

NO. 14-24-00267-CR

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IN THE  
COURT OF APPEALS FOR THE  
FOURTEENTH JUDICIAL DISTRICT OF TEXAS  
AT HOUSTON

FILED IN  
14th COURT OF APPEALS  
HOUSTON, TEXAS  
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Clerk of The Court

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STUART FRASER WHITE

V.

THE STATE OF TEXAS

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Appealed from the 232nd District Court  
of Harris County, Texas  
Cause Number 1414070

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BRIEF FOR APPELLANT

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ORAL ARGUMENT  
REQUESTED

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Trial Judge:              Josh Hill  
                                  232nd District Court of Harris County  
                                  1201 Franklin, 6th Floor  
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## SUBJECT INDEX

	<u>Page</u>
STATEMENT OF THE CASE.....	1
STATEMENT REGARDING ORAL ARGUMENT .....	1
ISSUES PRESENTED .....	1
STATEMENT OF FACTS.....	2
A.    The Indictment .....	2
B.    The State's Case.....	2
C.    The Defense's Case .....	9
D.    The Closing Arguments.....	13
E.    The Verdict .....	14
SUMMARY OF THE ARGUMENT.....	14
GROUND ONE.....	17

THE TRIAL COURT ERRED BY GRANTING THE STATE'S CHALLENGES FOR CAUSE TO NINE VENIREMEN WHO SAID THAT THEY COULD NOT CONVICT A DEFENDANT ON THE TESTIMONY OF ONE WITNESS WHOM THEY BELIEVED BEYOND A REASONABLE DOUBT.

STATEMENT OF FACTS .....	17
ARGUMENT AND AUTHORITIES.....	20
A.    The prosecutor's question did not support the trial court granting challenges for cause.....	20
B.    The error was harmful. ....	22

Page

GROUND TWO.....	26
-----------------	----

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MOTION FOR NEW TRIAL THAT ALLEGED THAT APPELLANT WOULD HAVE EXERCISED A PEREMPTORY CHALLENGE ON A VENIREMAN WHO WITHHELD MATERIAL INFORMATION DURING THE VOIR DIRE EXAMINATION THAT HIS SISTERS WERE SEXUALLY ABUSED BY HIS UNCLE WHEN THEY WERE CHILDREN.

STATEMENT OF FACTS .....	26
--------------------------	----

ARGUMENT AND AUTHORITIES.....	28
-------------------------------	----

A.    The Standard Of Review .....	28
------------------------------------	----

B.    The Trial Court Properly Considered A Juror's Affidavit In Determining That He Withheld Material Information During The Voir Dire Examination .....	29
---	----

C.    Appellant Would Have Exercised A Peremptory Challenge If The Juror Had Disclosed The Information .....	30
--	----

D.    The Error Is Constitutional .....	31
---	----

GROUND THREE .....	32
--------------------	----

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MISTRIAL WHEN THE JURY WAS DEADLOCKED AFTER TWO DAYS OF DELIBERATIONS.

STATEMENT OF FACTS .....	32
--------------------------	----

ARGUMENT AND AUTHORITIES.....	37
-------------------------------	----

A.    The Standard Of Review .....	37
------------------------------------	----

	<u>Page</u>
B. The Trial Court Knowingly Gave The Majority The Opportunity To Coerce The Holdout Juror To Change His Vote.....	38
<b>GROUND FOUR .....</b>	<b>41</b>
THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MOTION FOR NEW TRIAL ALLEGING THAT TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO THE COURT ALLOWING THE JURY TO SEPARATE FOR TEN DAYS DURING DELIBERATIONS.	
STATEMENT OF FACTS .....	41
ARGUMENT AND AUTHORITIES.....	43
A. The Standard Of Review .....	43
B. Deficient Performance .....	44
C. Prejudice .....	45
CONCLUSION .....	46
CERTIFICATE OF SERVICE.....	46
CERTIFICATE OF COMPLIANCE .....	47
APPENDIX .....	48

## INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Aguilera v. State, 75 S.W.3d 60 (Tex. App.—San Antonio 2002, pet. ref'd)..	7
Allen v. United States, 164 U.S. 492 (1896).....	35
Barnett v. State, 161 S.W.3d 128 (Tex. App.—Fort Worth 2005), aff'd, 189 S.W.3d 272 (Tex. Crim. App. 2006).....	39
Brooks v. State, 990 S.W.2d 278 (Tex. Crim. App. 1999) .....	45
Castillo v. State, 913 S.W.2d 529 (Tex. Crim. App. 1995) .....	20, 21
Easley v. State, 424 S.W.3d 535 (Tex. Crim. App. 2014).....	32
Ex Parte Menchaca, 854 S.W.2d 128 (Tex. Crim. App. 1993).....	35
Franklin v. State, 138 S.W.3d 351 (Tex. Crim. App. 2004) .....	32
Hood v. State, 828 S.W.2d 87 (Tex. App.—Austin 1992, no pet.).....	44
Howard v. State, 941 S.W.2d 102 (Tex. Crim. App. 1996).....	38
Jones v. State, 982 S.W.2d 386 (Tex. Crim. App. 1998) .....	23
Leonard v. State, 923 S.W.2d 770 (Tex. App.—Fort Worth 1996, no pet.).....	21
Lewis v. State, 911 S.W.2d 1 (Tex. Crim. App. 1995).....	28
McMann v. Richardson, 397 U.S. 759 (1970) .....	43
Milo v. State, 922 S.W.2d 678 (Tex. App.—Beaumont 1996, pet. ref'd).....	31
Montoya v. State, 810 S.W.2d 160 (Tex. Crim. App. 1989) .....	37
Morgan v. Illinois, 504 U.S. 719 (1992) .....	32
Norwood v. State, 58 S.W.2d 100 (Tex. Crim. App. 1933).....	31

	<u>Page</u>
Oregon v. Kennedy, 456 U.S. 667 (1982).....	36
Payton v. State, 572 S.W.2d 677 (Tex. Crim. App. 1978).....	22
Salazar v. State, 562 S.W.2d 480 (Tex. Crim. App. 1978).....	22, 30, 31
State v. Dixon, 893 S.W.2d 286 (Tex. App.—Texarkana 1995, no pet.).....	29
State v. Read, 965 S.W.2d 74 (Tex. App.—Austin 1998, no pet.).....	31
Strickland v. Washington, 466 U.S. 668 (1984) .....	43
Von January v. State, 576 S.W.2d 43 (Tex. Crim. App. 1978) .....	29, 31
Witherspoon v. Illinois, 391 U.S. 510 (1968) .....	26
Zinger v. State, 932 S.W.2d 511 (Tex. Crim. App. 1996) .....	21, 22
<b><u>Constitutional Provisions</u></b>	
U.S. Const. amend. VI.....	31, 43
U.S. CONST. amend. XIV .....	43
<b><u>Statutory Provisions</u></b>	
TEX. CRIM. PROC. CODE art. 35.23(West 2024) .....	17, 39, 42, 44
TEX. CRIM. PROC. CODE art. 36.31(West 2024).....	38
TEX. CRIM. PROC. CODE art. 36.29(b)(West 2024) .....	17
TEX. CRIM. PROC. CODE art. 36.29(c)(West 2024).....	39, 42, 44
TEX. GOV'T CODE § 508.145(a)(Vernon 2012).....	1
<b><u>Rules</u></b>	
TEX. R. APP. PROC. 21.7 .....	27

	<u>Page</u>
TEX. R. APP. PROC. 44.2(a) .....	32
TEX. R. EVID. 606(b)(1).....	29
TEX. R. EVID. 606(b)(2)(A) .....	29
TEX. R. EVID. 606(b)(2)(B).....	29

## **STATEMENT OF THE CASE**

Appellant pled not guilty to super-aggravated sexual assault of a child in cause number 1414070 and indecency with a child in cause number 1414071 in the 232nd District Court of Harris County before Judge Josh Hill. A jury acquitted him of indecency and convicted him of super-aggravated sexual assault on December 19, 2023. The court assessed his punishment at 25 years in prison on January 23, 2024.<sup>1</sup> Kent Schaffer and Angela Weltin represented him at trial.

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument.

## **ISSUES PRESENTED**

1. The trial court erred by granting the State's challenges for cause to nine veniremen who said that they could not convict a defendant on the testimony of one witness whom they believed beyond a reasonable doubt.
2. The trial court abused its discretion by denying a motion for new trial that alleged that appellant would have exercised a peremptory challenge on a venireman who withheld material information during the voir dire examination that his sisters were sexually abused by his uncle when they were children.
3. The trial court abused its discretion by denying a mistrial when the jury was deadlocked after two days of deliberations.

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<sup>1</sup> A person convicted of super-aggravated sexual assault of a child is not eligible for parole under Section 508.145(a) of the Government Code.

4. The trial court abused its discretion by denying a motion for new trial alleging that trial counsel were ineffective in failing to object to the court allowing the jury to separate for ten days during deliberations.

## **STATEMENT OF FACTS**

### **A. The Indictment**

The indictment for super-aggravated sexual assault of a child alleged that, on or about January 5, 2014, appellant did “intentionally and knowingly cause the penetration of the anus of [E.W.], a child younger than six years of age ... with the finger of the defendant” (C.R. 22).<sup>2</sup>

### **B. The State’s Case**

Cathryn Walker, an educator with two children from a prior marriage, became a patient of appellant, a nutritionist, in 1999 (4 R.R. 116-17; 5 R.R. 101). They became romantically involved and, when she got pregnant in 2001, they got married (4 R.R. 119, 121). G.W., a male, was born in 2002 (4 R.R. 121). E.W. and L.W., male and female twins, were born in March 2008 (6 R.R. 161; 8 R.R. 71). Cathryn believed that her marriage was on solid ground before December 2013 (4 R.R. 134).

On December 13, 2013, G.W. saw appellant texting in the kitchen, became suspicious, and told Cathryn (7 R.R. 149-50). Cathryn asked for his phone (4 R.R.

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<sup>2</sup> The indictment for indecency with a child alleged that appellant caused E.W. to touch his genitals with the intent to arouse or gratify his sexual desire (3 R.R. 15).

140). When a text message came in, he grabbed the phone from her and deleted the text message stream as he ran away (4 R.R. 140-41; 7 R.R. 150). She tried to grab the phone, knocked off his glasses, and they broke (4 R.R. 141). She asked him what was going on (4 R.R. 141). He responded that the text message was from a female professional colleague, that their marriage was in trouble, and that they needed to go to counseling (4 R.R. 136-37, 141-42, 144). He said that he was tired of her berating him, cursing him in front of the children, and insulting his business (5 R.R 146).

On December 14, 2023, Cathryn and appellant continued to argue, and she cried most of the day (6 R.R. 10). She left home, returned, and told him that she felt suicidal but would not hurt herself (6 R.R. 11).

On December 15, 2013, appellant told Cathryn that he was having an “emotional affair” with Nicole Fodel, a professional colleague in North Carolina, whom he considered to be “his soulmate and his destiny” (4 R.R. 146; 6 R.R. 13, 15). Appellant denied that he and Nicole were having a sexual relationship (4 R.R. 146). Cathryn asked appellant to break off his relationship with Nicole and work on improving their relationship and saving their marriage; he refused but agreed to go to counseling (4 R.R. 146; 6 R.R. 15-16). Cathryn called Nicole’s husband in North Carolina and informed him of the affair (6 R.R. 29-30).<sup>3</sup>

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<sup>3</sup> G.W. testified that appellant told him that he was having a “spiritual affair” that was based on a “divinely inspired connection” (7 R.R. 151). G.W. “seethed” in his anger and told Cathryn, who also became very angry (7 R.R. 152).

Cathryn testified that she arranged a joint counseling session with her therapist, Joan McKirachan (4 R.R. 148). At a session on December 31, 2013, appellant said that he was willing to work on their relationship but not on their marriage, as he would not give up Nicole (4 R.R. 150; 6 R.R. 41-42). Cathryn said that she was angry and felt that she had been blindsided (6 R.R. 50).<sup>4</sup> Cathryn scheduled their next session for January 6, 2014 (4 R.R. 151). However, she hired a divorce lawyer immediately after she left McKirachan's office (6 R.R. 41-42).

G.W. testified that E.W. pulled down her pants and showed her vagina to a boy in front of several children at a neighbor's home on January 2, 2014 (7 R.R. 153-54).<sup>5</sup> G.W., who was embarrassed and angry, told E.W. that he was going to tell their mother; E.W. begged him not to do so (7 R.R. 156-57).

Cathryn testified that G.W. told her what E.W. had done (4 R.R. 152). Cathryn informed appellant (4 R.R. 154). They agreed to talk to E.W. together but did not do so that night because E.W. was about to go to bed (6 R.R. 56).

Cathryn testified that she talked to E.W. after appellant went to work on January 3, 2014 (4 R.R. 156). E.W., who was extremely upset, acknowledged that she had pulled down her pants and underwear (6 R.R. 57-58, 64). Cathryn asked if

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<sup>4</sup> McKirachan testified that Cathryn cried, was angry, and was afraid that appellant was not being truthful about his relationship with Nicole (4 R.R. 37). Appellant said that he was scared of Cathryn because of her anger (4 R.R. 49).

<sup>5</sup> E.W. was five years old at the time.

anyone had touched her private area (4 R.R. 159; 6 R.R. 64). E.W. shook her head and said no (4 R.R. 159). Cathryn then named each person who lived in their home—including appellant—and asked whether that person had touched her (4 R.R. 161-62; 6 R.R. 64). E.W. said no “for the front side” (4 R.R. 162). Cathryn asked about the “back side” (4 R.R. 162). E.W. responded that appellant touches the hole where her “poo” comes out when he tucks her in bed at night and that he needs to trim his fingernails because they hurt (4 R.R. 162-64).

Cathryn testified that she called her therapist, internist, church counselor, aunt, a friend, and E.W.’s pediatrician to ask what to do (4 R.R. 164-65; 6 R.R. 100-05). The friend, Kristen Hassett, a psychologist, said that they both had a duty to report the accusation to Child Protective Services (CPS) (3 R.R. 26, 30-33; 6 R.R. 103). The next day, Hassett made an anonymous online report to CPS from a fake email address and provided Cathryn’s contact information (3 R.R. 33-35, 50).

On January 6, 2014, Casey Cain, a CPS investigator, arrived unannounced at Cathryn’s home and told Cathryn to bring the children and follow her to the Children’s Assessment Center (CAC) for an interview (3 R.R. 65-68, 71).

Claudia Gonzalez, a forensic interviewer at the CAC, testified that she

interviewed E.W. and L.W. on January 6, 2014 (3 R.R. 111, 117, 129).<sup>6</sup> E.W. disclosed during the interview that appellant let her touch his penis, scratched her bottom, had her and L.W. touch each other, and told them not to talk about it (3 R.R. 134-40). Gonzalez acknowledged that, when she asked open-ended questions, E.W. did not disclose sexual abuse; when she brought out anatomically correct dolls and asked directly if anyone had touched E.W.'s genitals, E.W. disclosed sexual abuse (4 R.R. 10, 12). L.W. told Gonzalez that appellant scratched his back and bottom once, but not inside the buttocks (4 R.R. 18-19).<sup>7</sup>

Gonzalez acknowledged that a lay person can intentionally or inadvertently contaminate a child's statement by interviewing the child about sexual abuse (4 R.R. 5-6).<sup>8</sup> She also agreed that a five-year-old is susceptible to suggestion and that asking a child if her father touched her privates is a leading question (4 R.R. 6-8). Gonzalez acknowledged that her asking whether E.W. had to touch L.W. was suggestive and could be inappropriate. (4 R.R. 12-14).

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<sup>6</sup> The trial court admitted E.W.'s videorecorded forensic interview over objection after the State argued that defense counsel had opened the door (9 R.R. 5-26). However, the court sustained the State's objection when the defense offered L.W.'s videorecorded forensic interview to impeach him (10 R.R. 127-32, 183-99). Thus, the jury saw an interview that bolstered E.W.'s testimony but did not see an interview that would have impeached L.W.'s testimony.

<sup>7</sup> L.W. testified that he did not disclose during the forensic interview that appellant touched his "butthole" and penis because he did not know what was right and wrong (8 R.R. 80, 104-05, 112).

<sup>8</sup> McKirachan, Cathryn's therapist, testified that Cathryn expressed concern on January 6, 2014, that a mental health professional told her that she may have contaminated E.W.'s statement (4 R.R. 65).

Whitney Crowson, a clinical psychologist at the CAC, testified that Cathryn's questions did not contaminate E.W.'s answers, as a child must have been exposed to a finger in the buttocks to have come up with that on her own (8 R.R. 137-38). In Crowson's experience and, "according to the research," it is "very rare" for a child to lie about sexual abuse (8 R.R. 143-44).<sup>9</sup> Although one cannot forensically determine whether a child was sexually abused or just convinced that she was (when, in fact, it did not occur), a forensic interview can determine whether the child can articulate details regarding sexual abuse (8 R.R. 153).

Dr. Reena Isaac, a pediatrician at the CAC, testified that she examined E.W.'s and L.W.'s genitals and anuses on January 9, 2014 (5 R.R. 21-22, 31). E.W. disclosed sexual abuse by appellant (5 R.R. 37-40). L.W. disclosed that appellant touched his bottom but did not disclose sexual abuse (5 R.R. 59-60). Each child's genitalia was normal and there was no physical indication of sexual abuse (5 R.R. 47-48, 61, 78).

Cathryn testified that she filed for divorce on January 9, 2014 (3 R.R. 100; 4 R.R. 96).<sup>10</sup> She called CPS after G.W. made an outcry to her regarding appellant on January 26, 2014 (5 R.R. 97-98). G.W. disclosed sexual abuse during a forensic

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<sup>9</sup> Defense counsel inexplicably failed to object to Crowson's clearly inadmissible, prejudicial opinion. See Aguilera v. State, 75 S.W. 3d 60, 64-66 (Tex. App.—San Antonio 2002, pet. ref'd) (error to admit psychologist's opinion that only about ten percent of children lie about sexual abuse).

<sup>10</sup> The divorce proceeding concluded in 2021 (6 R.R. 127-28).

interview at the CAC on January 27, 2014 (3 R.R. 130, 148).

E.W., who was 15 years old at the time of trial, testified that she and her twin, L.W., shared a bedroom when they were five years old (6 R.R. 161, 163). Her bedtime routine included appellant scratching her back, pulling down her pants, and sticking his finger in her “butthole” as L.W. watched (6 R.R. 164-69, 205). She testified that appellant then did this to L.W. and touched L.W.’s penis as she watched, and she occasionally touched L.W.’s penis (6 R.R. 170-172). On one occasion, when E.W. and L.W. entered their parents’ walk-in closet, appellant pulled out his penis and told E.W. to touch it (6 R.R. 173-75). L.W. then pulled down his pants, appellant pulled back L.W.’s foreskin, and L.W. said, “That hurts” (6 R.R. 175).

L.W., who also was 15 years old at the time of trial, testified that appellant sat on his bed at bedtime, scratched his back, pulled down his pants, and touched his “butthole” and penis (8 R.R. 71, 82-87). He testified that appellant then did this to E.W. and told E.W. to touch L.W.’s penis (8 R.R. 88-89). Appellant told L.W. to touch a mole on appellant’s buttocks, which he called the “cocoon” (8 R.R. 90, 92). Appellant also took E.W. and L.W. into his closet, pulled down his pants, and asked them to touch his penis; E.W. did, but L.W. did not (8 R.R. 92).<sup>11</sup> L.W. did not know

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<sup>11</sup> L.W. told Gonzalez during the forensic interview that appellant touched his buttocks but not his “butthole” or penis (8 R.R. 105, 112).

at the time that this conduct was wrong (8 R.R. 98).

G.W., who was 21 years old at the time of trial, testified that he and appellant cleaned each other's penis in the shower when he was six to eight years old (7 R.R. 144, 177). G.W. testified that appellant sexually abused him from the ages of four or five to ten or 11 while they played games that appeared to be innocent but actually were sexual (7 R.R. 169).<sup>12</sup> G.W. initially told both Cathryn and Cain that appellant did not touch him inappropriately because he did not associate these games with sexual abuse (7 R.R. 201-02; 8 R.R. 16-17). G.W. acknowledged that his statements about appellant touching him have changed over the years (8 R.R. 32). Represented by a lawyer hired by Cathryn, G.W. sued appellant for money damages in 2022 (8 R.R. 11-12).

### C. The Defense's Case

Appellant testified that he is a chiropractor and nutritionist who practices in Houston and Charlotte and frequently lectures at seminars around the country (10 R.R. 10, 12). Cathryn became his patient in 1998 (10 R.R. 12). They became romantically involved and got married after she became pregnant with G.W. (10 R.R. 13-14). By 2013, there was tension in the marriage, as they had not had sex for

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<sup>12</sup> G.W. testified that the game of "cocoon" consisted of him kissing an area on appellant's buttocks in which a butterfly purportedly resided (8 R.R. 170). The game of "walrus" consisted of them thrusting their penises in the air and making the sound of a walrus (8 R.R. 175). The game of "ninja chop" consisted of appellant running his hand up G.W.'s shorts to try to touch his penis while G.W. tried to stop him with a chop; if appellant got past the chop, he would stroke G.W.'s penis (7 R.R. 179-80, 184). G.W. then did this to appellant (7 R.R. 185-86).

18 months (10 R.R. 65). He “pulled away” from the marriage, developed romantic feelings for Nicole in August 2013, and they started “sexting” (10 R.R. 67-69).<sup>13</sup>

Appellant testified that G.W. saw him texting, told Cathryn, and she demanded to see his phone (10 R.R. 70). She chased him down the hall, grabbed him, and his glasses fell off and broke (10 R.R. 70). He initially was not honest with her but eventually admitted that he was having an “emotional affair” (10 R.R. 71-72). However, she believed that the affair was sexual (10 R.R. 73). She begged him not to lecture at a seminar in North Carolina in January 2014 because Nicole would be there, but he attended the seminar and saw Nicole (10 R.R. 74-75, 89).

Appellant testified that Cathryn told him that E.W. had pulled down her pants at a neighbor’s home, and they decided to talk to her that night (10 R.R. 77-78). When appellant got home, E.W. was asleep, and Cathryn did not want to wake her (10 R.R. 78). The next day, Cathryn was unfriendly and did not attend their counseling session (10 R.R. 79). When he got home, she told him to leave; he thought that the reason was that he would not give up Nicole (10 R.R. 80-81). He did not know that the children went to the CAC and that Cathryn was filing for divorce (10 R.R. 87-88). He learned of E.W.’s accusation when a police officer called and asked him to come to the station on January 7, 2014 (10 R.R. 87). He spoke to the officer and denied any improper touching (10 R.R. 88).

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<sup>13</sup> Appellant and Nicole were married and had two children by the time of trial (9 R.R. 28).

Appellant testified that he never touched E.W. in a sexual way and has never been sexually aroused by any of his children (10 R.R. 8-9). He taught his sons, who were uncircumcised, how to pull back the foreskin to clean the penis (10 R.R. 24-25). He occasionally took a shower with G.W. but not with E.W. or L.W. (10 R.R. 27). He read to E.W. and L.W. at bedtime with the door open and tickled them under the shirt from the back to the top of the buttocks, but did not touch the anus or between the legs (10 R.R. 30, 37-38, 40, 47-48). The children also tickled each other's back (10 R.R. 51).

Appellant testified that E.W. occasionally entered his closet when he was dressing and, on one occasion, she saw him naked (10 R.R. 63-64). He redirected her hand when she tried to touch him (10 R.R. 63). None of the children ever touched his penis (10 R.R. 64, 97). He has a mole on his right leg at the hip; none of the children ever put their mouth on it (10 R.R. 96-97). Appellant denied playing any of the games that G.W. described or touching G.W.'s penis (10 R.R. 59, 124-25).

Appellant testified that he believed that Cathryn learned about the affair, talked about sexual matters in front of the children for three weeks and, as a result, they picked up ideas and fabricated stories (10 R.R. 90, 111-12). Appellant opined that E.W.'s story had been reinforced by years of counseling until it became real to her (10 R.R. 118-19). His children's testimony that he sexually abused them was untrue (10 R.R. 94).

Sarah Collins, a retired teacher and friend of the White family, testified that Cathryn contacted her in December 2013, was upset, and wanted to discuss her marital problems (9 R.R. 88-92). Collins went to Cathryn's home on December 17, 2013 (9 R.R. 93). Cathryn played a video that she claimed depicted appellant having sex with Nicole, but the images were too blurry for Collins to determine what they depicted (9 R.R. 94, 96). E.W. was present, heard what Cathryn said, and was distraught (9 R.R. 96-97). Collins told Cathryn that E.W. was listening, but Cathryn continued to talk about the affair (9 R.R. 97). Collins testified that she and Cathryn had other "sexually charged" conversations about the affair in front of Cathryn's children (9 R.R. 112, 116-17).<sup>14</sup> Their relationship ended because Cathryn did not believe that Collins was on her side (9 R.R. 120).

Hughe Herve, a forensic psychologist, testified that E.W.'s conduct at the neighbor's home did not necessarily mean that she had been sexually abused, as young children engage in behavior involving body exploration (7 R.R. 5, 7-10). Herve explained that an adult can influence a child's memory of an event (7 R.R. 42). E.W.'s memory and answers could have been contaminated by her mother asking if appellant had touched her sexually (7 R.R. 10-13). When E.W. said during the forensic interview that appellant had "scratched" her bottom, Gonzalez changed

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<sup>14</sup> Cathryn testified that she did not remember discussing the affair with Collins (6 R.R. 22-25).

the verb to “touched,” which altered E.W.’s subsequent report (7 R.R. 21).

Appellant called eight character witnesses—professional colleagues, patients, friends, and a relative—to testify that he treats children with love and respect and is truthful and honest (10 R.R. 136, 150-51, 155, 162-63, 168, 172-73, 175-76, 179).

#### **D. The Closing Arguments**

The prosecutors argued that:

- E.W. was credible because the forensic interview depicts her disclosing what she believed to be normal conduct without realizing that she was describing sexual abuse (11 R.R. 33, 35-38, 56-57);
- E.W. disclosed details regarding sexual abuse, such as that appellant put his finger in her bottom, his fingernails hurt, and she liked to touch his penis (11 R.R. 35, 57);
- L.W. corroborated E.W. that they touched each other in appellant’s presence (11 R.R. 36-37, 58);
- G.W. could not make up the sexual games he described (11 R.R. 58-59);
- Cathryn did not have time to manipulate or coach the children to accuse appellant of sexual abuse because she did not know that a CPS investigator was coming to their home to escort them to the CAC (11 R.R. 35);
- Cathryn would not coach her children to say that they stuck a finger in each other’s “butthole” (11 R.R. 55); and
- Cathryn was not out to get appellant, as she called other persons for advice on what to do and scheduled appointments for E.W. with a pediatrician and a therapist instead of calling the police and CPS (11 R.R. 34-35, 60-

61).

Defense counsel argued that:

- Appellant was responsible for his predicament because he put E.W. and L.W. to bed by himself, tickled their bottoms, did not lock the door when he got dressed, and refused to end the affair with Nicole (11 R.R. 39-40);
- Appellant could not have repeatedly molested the children in their bedroom without Cathryn, who was nearby, suspecting anything (11 R.R. 44-46)
- E.W. told Gonzalez that appellant touched her bottom and, from that moment on, everyone assumed that it was sexual (11 R.R. 46-47);
- Although L.W. denied sexual abuse during the forensic interview, Gonzalez and Cain maintained that L.W. had been sexually abused (11 R.R. 47-48);
- G.W. was affected after hearing people say that appellant had sexually abused E.W. and L.W. (11 R.R. 48); and
- The children were told that they had been sexually abused and now believe it (11 R.R. 50).

#### **E. The Verdict**

The jury acquitted appellant of indecency with a child but convicted him of super-aggravated sexual assault of a child.

#### **SUMMARY OF THE ARGUMENT**

First, the trial court erred by granting the State's challenges for cause to nine veniremen who said that they could not convict the defendant on the testimony of

one witness whom they believed beyond a reasonable doubt. The prosecutor's question did not support any challenges for cause because it omitted that the witness's testimony established each element of the offense that the State was required to prove and convinced the venireman beyond a reasonable doubt that the defendant was guilty. The State, by receiving the equivalent of 18 peremptory challenges to appellant's ten, was able to shape the jury in its favor by eliminating all veniremen who had a high standard of reasonable doubt. Appellant was harmed by this substantial disparity in the number of challenges. He should receive a new trial because the prosecutor asked this question in bad faith as a pretext to challenge all veniremen who had a high standard of reasonable doubt in a case that did not involve the "one-witness rule," as the State did not rely on one witness to convict. Thus, neither the prosecutor's question nor the rule were relevant to the case.

Second, the trial court abused its discretion by denying appellant's motion for new trial based on information learned post-trial about juror Hammad Ahmed. Fifty-nine veniremen disclosed during the voir dire examination that they knew someone who had been a victim of or accused of sexual abuse. Forty-three of those veniremen said they would not be able to put that aside and be fair and impartial in this case. None of them served on the jury. Ahmed did not respond to the first question, was not asked the second question, and served on the jury. He disclosed after the trial that his two sisters confided in him years ago that their uncle had sexually abused

them when they were children, but they were afraid to report it; and that he did not disclose this information because he believed that it would not affect his ability to be fair. If he had disclosed this information during jury selection, appellant would have exercised a peremptory challenge on him.

Third, the trial court abused its discretion by denying appellant's fourth motion for mistrial. The jury reported at the end of the first day of deliberations that it could not reach a verdict and that "more deliberation will not lead to a unanimous decision." The jury received an Allen charge but remained deadlocked at the end of the second day. The trial court denied appellant's fourth motion for mistrial after defense counsel commented that the jurors "looked very upset" and one juror in particular "looked very angry." The bailiff informed the court that the jury was divided 11-1 and wanted to continue to deliberate. The court allowed the jury to do so, which enabled the majority to coerce the holdout juror to change his vote.

Fourth, the trial court abused its discretion by denying appellant's motion for new trial that alleged that trial counsel were ineffective in failing to object to the court allowing the jury to separate for ten days during deliberations. At the end of the first day of deliberations, the court told counsel that it was considering giving an Allen charge and ordering the jury to (1) return after a ten-day break in order to accommodate the travel plans of two jurors or (2) return on the following Monday, with the alternates replacing the jurors with travel plans. Defense counsel did not

object to either option. The court gave the jury an Allen charge and, minutes later, ordered the jury to return in 11 days. Ultimately, the majority coerced the holdout jurors to change their vote to guilty to enable everyone to attend to their holiday plans. If defense counsel had objected that a jury separation would violate article 35.23 of the Code of Criminal Procedure and that the substitution of the alternates for the jurors with travel plans would violate article 36.29(b) of the Code of Criminal Procedure, the trial court would have sustained those objections and ordered the jury to continue to deliberate. Counsel performed deficiently by failing to object to the lengthy jury separation. There is a reasonable probability that, if counsel had objected, and the court had ordered the jury to continue to deliberate, the jury would have deadlocked, and the court ultimately would have declared a mistrial.

### **GROUND ONE**

**THE TRIAL COURT ERRED BY GRANTING THE STATE'S CHALLENGES FOR CAUSE TO NINE VENIREMEN WHO SAID THAT THEY COULD NOT CONVICT A DEFENDANT ON THE TESTIMONY OF ONE WITNESS WHOM THEY BELIEVED BEYOND A REASONABLE DOUBT.**

### **STATEMENT OF FACTS**

The prosecutor questioned the jury panel about the “one witness rule” as follows (2 R.R. 64-67):

So only one witness means that—the Legislature said that the State can prove its case with only one witness alone. I can tell you I do not plan on calling only one witness or we wouldn’t be telling you guys that you

would be here a week and a half or two weeks. But I can tell you there is likely going to be one or more of those elements that I showed to you that can only be proven by one witness. Does that make sense?

And so by one witness there may not be any DNA or medical testimony or eyewitnesses that will be able to testify to that element. Does everybody understand? And that witness, one witness may be a child, all right?

And the theory behind this one witness rule and what I'm applying to this kind of case is that if Juror No. 119 walked out and was in the parking garage here, and that's terrible, has no video cameras. And I walked out, hey Janna—I'm Juror No. 119. Give me your wallet. What? You're a prosecutor. Yeah but—and I take your wallet. And then I don't use the credit card, I take the cash. No video, no DNA, no nothing. And they go to the police, it's Janna Oswald and she's a prosecutor. She took my wallet, she threatened me. And they're like, is that it? No DNA. Do you have a video camera? Do you have another witness? No. So it's just you alone. I'm sorry, we can't prosecute it.

How mad would you all be as citizens if that was the case? Right.

Now, I can tell you I'm not going to bring one witness, but it's very likely only one can be proven by one witness. So here is my question to you. If you believe that witness beyond a reasonable doubt—everybody understand the premise of my question is that you believe that one witness beyond a reasonable doubt, but its only that one witness testimony to that element, there is nothing else, no other witness. No DNA, no medical to make up evidence for that element, but you believe that witness beyond a reasonable doubt but it's only that testimony, can you find the defendant guilty if you believe the State has proven its case beyond a reasonable doubt? But one or more elements is just based off of the testimony of that one witness. Does that make sense?

I'm going to go row by row and ask you that. If you believe that witness beyond a reasonable doubt, just that one witness, to one or more of the elements, you believe that witness, would you be able to find the defendant guilty?

Juror No. 1.

MS. WELTIN: Object to commitment, Judge

THE COURT: As asked, sustained.

MS. OSWALD: All right. So given that scenario, if you believe that witness and there is only one witness to an element or more could you find the defendant guilty, if you believe the State's proven its case beyond a reasonable doubt?

Juror No. 1.

MS. WELTIN: Same objection, commitment. Too many things going in together.

THE COURT: The way the question is specifically asked I have to sustain the objection.

MS. OSWALD: So, given my hypothetical, knowing that the State can prove a case with just one witness alone, no other testimony and no other elements, like no other DNA or anything like that, it's just the testimony of just one witness, but you believe that witness beyond a reasonable doubt would you be able to find the defendant guilty?

Ten veniremen responded that they could not convict a defendant on the testimony of one witness whom they believed beyond a reasonable doubt (veniremen 5, 24, 28, 34, 41, 43, 88, 101, 104, 109) (2 R.R. 68-71, 75-77). The State moved to challenge them for cause (2 R.R. 160-61). Appellant objected because the question was improper (2 R.R. 162). The court granted all challenges except to venireman 104, and the State withdrew that challenge (2 R.R. 162-63).

The State exercised nine of its ten peremptory challenges (C.R. 786-91; 2 R.R. 175). The last juror selected was venireman 87, and the alternates were veniremen 94 and 112 (2 R.R. 176-77). Thus, all nine excluded veniremen were within the strike range.

### **ARGUMENT AND AUTHORITIES**

#### **A. The prosecutor's question did not support the trial court granting challenges for cause.**

The prosecutor asked the jury panel whether, “knowing that the State can prove a case with just one witness alone, no other testimony and no other elements, like no other DNA or anything like that, it’s just the testimony of one witness, but you believe that witness beyond a reasonable doubt would you be able to find a defendant guilty?” (2 R.R. 66-67). The question did not support any challenges for cause because it omitted that the witness’s testimony established each element of the offense that the State was required to prove and convinced the venireman beyond a reasonable doubt that the defendant was guilty.

The Court of Criminal Appeals (CCA) resolved this issue almost 30 years ago in Castillo v. State, 913 S.W. 2d 529 (Tex. Crim. App. 1995). The prosecutor asked whether anyone on the jury panel would need more than one witness to a crime to convict. Id. at 530. Venireman Blaydes responded that he could not convict on the testimony of one officer because there would be reasonable doubt. Id. at 531. The trial court granted the State’s challenge for cause. Id. The CCA held that a

venireman who categorically refuses to vote to convict on the testimony of one witness is not challengeable for cause if his refusal is predicated on his reasonable understanding of what constitutes “beyond a reasonable doubt.” *Id.* at 533. That venireman “may only be indicating that his threshold for proof beyond a reasonable doubt is somewhat higher than the minimum that the law recognizes as sufficient” and is not properly challengeable for cause. *Id.* “If the State does not want that venireman on the jury, it is obliged to use one of its statutorily allotted peremptory challenges to remove him.” *Id.* Conversely, a venireman who says that he could not convict on the testimony of one witness, even if he believed the witness, and the testimony convinced him beyond a reasonable doubt of the defendant’s guilt, is challengeable for cause. *Id.* See also Zinger v. State, 932 S.W. 2d 511, 514 (Tex. Crim. App. 1996) (error to grant challenge for cause to venireman who said that he would always have reasonable doubt in a one-witness case).

The State has the burden to prove that each challenged venireman was incapable of following the law. *Castillo*, 913 S.W. 2d at 534. The trial court must determine whether the venireman said that he would have a reasonable doubt based on the testimony of one witness or that he would not vote to convict even if that witness’s testimony convinced him beyond a reasonable doubt as to each element of the offense that the State was required to prove. *Leonard v. State*, 923 S.W. 2d 770, 774 (Tex. App.—Fort Worth 1996, no pet.).

The prosecutor in appellant's case asked a global question to the jury panel that omitted the necessary predicates that (1) the hypothetical witness's testimony established each element of the offense that the State was required to prove, and (2) the venireman would not vote to convict even if he believed that testimony established guilt beyond a reasonable doubt. In addition, the prosecutor did not ask each venireman who answered no to clarify whether the venireman would have a reasonable doubt based on the testimony of one witness or, instead, would not vote to convict even if that testimony convinced him beyond a reasonable doubt of the defendant's guilt. Thus, the question did not support the granting of any challenges for cause, much less nine. The trial court erred in granting these challenges over objection.

**B. The error was harmful.**

In the past, the erroneous granting of a prosecution challenge for cause constituted reversible error if its effect was to give the State an additional peremptory challenge. Payton v. State, 572 S.W. 2d 677, 680 (Tex. Crim. App 1978). When a trial court erroneously granted a State's challenge for cause, and the State used all of its peremptory challenges, the defendant had shown harm, and the conviction was reversed. Zinger, 932 S.W.2d at 514.

In appellant's case, the State used nine of its ten peremptory challenges. However, because the trial court erroneously granted nine challenges for cause, the

State had the equivalent of 18 peremptory challenges. That would have been sufficient to demonstrate harm under Payton and its progeny.

The CCA overruled Payton in Jones v. State, 982 S.W. 2d 386 (Tex. Crim. App. 1998). The CCA observed that “a defendant has no right that any particular individual serve on the jury. Id. at 393. The defendant’s only substantial right is that the jurors who do serve be qualified. The defendant’s rights go to those who serve, not to those who are excused.” Id. The CCA held that the erroneous granting of a challenge for cause requires reversal “only if the record shows that the error deprived the defendant of a lawfully constituted jury.” Id. at 394.

A court of appeals cannot overrule Jones. Nonetheless, appellant raises this issue to lay the predicate to ask the CCA to overrule Jones or, at the very least, to recognize an exception for cases (like appellant’s) in which the prosecutor asked the jury panel about the “one witness rule” in bad faith for the purpose of removing all veniremen who had a high standard of reasonable doubt.

The Jones standard not only is superfluous but also it effectively eliminates an appellate complaint that the trial court erroneously granted challenges for cause. A “lawfully constituted jury” consists of jurors who are qualified to serve under state law. If the defendant must show that an unqualified juror served, that error independently would compel reversal, and an appellate court would never have to decide whether the defendant was harmed by the erroneous granting of a challenge

for cause. The Jones standard also allows the trial court erroneously to grant unlimited prosecution challenges for cause without any consequences. The prosecutor can challenge for cause every venireman she does not want and, if the trial court is compliant, the State obtains a more favorable jury, and the defendant has no appellate remedy.

Although a defendant has no right to have any particular venireman serve on the jury, he does have a right not to have otherwise qualified veniremen erroneously removed for cause. Thus, the CCA should reconsider Jones because it gives the trial court unbridled power to remove every venireman the State does not want while denying the defendant any meaningful appellate remedy.

At the very least, there should be an exception to Jones when the prosecutor asked the question in objective bad faith in an effort to remove for cause veniremen who had a high standard of reasonable doubt. And, make no mistake about it, the prosecutor asked the question in objective bad faith, as appellant's case did not involve the "one witness rule." Thus, the question did not concern law applicable to the case.

The State did not rely on one witness to convict appellant.<sup>15</sup> E.W. testified that appellant routinely sexually abused her at bedtime. L.W. testified that he was

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<sup>15</sup> Indeed, the prosecutor twice told the jury during her voir dire examination that the State would not rely on one witness to convict, although "one or more" elements of the offense could only be proven by one witness (2 R.R. 64-65).

present, saw what appellant did to E.W., and that appellant did the same thing to him. G.W. provided corroboration by testifying that appellant sexually abused him. Because this was not a “one witness” case, it was irrelevant whether the veniremen could convict based on the testimony of one witness.

The prosecutor clearly asked this question in bad faith as a pretext to challenge veniremen who are true believers in the law requiring proof of guilt beyond a reasonable doubt in a criminal case. The effect of erroneously granting the State nine challenges for cause to which it was not entitled—instead of requiring the State to use peremptory challenges to exclude those veniremen—was to create an unfair disparity in the number of challenges available to the parties. The State, by receiving the equivalent of 18 peremptory challenges to appellant’s ten, was able to shape the jury in its favor by eliminating all veniremen who had a high standard of reasonable doubt.

This is not a case in which the trial court erroneously granted one or two prosecution challenges for cause. Rather, the court granted challenges to every venireman who had a high standard of reasonable doubt, thereby removing the entire category of citizens who support this fundamental legal principle designed to protect the accused from a wrongful conviction. An appellate remedy must be available to rectify this manifestly unfair practice.

Finally, by removing every venireman who had a high standard of reasonable

doubt, the trial court deprived appellant of a fair cross-section of the community on the jury. Cf. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (violation of fair cross-section requirement of Sixth Amendment to exclude every venireman with “scruples” against death penalty even though they could follow trial court’s instructions). The conviction should be reversed.

## **GROUND TWO**

**THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MOTION FOR NEW TRIAL THAT ALLEGED THAT APPELLANT WOULD HAVE EXERCISED A PEREMPTORY CHALLENGE ON A VENIREMAN WHO WITHHELD MATERIAL INFORMATION DURING THE VOIR DIRE EXAMINATION THAT HIS SISTERS WERE SEXUALLY ABUSED BY HIS UNCLE WHEN THEY WERE CHILDREN.**

## **STATEMENT OF FACTS**

During the voir dire examination, a prosecutor asked two questions about the veniremen’s prior experience, if any, with sexual abuse. She first asked the veniremen to “raise your number” if they know anyone who has been a victim of or accused of sexual abuse (2 R.R. 27). Fifty-nine veniremen responded to this question (2 R.R. 27-33). Venireman 6 was the only venireman on the first row who responded; venireman 4, Hammad Ahmed, did not respond (2 R.R. 27). The prosecutor next asked the veniremen who responded whether they would be able to put that aside and be fair and impartial in this case (2 R.R. 27). Forty-three of those

veniremen said that they could not do so (2 R.R. 27-33).<sup>16</sup> None of them served on the jury, but Ahmed did. (2 R.R. 176-77).<sup>17</sup>

Post-trial investigation revealed that Ahmed withheld material information in response to the prosecutor's first question. Accordingly, appellant filed a motion for a new trial that alleged that he would have exercised a peremptory challenge on Ahmed if Ahmed had disclosed this information (C.R. 855-59). Appellant filed Ahmed's affidavit in support of the motion, and the trial court admitted it in evidence at the hearing (C.R. 876-81; 14 R.R. 4-5).<sup>18</sup>

Ahmed testified by affidavit that his two sisters confided in him years ago that their uncle sexually abused them when they were children, but they were afraid to report it. When the lawyers asked during the voir dire examination whether any members of the panel or their family had been sexually abused, Ahmed did not disclose this information because he believed that it would not affect his ability to be fair (C.R. 879).

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<sup>16</sup> Veniremen 6, 11, 12, 13, 16, 18, 20, 21, 29, 32, 37, 38, 39, 46, 48, 51, 52, 53, 54, 61, 62, 65, 69, 71, 73, 76, 77, 78, 80, 84, 85, 86, 90, 96, 98, 99, 100, 102, 111, 116, 117, 118, 119 (2 R.R. 27-33).

<sup>17</sup> Veniremen 2, 4, 22, 23, 35, 36, 40, 42, 47, 64 and 87 served on the jury; veniremen 94 and 112 were the alternates (2 R.R. 176-77).

<sup>18</sup> The trial court may receive evidence by affidavit at a hearing on a motion for new trial under Rule of Appellate Procedure 21.7.

Defense counsel Schaffer testified by affidavit as follows (C.R. 883):<sup>19</sup>

If Mr. Ahmed had disclosed during the voir dire examination that his sisters allegedly had been sexually abused by his uncle, the defense would have challenged him for cause, or, if necessary, exercised a peremptory challenge on him. Even if he said this will not affect his ability to be fair, we would have challenged him to eliminate the risk that, consciously or subconsciously, it would have affected his verdict.

The trial court found Ahmed's affidavit to be credible that his sisters confided in him about the sexual abuse and that he failed to disclose this information during the voir dire examination because he did not believe that it would prevent him from being fair (15 R.R. 6-8; Supp. C.R. 3). The trial court also found that Schaffer's affidavit was credible about exercising a peremptory challenge on Ahmed if he had disclosed the sexual abuse (15 R.R. 14-15). Nonetheless, the trial court denied the motion for new trial (C.R. 931).

## **ARGUMENT AND AUTHORITIES**

### **A      The Standard Of Review**

The trial court's denial of a motion for new trial is reviewed for abuse of discretion and will be upheld unless it was arbitrary or unreasonable. Lewis v. State, 911 S.W. 2d 1, 7 (Tex. Crim. App. 1995).

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<sup>19</sup> The trial court also admitted Schaffer's affidavit at the hearing (4 R.R. 4-5).

**B. The Trial Court Properly Considered A Juror’s Affidavit In Determining That He Withheld Material Information During The Voir Dire Examination.**

Rule of Evidence 606(b) (1) prohibits a juror from testifying during an inquiry into the validity of a verdict or indictment about any statement made or incident that occurred during the deliberation; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. Rule 606(b) (1) is inapplicable by its terms to the issue raised by appellant, as Ahmed’s affidavit addressed what happened (or, more accurately, what did not happen) during the voir dire examination rather than during the deliberations.<sup>20</sup>

A trial court may properly consider a juror’s testimony that he withheld information during the voir dire examination. In Von January v. State, 576 S.W.2d 43, 44-46 (Tex. Crim. App. 1978), the trial court abused its discretion by denying a new trial after a juror, who had denied during the voir dire examination that he knew the family of the deceased, testified at the hearing on the motion for new trial that he did. In State v. Dixon, 893 S.W.2d 286, 287-88 (Tex. App.—Texarkana 1995, no pet.), the trial court did not abuse its discretion in granting a new trial because,

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<sup>20</sup> Assuming *arguendo* that Rule 606(b) (1) applies in this scenario, subsection (2)(A) creates an exception to allow a juror to testify to whether an outside influence was improperly brought to bear on any juror, and subsection (2)(B) allows testimony to rebut a claim that a juror was not qualified to serve. Although Ahmed was not “unqualified to serve,” he would have been challenged peremptorily if he had acknowledged during the voir dire examination that his uncle sexually abused his two sisters when they were children. Thus, the subsection (2)(B) exception arguably permits consideration of his affidavit.

although defense counsel *failed* to ask during the voir dire examination at an aggravated sexual assault trial whether the panel members or their relatives had been the victim of a sexual assault, testimony at the hearing on the motion for new trial established that a juror's nine-year-old granddaughter had been a victim of sexual abuse. In Salazar v. State, 562 S.W.2d 480 (Tex. Crim. App. 1978), the trial court abused its discretion by denying a mistrial after a juror told the court during the trial that he falsely denied during the voir dire examination that he had been a witness in a criminal case when, in fact, he had been an eyewitness to the sexual assault of his daughter. Id. at 481-83.

Because the trial court can consider a juror's testimony during the trial that he withheld material information during the voir dire examination, it would be illogical not to consider the same testimony (whether in person or by affidavit) at a hearing on a motion for new trial. Otherwise, the defendant's liberty would depend on when the juror disclosed that he withheld material information.

**C. Appellant Would Have Exercised A Peremptory Challenge If The Juror Had Disclosed The Information.**

Appellant must show that (1) a question about sexual abuse was asked, (2) a juror withheld material information, and (3) appellant would have challenged the juror if he had disclosed the information. See Salazar, 562 S.W.2d at 481-83 (error to deny mistrial when juror at indecency with a child trial denied during voir dire examination that he had been witness in criminal case when, in fact, he had been

eyewitness to sexual assault of his daughter);<sup>21</sup> Norwood v. State, 58 S.W.2d 100, 101 (Tex. Crim. App. 1933) (abuse of discretion to deny motion for new trial when juror at rape trial withheld information during voir dire examination that his sister had been sexually assaulted when they were children); cf. Von January, 576 S.W.2d at 45-46 (abuse of discretion to deny new trial when juror at murder trial failed to disclose that he knew family of deceased); Milo v. State, 922 S.W.2d 678, 680 (Tex. App.—Beaumont 1996, pet. ref'd) (error to deny mistrial when juror at murder trial denied during voir dire examination that she knew key prosecution witness but disclosed during testimony that she had lied and that they have close relationship); State v. Read, 965 S.W.2d 74, 76-78 (Tex. App.—Austin 1998, no pet.) (no abuse of discretion to grant new trial when juror at DWI trial failed to disclose her prior theft conviction during voir dire examination). Thus, appellant clearly established all three factors.<sup>22</sup>

#### **D. The Error Is Constitutional.**

The Sixth Amendment guarantees the defendant the right to a trial before an impartial jury. U.S. CONST. amend. VI. This constitutional guarantee includes the

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<sup>21</sup> Error of this nature is not cured by the juror's testimony that this would not affect his verdict. Salazar, 562 S.W. 2d at 482.

<sup>22</sup> Should the State argue that appellant was not entitled to rely on Ahmed's failure to respond because the question was asked by a prosecutor rather than by defense counsel, suffice it to say that the identity of the lawyer who asked the question is immaterial. The defense is entitled to rely on a venireman's answer or failure to answer, regardless of which lawyer asked the question.

opportunity to question the veniremen to identify objectionable jurors. Morgan v. Illinois, 504 U.S. 719, 729 (1992). The trial court's erroneous denial of a mistrial after a juror revealed that he withheld material information during the voir dire examination is constitutional error that requires a new trial under Rule of Appellate Procedure 44.2(a) unless the State proves beyond a reasonable doubt that it did not contribute to the conviction. Franklin v. State, 138 S.W. 3d 351, 354-55 (Tex. Crim. App. 2004).<sup>23</sup> Because Ahmed withheld material information, appellant was denied the opportunity to exercise a peremptory challenge on him. Accordingly, appellant is entitled to a new trial.

### **GROUND THREE**

#### **THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MISTRIAL WHEN THE JURY WAS DEADLOCKED AFTER TWO DAYS OF DELIBERATIONS.**

#### **STATEMENT OF FACTS**

The voir dire examination of the jury panel took place on Monday, November 27, 2023 (2 R.R. 1). The trial court told the panel in its introductory remarks that the trial could last until Friday, December 8, and asked whether anyone had a prepaid

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<sup>23</sup> The CCA subsequently held that the trial court's refusal to allow defense counsel to ask a proper question to the jury panel is non-constitutional error. Easley v. State, 424 S.W. 3d 535, 541 (Tex. Crim. App. 2014). However, refusing to allow defense counsel to ask a proper question does not affect the composition of the jury nearly as much as the service of a juror who withheld material information. Perhaps that is why Easley did not mention, much less overrule, Franklin.

vacation so the court could “make sure there are no scheduling problems” (2 R.R. 9). Thirty veniremen—including venireman 42—responded (2 R.R. 11). The prosecutor told the panel that she hoped that the trial would take a week-and-a-half (2 R.R. 13).

Venireman 42 informed the court that she had a trip planned from December 9 until December 17 that she could not reschedule (2 R.R. 145-46). The court and counsel agreed that would not be a problem (2 R.R. 168). Venireman 42 served on the jury (2 R.R. 176-77).

The trial court severely underestimated the length of the trial. The testimony lasted eight days because of inefficient time management. The docket sheet reflects that the jury heard 27 hours and 12 minutes of testimony over eight days (C.R. 954-56).<sup>24</sup> The earliest the testimony started was 10:24 a.m. and the latest was 12:23 p.m. (C.R. 954-56). The least amount of testimony presented in a day was 2 hours and 33 minutes and the most was 4 hours and 16 minutes (C.R. 954-56).<sup>25</sup> If the court had conducted full days of testimony, the testimony have taken four or five days, and the jury would have commenced deliberations on December 4 or 5 instead

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<sup>24</sup> Appellant has attached a summary chart reflecting the length of the testimony the jury heard each day (Appendix A).

<sup>25</sup> A jury typically hears five to six hours of testimony on an average day.

of December 8. The court should have worked full days to accommodate the jurors with travel plans.

The jury charge was filed at 11:18 a.m. on Friday, December 8 (C.R. 832). The jury began to deliberate at 12:45 p.m. (C.R. 956; Appendix B).<sup>26</sup> The jury sent a note at 1:05 p.m. asking for the complainant's forensic interview, which the trial court provided (C.R. 817). The jury sent a note at 4:07 p.m. asking about a possible medical defense, and the court referred the jury to the charge (C.R. 818). The jury sent a note at 5:05 p.m. requesting particular testimony from Cathryn and appellant, and the court responded that it would be prepared (C.R. 819). The jury sent a note at 5:32 p.m. asking what would happen if it could not reach a unanimous decision (C.R. 820). The court denied appellant's motion for mistrial and instructed the jury to continue to deliberate (C.R. 820; 11 R.R. 71).

The jury returned to the courtroom at 5:33 p.m. to hear testimony read back and resumed deliberations at 5:40 p.m. (C.R. 956; 11 R.R. 71).

The court informed counsel at 6:28 p.m. that, because one or two jurors had flights scheduled the next day or week, the court would ask how long the jury wanted to deliberate that night (11 R.R. 72). The court sent that note at 6:29 p.m., and the jury responded, "8:30 p.m." (C.R. 821).

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<sup>26</sup> Appellant has attached a summary chart reflecting the length of the deliberations (Appendix B).

The jury sent a note at 8:00 p.m. stating, “We are not able to come to a unanimous decision on either charge. More deliberation will not lead to a unanimous decision” (C.R. 822).<sup>27</sup> The court read the note to counsel (11 R.R. 73). The defense made its second motion for mistrial (11 R.R. 73). The State asked for an Allen charge,<sup>28</sup> and the defense objected (11 R.R. 74). The court informed the lawyers that it was considering the following options (11 R.R. 75):

- granting a mistrial;
- giving an Allen charge and ordering the jury to return in ten days, when all the jurors would next be available; or
- giving an Allen charge and ordering the jury to return on Monday (December 11) with the alternates replacing the two jurors with travel plans.

The State requested an Allen charge and a ten-day recess and opposed the substitution of the alternates (11 R.R. 76). The defense made its third motion for mistrial (11 R.R. 76). Schaffer expressed concern that the court would have “absolutely no control over what happens with [the jurors]” during such a lengthy recess and that it “doesn’t make sense to give an Allen charge and then you do not see them for a week or more” (11 R.R. 79). A prosecutor responded (incorrectly)

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<sup>27</sup> According to the affidavits of jurors Ahmed and John Iisager, Jr., the vote was 6-6 on one charge and 7-5 for guilty on the other charge throughout the first day of deliberations (C.R. 876, 886).

<sup>28</sup> Allen v. United States, 164 U.S. 492 (1896). An Allen charge instructs a deadlocked jury to continue to deliberate. Ex Parte Menchaca, 854 S.W.2d 128, 130 n.3 (Tex. Crim. App. 1993).

that, if the court granted a mistrial, and an appellate court determined that “we jumped the gun,” double jeopardy would bar a retrial (11 R.R. 79-80). Schaffer countered (correctly) that double jeopardy does not bar a retrial when the defendant requested a mistrial (11 R.R. 80). The prosecutor had the last word on the subject (and, again, was incorrect): “This court knows that it doesn’t matter if an appellate court determines that we should have Allen charged them and we did not then they could determine that jeopardy has attached” (11 R.R. 80).<sup>29</sup>

The court gave an Allen charge to the jury at 8:51 p.m. (C.R. 823). The jurors returned to the courtroom at 8:57 p.m. and were told to return 11 days later, on December 19, 2023 (11 R.R. 82-83).<sup>30</sup>

The jury resumed deliberations at 11:10 a.m. on December 19 (C.R. 956). The jury sent a note at 3:40 p.m. requesting E.W.’s testimony on particular matters (C.R. 834). The court instructed the jury to specify what was in dispute. The jury did not respond. The jury returned to the courtroom at 5:34 p.m. and was released until the next morning (12 R.R. 9-10). Defense counsel Weltin commented that the jurors “looked very upset” and one juror in particular “looked very angry” (12 R.R. 10).<sup>31</sup>

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<sup>29</sup> The prosecutor completely misstated the applicable law. Double jeopardy does not bar a retrial when the court grants a mistrial at the defendant’s request unless the prosecution intended to provoke the mistrial by engaging in misconduct. Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982). There was no such misconduct in appellant’s case.

<sup>30</sup> Schaffer had requested an additional day to accommodate his travel plans (11 R.R. 81).

<sup>31</sup> The trial court responded that the jurors looked exhausted (12 R.R. 10).

The defense made its fourth motion for mistrial, which the court denied at 5:36 p.m. (C.R. 956; 12 R.R. 10).

The bailiff informed the court at 5:37 p.m. that the jury wanted to try to finish that night, as the vote was 11-1; that many jurors “have issues for tomorrow,” such as having to catch a plane; and that one juror could not return until 1:00 p.m. (12 R.R. 11). The defense objected to “the bullying situation of them pressing one person” (12 R.R. 11). The State, of course, wanted the deliberations to continue. The court allowed the jury to continue to deliberate. Not surprisingly, the jury returned a verdict at 6:46 p.m. (C.R. 956; 12 R.R. 13).<sup>32</sup>

Appellant filed a motion for new trial alleging that the trial court abused its discretion by denying a mistrial following two days of deliberations, which enabled the majority to coerce the holdout juror to change his vote (C.R. 860-69). The court denied the motion (C.R. 931).

## ARGUMENT AND AUTHORITIES

### A. The Standard Of Review

The denial of a mistrial during jury deliberations following the trial court’s instruction that the jury continue to deliberate is reviewed for abuse of discretion. Montoya v. State, 810 S.W.2d 160, 166 (Tex Crim. App. 1989).

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<sup>32</sup> The jury deliberated 15 hours and 38 minutes over two days before reaching a verdict and had deliberated 14 hours and 28 minutes at the time the court denied the fourth motion for mistrial (C.R. 956; Appendix B).

**B. The Trial Court Knowingly Gave The Majority The Opportunity To Coerce The Holdout Juror To Change His Vote.**

Article 36.31 of the Code of Criminal Procedure allows the trial court, in its discretion, to discharge the jury when “it has been kept together for such time as to render it altogether improbable that it can agree.” To determine whether the trial court abused its discretion by denying a mistrial during jury deliberations, the appellate court must consider the length of the testimony and the amount of evidence presented. Howard v. State, 941 S.W. 2d 102, 121 (Tex. Crim. App. 1996).

The testimony in appellant’s trial lasted 27 hours and 12 minutes (C.R. 954-56; Appendix A). The jury had deliberated 14 hours and 28 minutes at the time the court denied appellant’s fourth motion for mistrial (C.R. 956; Appendix B). Thus, the jury had deliberated slightly more than half the amount of time it heard testimony. However, what distinguishes this case from the mine run of cases and makes it so compelling is that the trial court knew that the jurors, having returned on December 19 following an 11- day break in the deliberations, were anxious to finish the trial because they had holiday plans.

A perfect storm of unfortunate events culminated in a coerced verdict. The jury announced that it was hopelessly deadlocked on Friday, December 8. The court presented counsel with the unpalatable options of accepting an Allen charge and (1) allowing the jurors to separate for ten days to accommodate the travel plans of two jurors or (2) allowing the jurors to separate over the weekend and return on Monday

with the alternates replacing the jurors with travel plans. If the defense had objected, the first option would have violated article 35.23 of the Code of Criminal Procedure, and the second option would have violated article 36.29(b). The prosecutor then misstated the law by asserting that, if the court granted a defense motion for mistrial, and an appellate court concluded that the mistrial was premature and reversed the conviction, double jeopardy would bar a retrial. The court denied a mistrial, gave an Allen charge, and instructed the jury to return on December 19. When the deliberations resumed, and the jury had not reached a verdict by the end of the day, the court released the jurors until the next morning and denied a fourth motion for mistrial. The bailiff then informed the court that the jury was divided 11-1 and wanted to continue to deliberate. The court allowed the jury to do so over the defense objection that this would enable the majority to “bully” the holdout—which proved to be exactly what happened. This verdict was tainted by any measure.

This case is similar to Barnett v. State, 161 S.W.3d 128 (Tex. App.—Fort Worth 2005), aff'd, 189 S.W.3d 272 (Tex. Crim. App. 2006). In Barnett, the jury returned verdicts of not guilty of aggravated sexual assault of a child and guilty of indecency with a child. When the court polled the jurors after the verdicts were read, they responded that they were 11-1 for not guilty of aggravated sexual assault and 11-1 for guilty of indecency. The court asked the holdout jurors whether they would be able to change their votes after further deliberations, obtained assurances that “a

change was possible,” and instructed the jury to continue to deliberate. The defense moved for a mistrial out of concern that the holdout jurors would compromise in order to return a verdict. The court denied a mistrial. Nineteen minutes later, the jury returned split verdicts, as defense counsel had predicted. Id. at 131. The court again denied a mistrial. The court of appeals held that the trial court abused its discretion by denying a mistrial after it learned of the 11-1 split and questioned the holdout jurors. Id. at 134-35.

The trial court in appellant’s case knew that, by recessing the deliberations from December 8 until December 19, the jurors would be under pressure to reach a verdict upon their return because of the holidays. When the court learned at the end of the second day of deliberations that the vote was 11-1, and defense counsel expressed concern that further deliberations would allow the majority to “bully” the holdout juror to change his vote, the court nonetheless allowed the jury to continue to deliberate. Although the court did not speak directly to the holdout juror, as in Barnett, the effect was the same. The verdict returned about an hour later resulted from coercion. Thus, the trial court abused its discretion by denying the fourth motion for mistrial.

## **GROUND FOUR**

**THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MOTION FOR NEW TRIAL ALLEGING THAT TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO THE COURT ALLOWING THE JURY TO SEPARATE FOR TEN DAYS DURING DELIBERATIONS.**

### **STATEMENT OF FACTS**

The jury sent the following note at 8:00 p.m. on the first day of deliberations: "We are not able to come to a unanimous decision on either charge. More deliberation will not lead to a unanimous decision" (C.R. 822). The trial court informed counsel that it was considering giving an Allen charge and ordering the jury to return in ten days to accommodate the travel plans of two jurors or ordering the jury to return on the following Monday, with the alternates replacing the jurors with travel plans (11 R.R. 75). Defense counsel expressed concern about allowing the jurors to separate for that amount of time but did not object to either option (11 R.R. 76-80). The court gave an Allen charge to the jury and, a few minutes later, ordered the jury to return on December 19—11 days later (11 R.R. 82-83).

The jury returned on December 19. When the jury had not reached a verdict by 5:30 p.m., the court released the jury until the next day (12 R.R. 9-10). The jurors returned to the jury room, were very upset, and told the bailiff to inform the court that they were divided 11-1 and wanted to try to finish that night (12 R.R. 10-11). The court allowed the jury to continue to deliberate over objection, and the jury

reached a verdict about an hour later (12 R.R. 13).

Appellant filed a motion for new trial that alleged that trial counsel were ineffective in failing to object to the lengthy jury separation under article 35.23 of the Code of Criminal Procedure (C.R. 869-70). Schaffer testified by affidavit that he was concerned that the jurors voting for acquittal might change their vote if the court recessed for ten days and returned several days before Christmas, but he did not want the court to replace the two jurors with travel plans (who might have been voting for acquittal) with the alternates (C.R. 883-84). He did not remember whether he considered objecting that a jury separation would violate article 35.23 but acknowledged that he should have done so; and, if the court had overruled the objection and substituted the alternates, he should have objected that the substitution violated article 36.29(b) because jurors with travel plans are not “disabled” (C.R. 884).

The trial court, after hearing argument, found that it would not have allowed the jurors to separate if defense counsel had made an article 35.23 objection and would not have substituted the alternates for the jurors with travel plans if counsel had made an article 36.29 (b) objection (15 R.R. 12-13). However, the court denied the motion for new trial (C.R. 931).

## **ARGUMENT AND AUTHORITIES**

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

The defendant has a right to the effective assistance of counsel at trial. U.S. Const. amends. VI and XIV; Strickland v. Washington, 466 U.S. 668 (1984). Counsel must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759, 771 (1970).

In Strickland, the Supreme Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient under prevailing professional norms. Strickland, 466 U.S. at 687-88. The defendant also must show that counsel's deficient performance prejudiced the defense by depriving him of a fair trial with a reliable result. Id. at 687.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Strickland, 466 U.S. at 690. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Id. Ultimately, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

## **B. Deficient Performance**

The trial court would have violated article 35.23 of the Code of Criminal Procedure if it had allowed the jury to separate over objection during the deliberations—much less for ten days. Article 35.23 provides, “The court … on the motion of either party *shall* after having given its charge to the jury, order that the jury not be allowed to separate … until a verdict has been rendered or the jury discharged” (emphasis added). Article 35.23 is a mandatory statute. Hood v. State, 828 S.W. 2d 87, 93 (Tex. App.—Austin 1992, no pet.). The trial court found that it would not have allowed the jury to separate if defense counsel had objected (15 R.R. 12). Thus, the court would have either granted a mistrial, sequestered the jury and continued the deliberations, or allowed the unsequestered jury to return the next day with the consent of the parties to continue to deliberate.

Texas law does not allow the trial court over objection to substitute alternates for deliberating jurors with travel plans. Article 36.29(b) of the Code of Criminal Procedure provides that an alternate juror shall replace a juror who has died or “become disabled at any time before the charge of the court is read to the jury.” Subsection (c) provides that, if a juror becomes “so sick as to prevent the continuance” of his duty, an alternate can replace him. Neither provision allows the court to replace a deliberating juror with travel plans. The Legislature intended to allow the court to replace only a juror who has become “physically or mentally

impaired in some way which hindered his ability to perform his duty as a juror.” Brooks v. State, 990 S.W. 2d 278, 286 (Tex. Crim. App. 1999). The court found that it would not have substituted the alternates for the jurors with travel plans if the defense had objected (15 R.R. 12-13).

If the deliberations had continued on December 8 or 9—before the start of the holiday season—the majority would not have been able to exert the same amount of pressure on the holdout jurors that it exerted on December 19. Counsel performed deficiently by failing to object to the lengthy jury separation, which forced the jury to resume deliberations in the midst of the holiday season.

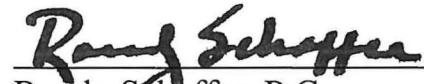
### C. Prejudice

There is a reasonable probability that, if the trial court had ordered the jury to continue to deliberate on December 8 or December 9 instead of recessing the deliberations until December 19, the outcome of the trial would have been different. The extrinsic pressure on the jury to reach a verdict because of the holidays would not have existed. The jurors who favored acquittal probably would not have succumbed to the pressure of those favoring conviction and would not have abandoned their reasonable doubt. Ultimately, the trial court probably would have declared a mistrial. Accordingly, appellant has demonstrated the requisite prejudice.

## CONCLUSION

The Court should reverse the conviction and remand for a new trial.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I served a copy of this document on John David Crump, assistant district attorney for Harris County, by efile on July 10, 2024.



Randy Schaffer

## **CERTIFICATE OF COMPLIANCE**

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

## **APPENDIX**

- A. Chart reflecting the length of the testimony
- B. Chart reflecting the length of the jury deliberations

**LENGTH OF TRIAL TESTIMONY**  
**(C.R. 954-56)**

<b>Date</b>	<b>Time</b>	<b>Total</b>
11/28/2023	12:14-12:44 12:50-12:54 2:25-3:38 4:04-5:03	2:46
11/29/2023	10:29-11:49 12:26-12:41 3:08-4:32	3:00
11/30/2023	11:39-12:23 12:31-1:01 2:07-3:30 3:41-4:16 4:40-4:58	3:30
12/1/2023	10:24-10:46 10:52-12:01 1:33-2:21 2:31-4:28	4:16
12/4/2023	11:00-1:27 3:58-5:29	3:58
12/5/2023	11:15-12:09 2:31-3:24 3:53-4:58 5:05-5:13	3:00
12/6/2023	12:23-1:13 2:23-2:46 3:38-4:36 4:56-5:18	2:33
12/7/2023	10:44-12:56 1:51-2:44 3:05-4:10	4:10
	<b>Total</b>	<b>27:12</b>

**LENGTH OF DELIBERATIONS**  
**(C.R. 956)**

<b>Date</b>	<b>Jury Deliberations</b>	<b>Total</b>
12/8/2023	12:45-5:33 5:40-8:56	8:04
12/19/2023	11:10-5:34 5:38-6:48	7:34
	<b>Total</b>	<b>15:38</b>

B

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