONST. amend VI; TEX. CRIM. PROC. CODE art. 36.29(a)(West 2024); Ramos v. Louisiana, 590 U.S. 83 (2020). Instructing the jury on alternative theories of committing the same offense does not violate the unanimity requirement, but instructing the jury on separate offenses involving separate incidents without requiring unanimity does. Martinez v. State, 129 S.W.3d 101, 103 (Tex. Crim. App. 1991).

A charge that authorizes the jury to convict the defendant on a disjunctive finding among separate offenses improperly deprives him of the right to a unanimous verdict. Stuhler v. State, 218 S.W.3d 706, 718-19 (Tex. Crim. App. 2007) (injury to a child conviction reversed where jury charge did not require unanimity as to whether defendant caused serious bodily injury or serious mental impairment); Francis v. State, 36 S.W.3d 121, 123-25 (Tex. Crim. App. 2000) (indecency with a child conviction reversed where jury charge did not require unanimity as to whether

defendant's hand touched complainant's breasts or genitals); Carty v. State, 178 S.W.3d 297, 302 (Tex. App.—Houston [1st Dist.] 2005) (aggravated assault conviction reversed where jury charge did not require unanimity as to whether defendant's penis penetrated or contacted complainant's vagina or his finger penetrated her vagina); Ploeger v. State, 189 S.W.3d 799, 806-07 (Tex. App.—Houston [1st Dist.] 2006) (stalking conviction reversed where jury charge did not require unanimity as to whether complainant would regard defendant's conduct as threatening bodily injury or death, whether his conduct placed her in fear of bodily injury or death, or whether his conduct would cause a reasonable person to fear bodily injury or death); Dolkart v. State, 197 S.W.3d 887, 893 (Tex. App.—Dallas 2006) (aggravated assault conviction reversed where jury charge did not require unanimity as to whether defendant caused or threatened bodily injury, which are separate offenses rather than different ways of committing the same offense); Pizzo v. State, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007) (indecency with a child conviction reversed where jury charge did not require unanimity as to whether defendant touched child's breasts or genitals).

The decision of the Court of Criminal Appeals (CCA) in Jefferson v. State, 189 S.W.3d 305 (Tex. Crim. App. 2006), does not hold to the contrary. The CCA held that the jury did not have to agree on whether a defendant charged with injury to a child committed the offense by commission or by omission in this particular

case where the acts and omissions involved the same injury to the same child during the same transaction. *Id.* at 306, 313. There was no constitutional violation merely because “six jurors may have believed that he struck the fatal blow to the child while six other jurors may have believed that he failed to pick up the phone and call 9-1-1 to seek medical help” for the injured child. *Id.* at 314.

Appellant’s case is readily distinguishable from *Jefferson*, which involved an act and omission that occurred in one fell swoop. See *Jefferson*, 189 S.W.3d at 306 (“The child was struck by some object, causing her to fall and hit her head. Neither appellant nor the child’s mother sought medical attention for the child even though the child was obviously in great distress. The child died very soon after being struck”). Conversely, in appellant’s cases, the State alleged that R.F. and G.F. were hit, tied up, and starved over a period of time rather than on just one occasion. The serious bodily injury resulted from an accumulation of injuries over several months. The trial court erred by failing to instruct the jury that it had to unanimously agree on whether appellant committed injury to a child *by commission* (by one or more of four means) or *by omission* (by one or more of two means) as these are separate offenses involving separate incidents.

**D. Appellant Suffered Egregious Harm Because The Prosecutors Emphasized That The Jury Did Not Have To Be Unanimous As To How He Injured The Children.**

A prosecutor told the jury panel during the voir dire examination and the

closing argument that the jurors did not have to unanimously agree on whether appellant injured the children by commission or by omission (2 R.R. 110; 7 R.R. 215). The jury charge did not require unanimity on this matter.

A jury charge that erroneously authorizes a non-unanimous verdict results in egregious harm, despite counsel's failure to object, where a prosecutor argues that the jury does not have to be unanimous. See Mathonican v. State, 194 S.W.3d 59, 66-67 (Tex. App.—Texarkana 2006) (egregious harm where prosecutor argued that jury charge did not require unanimity as to whether defendant's penis penetrated complainant's mouth or complainant's penis penetrated defendant's mouth or anus); Clear v. State, 76 S.W.3d 622, 623-64 (Tex. App.—Corpus Christi 2002) (egregious harm where prosecutor argued that jury charge did not require unanimity as to whether defendant's penis penetrated complainant's vagina or mouth or his finger penetrated her vagina); Dolkart, 197 S.W.3d at 894 (egregious harm where prosecutor argued that jury charge did not require unanimity as to whether defendant committed aggravated assault by causing or threatening bodily injury where evidence was contested as to both allegations); Stuhler, 218 S.W.3d at 719-20 (egregious harm where prosecutor argued that jury charge did not require unanimity as to whether defendant injured child by causing serious bodily injury or serious mental impairment); Hines v. State, 269 S.W.3d 209, 219-22 (Tex. App.—Texarkana 2008) (egregious harm where prosecutor argued that jury charge did not

require unanimity as to whether defendant had sexual contact with complainant's anus, genitals, or breasts).

Where the appellate court cannot determine the basis for the jury verdict, the possibility that the jury returned a non-unanimous verdict demonstrates egregious harm. Clear, 76 S.W.3d at 623-24; Hendrix v. State, 150 S.W.3d 839, 849 (Tex. App.—Houston [14th Dist.] 2004); Tyson v. State, 172 S.W.3d 172, 179 (Tex. App.—Fort Worth 2005).

The State presented evidence and argument in support of convictions for injury to a child by commission and by omission. Appellant contested these allegations. The State did not prove that appellant—who had sex with his girlfriend at his office, where she and her children lived—assumed care, custody, and control of the children so as to be criminally responsible for their lack of nutrition. In view of the jury's general verdict, this Court simply cannot determine whether the jury unanimously agreed that appellant injured the children by commission, and the allegation of injury to a child by omission was insupportable because he never assumed care, custody, and control of the children. The lack of a unanimity instruction, combined with the prosecutor telling the jury during the voir dire examination and closing argument that unanimity was not required, could have resulted in a non-unanimous verdict and, hence, caused egregious harm. See Robinson v. State, 266 S.W.3d 8, 15 (Tex. App.—Houston [1st Dist.] 2008).

Accordingly, the Court should reverse the convictions and remand for a new trial.

## **ISSUE TWO**

### **THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THAT APPELLANT INTENTIONALLY OR KNOWINGLY CAUSED SERIOUS BODILY HARM TO THE CHILDREN BY OMISSION.**

#### **STATEMENT OF FACTS**

The amended indictment in cause number 1855792 alleged that appellant, “while having assumed care, custody, and control” of R.F., intentionally and knowingly by omission caused serious bodily injury to R.F. by failing to provide adequate nutrition or supervision (1 C.R. 137). The amended indictment in cause number 1855793 made the same allegations with regard to G.F. (2 C.R. 128).

Dr. Angela Bachim testified that R.F. sustained serious bodily injury from a loss of brain tissue resulting from starvation (6 R.R. 162, 164, 171-73). She did not testify that G.F. sustained serious bodily due to starvation (6 R.R. 182).

Elizabeth Ramirez testified that her relationship with appellant was essentially a “booty call” (5 R.R. 200).<sup>12</sup> Appellant spent time with them at the office (5 R.R. 90). She asked him to take care of the children while she was at work (5 R.R. 64). He said that he would stop by to feed and watch them (5 R.R. 116, 226). He did not want the children to eat at his table, so she bought a table for them and kept snacks

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<sup>12</sup> Appellant described their relationship in the same manner (7 R.R. 126).

in the refrigerator in their space (5 R.R. 77-79). He said that he did not want to give them food because they made a mess (5 R.R. 146). When she moved to her own apartment in May 2020, she did not have much food (5 R.R. 158).

Laura Mandala testified that she told appellant to feed the children, and he said no because they were not potty-trained and would poop in their diapers (4 R.R. 89).

G.F. testified that appellant “didn’t really give us any food” (6 R.R. 245).

The court instructed the jury that it could convict appellant of injury to a child by omission if, “while having assumed care, custody, and control” of the children, he failed to provide adequate nutrition or supervision, either acting alone or as a party with Ramirez (1 C.R. 194-95).

## **ARGUMENT AND AUTHORITIES**

### **A. The Standard Of Review**

A challenge to the legal sufficiency of the evidence requires the appellate court to consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Byrd v. State, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011).

The legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. Malik v. State, 953

S.W.2d 234, 240 (Tex. Crim. App. 1997). A “hypothetically correct” jury charge is “one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” Id.

**B. The Evidence Was Legally Insufficient To Establish That Appellant Assumed Care, Custody, And Control Of The Children So That He Had A Legal Duty To Provide Them With Nutrition.**

A person commits the offense of injury to a child under Texas Penal Code §22.04(a)(1) if he “intentionally, knowingly, or recklessly by omission causes to a child … serious bodily injury.” An omission that causes serious bodily injury constitutes an offense under subsection (b)(2) if “the actor has assumed care, custody, or control of a child ....” The actor “has assumed care, custody, or control” of a child under subsection (d) if he has, “by act, words, or course of conduct acted so as to cause a reasonable person to conclude that the actor has accepted responsibility for protection, food, shelter, or medical care for a child ....” Rey v. State, 280 S.W.3d 260, 269 (Tex. Crim. App. 2009).

The indictment alleged that appellant committed injury to a child by omission by failing to provide adequate supervision over the children. There was no evidence that any purported lack of supervision caused the children serious bodily injury. Accordingly, appellant will address whether he had a legal duty to provide them with

nutrition.

The cases that have upheld convictions for injury to a child by omission for failing to provide adequate nutrition involved a child who lived in the defendant's home. In Proo v. State, 587 S.W.3d 789, 808 (Tex. App.—San Antonio 2019), the evidence was legally sufficient to establish that the defendant assumed care, custody, and control of her son-in-law's child and failed to provide adequate nutrition and medical care because she held herself out as being in charge of the child and restricted the child's food intake and social interaction as a disciplinary measure. In Bleimeyer v. State, 616 S.W.3d 234, 244 (Tex. App.—Houston [14th Dist.] 2021), the evidence was legally sufficient to establish that the defendant assumed care, custody, and control of a child who lived in her home and she treated like one of her own.

R.F. and G.F. lived with Ramirez in appellant's office. Appellant lived with his own family. By going to the office for "booty calls," he did not assume care, custody, and control of the children. Ramirez was responsible to feed her own children, regardless of her financial circumstances. Appellant had no legal duty to provide them with nutrition. The evidence thus was legally insufficient to establish that appellant injured the children by omission. Additionally, G.F. did not sustain serious bodily injury as a result of a lack of nutrition. Because the jury returned a general verdict, this Court cannot determine whether the jury convicted appellant of

injury to a child by omission, by commission, or could not unanimously agree but believed that he was responsible for the injuries. The remedy is to reverse and remand for a new trial on injury to a child by commission. Cf. Robinson v. State, 266 S.W.3d 8, 15 (Tex. App—Houston [1st Dist.] 2008).

### **ISSUE THREE**

#### **THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CORROBORATE THE ACCOMPLICE TESTIMONY OF ELIZABETH RAMIREZ.**

#### **STATEMENT OF FACTS**

The amended indictment in cause number 1855792 alleged that appellant, “while having assumed care, custody, and control” of R.F., intentionally and knowingly by omission caused serious bodily injury to R.F. by failing to provide adequate nutrition or supervision (1 C.R. 137). The amended indictment in cause number 1855793 made the same allegations with regard to G.F. (2 C.R. 128).

Dr. Angela Bachim testified that R.F. sustained serious bodily injury from a loss of brain tissue resulting from starvation (6 R.R. 162, 164, 171-73). She did not testify that G.F. sustained serious bodily injury due to starvation (6 R.R. 182).

Elizabeth Ramirez testified that she asked appellant to take care of the children while she was at work (5 R.R. 64). He said that he would stop by to feed and watch them (5 R.R. 116, 226). He did not want the children to eat at his table, so she bought a table for them and kept snacks in the refrigerator in their space (5 R.R. 77-79). He

said that he did not want to give them food because they made a mess (5 R.R. 146).

When she moved to her own apartment in May 2020, she did not have much food for her and the children (5 R.R. 158).

Laura Mandala testified that she told appellant to feed the children, and he said no because they were not potty-trained and would poop in their diapers (4 R.R. 89).

G.F. testified that appellant “didn’t really give us any food” (6 R.R. 245).

The court instructed the jury that it could convict appellant of injury to a child by omission if, “while having assumed care, custody, and control” of the children, he failed to provide adequate nutrition or supervision, either acting alone or as a party with Ramirez (1 C.R. 194-95). The court also instructed the jury that, if it believed or had a reasonable doubt that Ramirez was an accomplice, it could not convict appellant unless her testimony was corroborated (1 C.R. 196-97).<sup>13</sup>

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<sup>13</sup> The trial court erred by instructing the jury that it was a fact question whether Ramirez was an accomplice witness. A co-defendant who testifies for the State is an accomplice witness as a matter of law. Hendricks v. State, 508 S.W.2d 633, 634 (Tex. Crim. App. 1974). Where the trial court instructed the jury that it is a fact question, the witness is an accomplice as a matter of law, and defense counsel objected, the conviction must be reversed if there was no corroboration. Burns v. State, 703 S.W.2d 649, 652 (Tex. Crim. App. 1985). In appellant’s case, defense counsel did not object, and appellant cannot show egregious harm because the prosecutor told the jury during her closing argument that Ramirez was an accomplice witness whose testimony was corroborated (7 R.R. 216-17).

## **ARGUMENT AND AUTHORITIES**

### **A. The Standard Of Review**

“A conviction cannot be had upon the testimony of an accomplice witness unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of an offense.” TEX. CRIM. PROC. CODE. art. 38.14 (West 2024). The test for determining the sufficiency of the corroboration is to eliminate the testimony of the accomplice from consideration and then ascertain whether there was other incriminating evidence that tends to connect the accused with the commission of the offense. The corroborative evidence need not directly link the accused to the crime or be sufficient in itself to establish guilt, but need only make the accomplice’s testimony more likely than not. Merely showing that an offense was committed is not sufficient to corroborate the testimony of an accomplice. Jones v. State, 538 S.W.2d 414, 416 (Tex. Crim. App. 1976).

### **B. The Non-Accomplice Testimony Did Not Establish That Appellant Assumed Care, Custody, And Control Of The Children So That He Had A Legal Duty To Provide Them With Nutrition.**

Ramirez testified that appellant said that he would stop by to feed and watch the children while she was at work (5 R.R. 116, 226). Mandala and G.F. testified that appellant did not feed the children (4 R.R. 89; 6 R.R. 245). They did not testify that he had agreed to do so. Ramirez was solely responsible to feed her children,

regardless of her financial circumstances. Appellant did not assume a legal duty to provide them with nutrition simply by having sex with their mother at his office. The State did not corroborate that he agreed to accept that responsibility. Additionally, G.F. did not sustain serious bodily injury as a result of a lack of nutrition. Because the jury returned a general verdict, this Court cannot determine whether the jury convicted appellant of injury to a child by omission, by commission, or could not unanimously agree but believed that he was responsible for the injuries. The remedy is to reverse and remand for a new trial on injury to a child by commission. Cf. Robinson v. State, 266 S.W.3d 8, 15 (Tex. App.—Houston [1st Dist.] 2008).

#### **ISSUE FOUR**

#### **THE TRIAL COURT ERRED BY IMPOSING COURT COSTS AND FEES ON TWO CONVICTIONS OBTAINED IN ONE TRIAL.**

#### **STATEMENT OF FACTS**

The judgments reflect that the court ordered appellant to pay court costs of \$290 and reimbursement fees of \$100 in cause number 1855792 (1 C.R. 208), and court costs of \$290 and reimbursement fees of \$475 in cause number 1855793 (2 C.R. 186).

## **ARGUMENT AND AUTHORITIES**

Article 102.073(a) of the Code of Criminal Procedure provides that court costs or fees may be assessed only once against a defendant who is convicted of multiple offenses in a single criminal action. Appellant was convicted of two separate offenses in a single criminal action, yet each judgment ordered him to pay court costs and reimbursement fees.

An appellate court has the power to modify the trial court's judgment to make it speak the truth when it has the necessary information before it to do so. TEX. R. APP. P. 43.2(b); Bigley v. State, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). Each court cost or fee must be assessed "using the highest category of offense that is possible based on the defendant's convictions" under article 102.073(b). Appellant's convictions are equally serious. Thus, the Court should delete the costs and fees in the highest cause number. See Williams v. State, 495 S.W.3d 583, 589-90 (Tex. App.—Houston [1st Dist.] 2016).

## CONCLUSION

The Court should reverse the convictions and remand for a new trial on both offenses or, alternatively, on injury to a child by commission. Additionally, the court should delete the costs and fees from the judgment in cause number 1855793.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I served a copy of this document on Jessica Caird, assistant district attorney for Harris County, by efile on February 13, 2025.

  
\_\_\_\_\_  
Randy Schaffer

## **CERTIFICATE OF COMPLIANCE**

The word count of the countable portions of this computer-generated document, as shown by the representation provided by the word-processing program that was used to create the document, is 8,938 words. This document complies with the typeface requirements of Rule of Appellate Procedure 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

  
\_\_\_\_\_  
Randy Schaffer

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