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FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
CLERK OF THE COURT

No. 14-24-00401-CR

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

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
11/20/2024 4:40:52 PM
DEBORAH M. YOUNG
Clerk of The Court

TYLER MARSHALL
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1776112
From the 338th District Court of Harris County, Texas

APPELLANT'S BRIEF

Alexander Bunin
Chief Public Defender
Harris County, Texas

Nicholas Mensch
State Bar of Texas No. 24070262
Assistant Public Defender
Harris County, Texas
1310 Prairie Street, 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

Attorney for Appellant

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Tyler Marshall TDCJ# 02508169 Holliday Unit 295 IH-45 North Huntsville, Texas 77320-8443
TRIAL COUNSEL FOR APPELLANT:	Lott Brooks, III State Bar of Texas No. 03070750 2900 Smith Street, Suite 230 Houston, Texas 77002
APPELLATE COUNSEL FOR APPELLANT:	Nicholas Mensch State Bar of Texas No. 24070262 Assistant Public Defender Harris County, Texas 1310 Prairie Street, 4th Floor Houston, Texas 77002
TRIAL COUNSEL FOR THE STATE:	Barbara Mousset State Bar of Texas No. 24105673 Cameron Gonzales State Bar of Texas No. 24109541 Assistant District Attorneys Harris County, Texas 1201 Franklin Street, 6th Floor Houston, Texas 77002

APPELLATE COUNSEL FOR THE STATE:	Jessica Caird State Bar of Texas No. 24000608 Assistant District Attorney Harris County, Texas 1201 Franklin Street, 6th Floor Houston, Texas 77002
PRESIDING JUDGE:	Hon. Ramona Franklin 338th District Court Harris County, Texas 1201 Franklin Street, 15th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On September 15, 2022, a Harris County grand jury returned an indictment charging Appellant with the offense of murder alleged to have occurred on or about June 24, 2022. (C.R. at 34). On May 29, 2024, a jury found Appellant guilty as charged in the indictment. (9 R.R. at 79; C.R. at 369, 372-375). On that same date, the jury assessed Appellant's punishment at 40 years in the Texas Department of Criminal Justice – Institutional Division and a $10,000 fine. (10 R.R. at 72; C.R. at 354, 372-375). The trial court certified Appellant's right of appeal and he timely filed his notice of appeal on May 29, 2024. (C.R. at 372, 378-379).

STATEMENT REGARDING ORAL ARGUMENT

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

ISSUE PRESENTED

Whether trial counsel rendered ineffective assistance of counsel by failing to object to the portion of Appellant's recorded statement with Deputy Crain where he invoked his right to counsel after receiving his statutory warnings and when trial counsel failed to object to the State's question highlighting Appellant's invocation during Deputy Crain's direct examination?

STATEMENT OF FACTS

A. State's Evidence

On June 24, 2022, Jeremy Bogany was eating breakfast at around 10:30 a.m. when he heard a commotion in the middle of the street. (4 R.R. at 23). Mr. Bogany was sitting in front of the kitchen window at his table. (4 R.R. at 25). The commotion sounded like loud talking and he was able to make out a male voice saying "You got that." (4 R.R. at 26). Mr. Bogany turned and opened the blind and saw a young man walking from a Cadillac SUV holding a yellow bag. (4 R.R. at 26-27). He described the young man as a black male with plaits or dreads in his hair. (4 R.R. at 27). In the Cadillac were an older female driving and another male with curly hair in the front passenger seat. (4 R.R. at 28). As the black male was walking away from the car, the male occupant of the vehicle opened the door and had a gun in his hand pointing across the windshield. (4 R.R. at 29). Mr. Bogany then heard a single gunshot and observed the black male take off running. (4 R.R. at 29). He described the woman's demeanor as hysterical and he heard her say "Why you do that?" (4 R.R. at 33). The shooter got out of the car and grabbed the yellow bag that had fallen onto the street. (4 R.R. at 34). Once Mr. Bogany went outside, he noticed a cell phone in the

street that he picked up. (4 R.R. at 28, 30). Ten to fifteen minutes later, the Cadillac returned and slowly drove with the male driving and the female in the passenger seat looking left to right. (4 R.R. at 31).

On that same date, James Carter was sitting in his garage in the early morning when he heard a car accelerating from around a corner. (4 R.R. at 58). The car sounded like it was picking up speed in a short distance where a car just accelerated really fast. (4 R.R. at 59). He noticed a black SUV coming up behind an individual and then hitting the brakes. (4 R.R. at 59). The individual yelled "Y'all have it. Y'all have it." (4 R.R. at 58). Mr. Carter described this individual as a slender African American male, a young guy who was running. (4 R.R. at 59). A heavyset, curly head Hispanic male stood up outside of the passenger door and fired one shot in the direction that the black male was running in. (4 R.R. at 59). The firearm was a pistol. (4 R.R. at 60). After the shot was fired, Mr. Carter heard a female voice saying "What did you do that? Why did you do that? Oh, my God, why did you do that?" (4 R.R. at 61). He characterized the woman's demeanor as terrified. (4 R.R. at 61). Mr. Carter was not able to see the black male once the shot was fired. (4 R.R. at 62). However, he saw the Hispanic male grab a yellow bag and then retreat to the car. (4 R.R. at 62-63). The car then

went down the street and made a left, and then his neighbor came out. (4 R.R. at 62). Five minutes later, the car returned with the Hispanic male driving and the woman in the passenger seat. (4 R.R. at 64). Mr. Carter estimated he was about 20 to 25 yards away from the street. (4 R.R. at 62). He did not hear any words exchanged between the Hispanic male and black male, nor did he see the black male with a firearm. (4 R.R. at 63-65). However, Mr. Carter did not know whether the black male had a firearm tucked in his pocket or anywhere else. (4 R.R. at 65-66).

Numerous officers were dispatched and responded to this incident. Sergeant Landon McDonald with the Harris County Precinct 3 Constable's was notified while en route by dispatch that a female had called in saying that her son had shot his friend. (4 R.R. at 74-76). In addition, the event report entered at 11:26 a.m. indicated that the caller advised she was with her son picking up a friend, the friend wanted to rob them, and her son possibly shot at the friend. (4 R.R. at 77). Caller also advised that son had left in a gray Cadillac and was not with her. (4 R.R. at 77). When Sgt. McDonald arrived to the location on Larriston, he observed the Appellant's mother, Yvonne Hinojsa, standing in the driveway. (4 R.R. at 77-78).[1]

[1] This location was Appellant's residence. (11 R.R. State's Ex. 25 at 1:26-1:44).

Initially, Appellant was not present but he eventually arrived in a dark colored SVU with his father. (4 R.R. at 78). A gun was recovered from the SUV. (4 R.R. at 81; 5 R.R. at 80-84; 11 R.R. State's Ex. 136).[2] After Appellant exited the SVU, Sgt. McDonald spoke with him. (4 R.R. at 82). Appellant told Sgt. McDonald that while driving to the store, he noticed the Complainant, who then got into the vehicle. (4 R.R. at 87). Complainant then apparently stuck his head through and demanded to give them, his mother ("the driver") and himself ("the passenger"), all that they got, to which point, the Complainant jumped out of the vehicle, followed by the Appellant who retrieved a weapon. (4 R.R. at 87). Appellant did not say that the Complainant took anything. (4 R.R. at 87-88). Sgt. McDonald asked Appellant whether the Complainant had a weapon on multiple occasions

[2] Dusty Foley, a DNA analysist for the Harris County Institute of Forensic Sciences testified that DNA swabs taken from the grip of the firearm by Deputy McWhirter were consistent with a mixture of DNA from three individuals, excluding the Complainant as a contributor to the mixture. (6 R.R. at 74). The DNA mixture was approximately 88 trillion times more likely if it originated from the Appellant and two unknown individuals than if it originated from three unknown individuals. (6 R.R. at 74). DNA swabs taken from the slide groove of the firearm were consistent with a mixture of DNA from three individuals, excluding the Complainant as a contributor to the mixture. (6 R.R. at 74-75). The DNA mixture was approximately 8 trillion times more likely if it originated from the Appellant and two unknown individuals than if it originated from three unknown individuals. (6 R.R. at 75). DNA swabs taken from the trigger of the firearm were consistent with a mixture of DNA from three individuals, with the analysis showing a moderate support for the proposition that the Complainant was excluded as a contributor. (6 R.R. at 54). The DNA mixture was approximately 223 million more times more likely if it originated from the Appellant and two unknown individuals than if it originated from three unknown individuals. (6 R.R. at 75).

and Appellant's answer was no every time. (4 R.R. at 87-88; 5 R.R. at 19). Sgt. McDonald also spoke with the Appellant's mother. (5 R.R. at 11).[3] He testified that she did not really give them very much, as all she kept saying was what she reported to dispatch, that her son shot his friend. (5 R.R. at 11). Both told him that they were fear for their life. (4 R.R. at 90). Based on what he had at the time, Sgt. McDonald believed Appellant and his mother were the victims. (4 R.R. at 88). Appellant was then taken back to Melody Park where the shooting occurred, a location down the street (about two to three minutes) from where they were at. (4 R.R. at 89-90).

When he arrived at the scene of the shooting, Sgt. McDonald spoke with Mr. Carter and Mr. Bogany. (4 R.R. at 94). Mr. Bogany gave Sgt. McDonald a cell phone found in the middle of the roadway. (4 R.R. at 94). According to Sgt. McDonald, the eye witness testimony took the investigation in a different direction, as it contradicted what the Appellant said. (4 R.R. at 94-95). Appellant then became a suspect. (5 R.R. at 10). Sgt. McDonald confronted Appellant with the eyewitness statements and his

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[3] Deputy Alicia Anderson with the Harris County Precinct 3 Constable's Office backed up Sgt. McDonald. (5 R.R. at 26). When she arrived, she met the Appellant's mother whom she described as frantic. (5 R.R. at 27-28). Appellant's mother was waiving her hands a lot like she was frightened or scared. (5 R.R. at 28). She did say that she thought her son had shot someone. (5 R.R. at 28). Appellant eventually arrived and agreed to go with Deputy Anderson to where the shooting happened. (5 R.R. at 32).

demeanor changed as he shut down. (5 R.R. at 15). Further investigation revealed a shell casing where the eyewitnesses said Appellant was standing. (4 R.R. at 96, 106). However, the yellow bag was not located. (4 R.R. at 107). Complainant's body was discovered hours after Sgt. McDonald arrived at the Appellant's residence. (5 R.R. at 16-17). Complainant was discovered in the backyard of a residence with the aid of air support. (4 R.R. at 112). Sgt. McDonald did not see a weapon on the Complainant. (5 R.R. at 17).

Deputy Scott McWhirter, a crime scene examiner with the Harris County Sherriff's office, examined the scene off of Melody Park. (5 R.R. at 47, 49). When he arrived, he was given details of officers finding a male deceased in a back yard of a residence and that a person was detained in one of the patrol vehicles. (5 R.R. at 50). A forensic processing of the Appellant was done on scene. (5 R.R. at 51). He described Appellant's hair as long and curly. (5 R.R. at 53). Deputy McWhirter did not notice any injuries to Appellant's hands and performed a gunshot residue kit on him. (5 R.R. at 54-55).[4] In addition, he collected a DNA specimen from the

[4] Jason Schroeder analyzed the gunshot residue kit collected from the Appellant. (6 R.R. at 107). For the sample labeled right hand, had one particle confirmed as having a composition characteristic of GSR which could have resulted from activities such as firing a weapon, being in close proximity to a firearm during discharge, or handling a firearm, a fired cartridge, or some other surface bearing GSR. (6 R.R. at 106-107). For the

Appellant. (5 R.R. at 60-64). Deputy McWhirter met with the patrol deputies and the homicide investigators on scene to do a scene walkthrough after processing the Appellant. (5 R.R. at 64). An ammunition cartridge case was found on the street. (5 R.R. at 72-73). Deputy McWhitter did not see a weapon near the Complainant's body. (5 R.R. at 74). After processing the initial scene, he processed the Appellant's residence. (5 R.R. at 90). On a countertop in the kitchen was a piece of paper with a phone number on it. (5 R.R. at 103). The phone number was for the non-emergency dispatch for the Precinct 3 Constable's Office. (5 R.R. at 104). A white shirt with several red stains was also located in the residence. (5 R.R. at 104, 116).[5]

Deputy David Crain with the Harris County Sheriff's became the primary investigator of this case. (7 R.R. at 17-19). Deputy Crain conducted an interview of the Appellant that was recorded. (7 R.R. at 20; 11 R.R. State's Ex. 25). Appellant provided his cell phone number and his father's

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samples labeled left hand and control, no particles confirmed as having a composition characteristic with GSR were detected. (6 R.R. at 107).

[5] Deputy Mario Quintanilla testified that Appellant told him that he had been wearing a white shirt at the time of the shooting, and that he had left it at his house when he changed because it was bloody. (7 R.R. at 12). Appellant did not say how the shirt became bloody. (7 R.R. at 12). Mr. Schroeder testified that Appellant's white shirt had two particles confirmed as having composition characteristic of GSR which could have resulted from activities such as firing a weapon, being in close proximity to a firearm during discharge, or handling a firearm, a fired cartridge, or some other surface bearing GSR. (6 R.R. at 109).

phone number during the interview. (7 R.R. at 23). The number associated with the Appellant's father's number reported this particular incident. (7 R.R. at 24). Eventually, the interview turned towards the incident and Deputy Crain read Appellant his statutory warnings with the Appellant invoking his right to an attorney immediately after the warnings were read. (11 R.R. State's Ex. 25 at 3:38-4:36).

Deputy Crain also successfully extracted data from the Complainant's phone. (7 R.R. at 27). According to the extraction report, Appellant's phone number made a call to the Complainant's phone at 10:29 a.m. on June 24, 2022. (7 R.R. at 31). The call lasted one minute and 19 seconds, and it was a FaceTime video call. (7 R.R. at 31). An outgoing phone call was made by the Complainant's phone to the Appellant's on that same date at 10:17:41 a.m. (7 R.R. at 32). That FaceTime call lasted one minute and 36 seconds. (7 R.R. at 32). In addition, there was an unanswered outgoing phone call to Appellant's phone to the Complainant the day prior. (7 R.R. at 33). Finally, there was another FaceTime call two days prior to the incident from the Complainant to the Appellant. (7 R.R. at 33-34). Deputy Crain also testified that there were numerous text messages between the Complainant and the Appellant where they were arranging a sale of marijuana. (7 R.R. at 35-36).

Complainant sent Appellant a video of money and Appellant replied with "money good." (7 R.R. at 38). Eventually, Appellant sent the Complainant a text with a picture of a yellow bag. (7 R.R. at 41).

Dr. Darshan Phatak performed the autopsy of the Complainant on June 25, 2022. (6 R.R. at 9-10). A bullet was located on the right side of the Complainant's body that was subsequently removed. (6 R.R. at 17, 22). The entrance wound was on the left axillary region of the chest, or the left armpit area. (6 R.R. at 18). There was no exit wound. (6 R.R. at 18). Regarding the trajectory of the bullet, Dr. Phatak testified:

> So this bullet went through the left fourth rib, the left pleural cavity; that's the side of the chest where the left lung sits. It went through the left lung itself and then the pericardial sack. That's a membrane that surrounds the heart. And then it went through the heart itself, and then the right fourth sternocostal junction. That's where the right forth rib meets the breastbone.

(6 R.R. at 17)

The injuries to the Complainant were consistent with him walking or running down a street and being shot from where he was walking away. (6 R.R. at 19). The injuries were also consistent with the Complainant turning and running or someone with their hands up. (6 R.R. at 20). The cause of death was a gunshot wound of the torso. (6 R.R. at 21). Dr. Phatlak could not determine exactly how far the end of the gun was when it was fired at

the Complainant, as there was no soot, strippling or muzzle abrasion, and there was no clothing present. (6 R.R. at 25).

B. Defense Evidence

Appellant was 17-years old at the time of the alleged offense. (8 R.R. at 12). He testified that he had known the Complainant for two years. (8 R.R. at 13). In June 2022, Complainant was looking to buy weed from the Appellant. (8 R.R. at 15-16). The transaction was going to be on June 24, as they had tried to meet up before without success. (8 R.R. at 16). Appellant's mother was with him on June 24. (8 R.R. at 17). She wanted to be in the car, but Appellant did not know why. (8 R.R. at 17). She supplied Appellant with the weed. (8 R.R. at 23). However, Appellant testified that she asked him to grab her gun from the house. (8 R.R. at 18). This was around 10:00 a.m. (8 R.R. at 18). Appellant did not remember what time it was when the Complainant arrived at their car. (8 R.R. at 24-25). Complainant got in and a conversation ensued between the three of them while the Appellant's mother was driving. (8 R.R. at 25-26). Right before the Complainant got out of the car, he asked for the weed, and eventually grabbed it. (8 R.R. at 27). By grabbing the weed, Appellant testified that Complainant was basically asking for it, and then he said "Now give me everything else." (8 R.R. at

28). Appellant did not know what that meant as he was scared and disoriented. (8 R.R. at 28). Complainant did not necessarily threaten him. (8 R.R. at 52). Appellant did not see any money from the Complainant. (8 R.R. at 58-59). Complainant told Appellant's mother to stop the car and she did. (8 R.R. at 28). Complainant then jumped out of the car from the back seat and Appellant did so as well from the front seat. (8 R.R. at 29). Appellant then reached into the glove box and grabbed the gun while the Complainant was in front of the car about five feet away. (8 R.R. at 29-30). Appellant pointed the gun in the area of the Complainant. (8 R.R. at 30). He did not know what to do and testified he was scared did not know what was going on. (8 R.R. at 30-31). Appellant was looking at the Complainant and the Complainant started to turn around a little bit while he was running. (8 R.R. at 31). Appellant saw the Complainant move his arm like he was reaching for something, and Appellant then fired the gun. (8 R.R. at 31). Appellant could not see if the Complainant had a weapon, but thought he had seen him with one. (8 R.R. at 52-53).[6] From what Appellant saw, the Complainant had the bag and that was it, as he did not see anything else while the Complainant was running. (8 R.R. at 60). Appellant only fired

[6] Appellant did not tell Deputy McDonald that he saw the Complainant with a weapon. (8 R.R. at 54).

once. (8 R.R. at 31). Complainant fell down initially, but got back up and started running again. (8 R.R. at 32). After putting the gun back in the car, Appellant ran in the middle of the street and grabbed the bag of marijuana after being told to do so by his mother. (8 R.R. at 32, 64). Appellant then got back into the car and his mother started driving. (8 R.R. at 33). Appellant tried to get his mother to stop the car, as he wanted to see if the Complainant was hurt. (8 R.R. at 33-34). They then drove home and Appellant told his father what happened. (8 R.R. at 35-36). Appellant changed shirts at his residence. (8 R.R. at 70). Eventually, he and his father got back into the car to look for a constable. (8 R.R. at 37). They returned home after his mother called saying the police were at their house. (8 R.R. at 38-39). When Appellant arrived home, he got out of the car and told the police what his mother told him to say. (8 R.R. at 39-40). He was told not to mention the bag. (8 R.R. at 49).

SUMMARY OF THE ARGUMENT

Appellant contends that trial counsel rendered ineffective assistance of counsel by failing to object to the portion of his recorded statement with Deputy Crain where he invoked his right to counsel and remain silent, and his ability to terminate the interview after receiving his statutory warnings,

and when trial counsel failed to object to the State's question highlighting this during Deputy Crain's direct examination. Precedents from the Court of Criminal Appeals and this Court have determined that this type of substantive evidence is inadmissible and constitutes a due process violation. Given that the record demonstrates that trial counsel's strategy was entirely dependent on the Appellant and his credibility, this is not a case where this Court should rely on a silent record to dispose of his ineffective assistance of counsel claim. Trial counsel allowed Appellant's credibility to be tarnished before he even testified in his own defense where he was the sole defense witness to offer an exculpatory story at trial.

ARGUMENT

Whether trial counsel rendered ineffective assistance of counsel by failing to object to the portion of Appellant's recorded statement with Deputy Crain where he invoked his right to counsel after receiving his statutory warnings and when trial counsel failed to object to the State's question highlighting Appellant's invocation during Deputy Crain's direct examination?

A. Applicable Law and Standard of Review

Under *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffective assistance of counsel claim is subjected to a two-step analysis whereby the appellant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors,

there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687. An Appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). When the record is silent, a reviewing court may not speculate to find trial counsel ineffective. *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994), citing *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Thompson*, 9 S.W.3d at 813. "An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluation the effectiveness of counsel." *Id.*, citing *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

"In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test – that trial counsel's representation fell below an objective standard of reasonableness-because the record on direct appeal is undeveloped." *Lopez v. State*, 565 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd), citing *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). "When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id.*, quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). "That is, the record must show that counsel's performance fell below an objective standard of reasonableness as a matter of law and that no reasonable trial strategy could justify his deficient performance." *Dryer v. State*, 674 S.W.3d 635, 647 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd), citing *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Courts "generally will assume that counsel had a reasonable strategic motive if any reasonable trial strategy can be imagined." *Id.*, citing *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). "[I]t is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance."

Thompson, 9 S.W.3d at 813, citing *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985). "A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole." *Dryer*, 674 S.W.3d at 647, citing *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

"In *Miranda v. Arizona*, the United States Supreme Court held that, pursuant to the Fifth Amendment, an individual subjected to custodial interrogation must be informed that 'he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" *Friend v. State*, 473 S.W.3d 470, 477 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd), quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "Under the Fifth Amendment, a right to counsel exists as a prophylactic protection of the right to remain silent; in other words, it exists to counteract the inherent pressures of custodial interrogation." *Garcia v. State*, 191 S.W.3d 870, 877 (Tex. App.—Houston [14th Dist.] 2006, no pet.), citing U.S. CONST. AMEND. V and *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). "An individual may not be penalized for exercising his Fifth Amendment rights when he is under police investigation; evidence of his invocation of his right

to counsel is inadmissible as evidence of guilt." *Kalisz v. State*, 32 S.W.3d 718, 721 (Tex. App.—Houston [14th Dist.] 2000, pet ref'd), citing *Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991) and *Mathieu v. State*, 992 S.W.2d 725, 729 (Tex. App.—Houston [1st Dist.] 1999, no pet.). "Evidence of an accused invoking his right to counsel 'may indeed be construed adversely to a defendant and may improperly be considered as an inference of guilt.'" *Howard v. State*, 482 S.W.3d 249, 258-259 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd), citing *Hardie*, 807 S.W.2d at 322 and *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "The guaranty of fundamental fairness in the Due Process Clause forbids the government from making the *Miranda* promises and breaking them by using a suspect's exercise of a right as evidence against him" *Id.*, quoting *Griffith v. State*, 55 S.W.3d 598, 605 (Tex. Crim. App. 2001). "Thus, if a defendant invokes his right to remain silent after receiving his post-arrest *Miranda* warnings, the State cannot use that invocation as evidence of guilt at trial." *Id.*, citing *Friend*, 473 S.W.3d at 477-478 ("Use of a defendant's silence for either substantive or impeachment value is constitutionally prohibited; it is fundamentally unfair to simultaneously afford a suspect a constitutional right to silence following

his receipt of his *Miranda* warnings and then allow the implications of that silence to be used against him.").

B. Analysis

1. Trial Counsel's performance was deficient

"Counsel's performance is deficient when his representation falls below an objective standard of reasonableness." *Cueva v. State*, 339 S.W.3d 839, 857-858 (Tex. App.—Corpus Christi-Edinburg 2011, pet. ref'd), citing *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005) and *Strickland*, 466 U.S. at 687-688. "In determining whether there is a deficiency, we afford great deference to trial counsel's ability, indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and that counsel's actions were the result of sound and reasonable trial strategy." *Id*. at 858, citing *Strickland*, 466 U.S. at 689 and *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi-Edinburg 2006, no pet.). "[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct

was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008).

Appellant's statement was admitted into evidence during the guilt-innocence phase without any objection by trial counsel. (7 R.R. at 22) (defense counsel noting "We've had an opportunity to inspect, Judge, and would like to let the prosecutor go ahead and put on the video."). Appellant's statement lasted about 5 minutes and was played for the jury while the State questioned Deputy Crain. (7 R.R. at 22-24; 11 R.R. State's Ex. 25). The statement began with Deputy Crain introducing himself and another officer, and noting the date and time. (11 R.R. State's Ex. 25 at 0:20-1:01). Appellant also answered Deputy Crain's questions regarding his address, his phone number, and his parents' phone numbers. (11 R.R. State's Ex. 25 at 1:11-3:11). Eventually, the interview moved towards the incident and Deputy Crain read Appellant his statutory warnings:

> [Deputy Crain]: You have the right to remain silent and not make any statement at all. Any statement you make may be used against you at trial. Do you understand that?
>
> [Appellant]: Yes, sir.
>
> [Deputy Crain]: Any statement you make may be used as evidence against you in court. Do you understand that?
>
> [Appellant]: Yes, sir.

> [Deputy Crain]: You have the right to have a lawyer present to advise you prior to and during any questions. Do you understand that?
>
> [Appellant]: Yes, sir.
>
> [Deputy Crain]: You have the right, uh, I'm sorry, if you are unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questions. Do you understand that?
>
> [Appellant]: Yes, sir.
>
> [Deputy Crain]: And you have the right to terminate this interview at any time. Do you understand that?
>
> [Appellant]: Yes, sir.
>
> [Deputy Crain]: Okay. Knowing what I read to you, do you want to tell me what happened out there today?
>
> [Appellant]: I would like to wait until (inaudible) a lawyer comes.[7]
>
> [Deputy Crain]: You want a lawyer? Okay. That's fine.

(11 R.R. State's Ex. 25 at 3:38-4:36)

In addition to the entire statement being played in front of the jury, the State emphasized that Appellant invoked his right to a lawyer during their questioning of Deputy Crain on direct examination:

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[7] Undersigned counsel had trouble making out exactly what Appellant said from the audio recording and reproduces his good faith best guess as to what exactly was said. However, the audio is clear that Appellant requested a lawyer and Deputy Crain's subsequent statement confirms this.

> [State]: At that point, Deputy Crain, when he requested his lawyer, did the interview kind of terminate?
>
> [Deputy Crain]: It did.

(7 R.R. at 24)

Again, Appellant's trial counsel offered no objection to either the question or the response. (7 R.R. at 24). Trial counsel's complete failure to object to latter portion of Appellant's statement where he invoked his right to counsel and ability to terminate the interview, and the State's remark to Deputy Crain highlighting Appellant's invocation was deficient performance. "To argue successfully that trial counsel's failure to object amounted to ineffective assistance, appellant must show, at a minimum, that the trial court would have erred in overruling the particular objection." *Torres v. State*, 609 S.W.3d 595, 597 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd), citing *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) and *Jagaroo v. State*, 180 S.W.2d 793, 800 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Prior precedent clearly demonstrates that the State introducing evidence of Appellant's invocation of his right to counsel and ability to terminate an interview after receiving his *Miranda* rights for a substantive purpose is error. See *e.g. Kalisz*, 32 S.W.3d at 721 ("An individual may not be penalized for exercising his Fifth Amendment rights

when he is under police investigation; evidence of his invocation of his right to counsel is inadmissible as evidence of guilt."). "This kind of due-process violation is prejudicial to a defendant because the introduction of such evidence invites the jury to draw an adverse inference of guilt from the exercise of a constitutional right." *Ex parte Skelton*, 434 S.W.3d 709, 719 (Tex. App.—San Antonio 2014, pet. ref'd), citing *Hardie*, 807 S.W.2d at 322 and *Kalisz*, 32 S.W.3d at 723. "Stated another way, the probable collateral implication of a defendant's invocation of [his] rights is that [he] is guilty." *Id*., citing *Gray v. State*, 986 S.W.2d 814, 815 (Tex. App.—Beaumont 1999, no pet.); *Loy v. State*, 982 S.W.2d 616, 618 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd); and *Cooper v. State*, 961 S.W.2d 222, 227 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). The State admitted and played Appellant's statements that clearly indicated he invoked his right to counsel and ability to terminate the interview with Deputy Crain. The State then highlighted Appellant's invocation during its questioning of Deputy Crain. This was a due-process violation that Appellant's trial counsel failed to object to in the face of clear and binding precedent. The trial court would have had to have sustained an objection if one had been made. This was deficient performance.

Appellant anticipates that the State will likely contend that the record is silent regarding trial counsel's failure to object and urge this Court to uphold the conviction on that basis alone. However, this is not a case where the record is silent regarding Appellant's trial strategy. Trial counsel's strategy of asking to the jury to convict the Appellant of a lesser-included offense of criminally negligent homicide or acquit him of the offense of murder based on self-defense were wholly dependent on Appellant's testimony and was evident through trial counsel's opening and closing statements. In his opening statement, trial counsel highlighted the importance of Appellant's upcoming testimony:

> Ladies and gentlemen, what we believe we will show you is that Tyler Marshall was in a situation where he was manipulated by his mother, and that manipulation caused some action that Tyler did on this particular day.
>
> We are going to bring you Tyler Marshall and give you an opportunity to hear what happened that particular day. I just want you to remember that he was 17.
>
> At this time, Your Honor, we would call Tyler Marshall to the stand, Your Honor.

(8 R.R. at 11)

Similarly, trial counsel highlighted the importance of Appellant's trial testimony during his closing argument. (9 R.R. at 48-49, 50-51, 52, 54, 55-

56) (noting testimony from Appellant regarding his mother telling him to get gun, his testimony that his mother told him to "Get him", and his testimony that he was just trying to scare the Complainant). For example, trial counsel argued:

> A little bit more about a 17-year-old kid. He's 19 now, but he was two months past 17 when this offense occurred. He's by himself. It's him and me. And he got up there -- because I know a lot of you were thinking, well, if he doesn't testify, how we are going to get the information. He stood up there and he testified. He told you what happened. He told you what happened.

(9 R.R. at 55-56)

In addition, this is not a case where the record reveals that trial counsel had a legitimate trial strategy in failing to object to this type of inadmissible evidence. See *Barfield v. State*, 464 S.W.3d 67, 74-75 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd), *cert. denied*, 578 U.S. 1023 (2016) ("Defense counsel here used the repeated invocation of counsel to support two of the defense's main theories: (1) appellant was not in fact intoxicated at the time of her detention, as evidenced by the fact she was able to calmly and coherently request counsel by name on the videotape; and (2) appellant's request for counsel and refusal to perform the sobriety tests at the station demonstrated her distrust of Houston police, as also stated on the videotape."). Here, Appellant's defense entirely rested on his

credibility and testimony and Appellant was the sole basis for trial counsel's arguments in support of Appellant during his opening and closing statements. While Appellant's statements to Officer McDonald were admitted through his body camera, a defense centered on Appellant's credibility would undoubtedly not be served by allowing an invocation of Appellant's rights to be admitted and emphasized by the State when Appellant had previously cooperated with law enforcement. (4 R.R. at 82, 87-88). Given that the record demonstrates that trial counsel's strategy was entirely dependent on the Appellant himself, this is not a case where this Court should rely on a silent record to dispose of his ineffective assistance of counsel claim. Trial counsel allowed Appellant's credibility to be tarnished before he even testified in his own defense where he was the sole defense witness to offer an exculpatory story at trial. "Where a defendant's credibility is central to [his] defensive strategy, it is not sound trial strategy to allow the introduction of inadmissible evidence that directly impairs the defendant's credibility without objection." *Skelton*, 434 S.W.3d at 722, citing *Robertson v. State*, 187 S.W.3d 475, 484 (Tex. Crim. App. 2006); *Ex parte Menchaca*, 854 S.W.2d 128, 132-133 (Tex. Crim. App. 1993); *Garcia v. State*, 308 S.W.3d 62, 68-69 (Tex. App.—San Antonio 2009, no pet.); and

Stone v. State, 17 S.W.3d 348, 353 (Tex. App.—Corpus Christi 2000, pet. ref'd) (further citations omitted). That is the case here. Trial counsel's performance was deficient.

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

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

The record in this case shows that the State introduced and then deliberately emphasized that Appellant invoked his right to counsel and remain silent during his interview. The State caused this error themselves when it introduced Appellant's audio statement. (7 R.R. at 21-22). The State then compounded that error by publishing Appellant's statement, including his invocation of his rights, to the jury. (7 R.R. at 22-24). The State then further compounded that error by emphasizing Appellant's invocation of right to counsel and his right to remain silent during their questioning of

Deputy Crain, who also testified that what was when the interview terminated. (7 R.R. at 24). While the State did not emphasize Appellant's invocation during their closing argument, similar to this Court's decision in *Kalisz*, "the probable collateral implication is that the jury may have adversely or improperly considered evidence of an accused invoking a constitutional right or privilege as an inference of guilt." *Kalisz*, 32 S.W.3d at 724. The evidence of guilt was conflicting, given Appellant's testimony that his mother exerted pressure on him to shoot the Complainant after the Complainant apparently robbed them after the drug transaction concluded and that Appellant testified that he saw the Complainant move his arm like he was reaching for something forced him to shoot the Complainant. (8 R.R. at 31). In addition, Appellant testified that he could not see if the Complainant had a weapon, but thought he had seen him with one. (8 R.R. at 52-53). As stated earlier, Appellant's defense entirely rested on his trial testimony and credibility.

Based upon the totality of the circumstances in this case, trial counsel's failure to object to inadmissible evidence regarding invocation of right to counsel and terminate his interview with Deputy Crain prejudiced

the outcome of the case. As a result, Appellant received ineffective of counsel and should receive a new trial.

PRAYER

Appellant, Tyler Marshall, prays that this Court reverse the trial court's judgment and remand this case back to the trial court for a new trial. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

Alexander Bunin
Chief Public Defender
Harris County Texas

/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24070262
1310 Prairie Street, 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on Jessica Caird of the Harris County District Attorney's Office on November 20, 2024 to the email address on file with the Texas E-filing system.

/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender

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/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender

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Bar No. 24070262
nicholas.mensch@pdo.hctx.net
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	11/20/2024 4:40:52 PM	SENT