No. 01-24-00997-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

JAMES REID SHARPLESS
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1825879
From the 178th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Not Requested

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Statement of the Case

On September 8, 2023, a Harris County grand jury returned an indictment charging James Reid Sharpless with the felony offense of Indecency with a Child alleged to have occurred on or about November 26, 2021. (C.R. at 61). Tex. Penal Code § 21.11. On December 12, 2024, a jury found Appellant guilty of the offense as charged in the indictment. (C.R. at 266). The court assessed a sentence of Life in the Texas Department of Criminal Justice, Correctional Institutions Division. (C.R. at 269; 6 R.R. at 40). The trial court certified Appellant's right to appeal and he timely filed his notice of appeal. (C.R. at 277; 275-276). No motion for new trial was filed.

Statement Regarding Oral Argument

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

Issues Presented

ISSUE ONE: Whether the trial court violated Texas Code of Criminal Procedure Article 38.05 during voir dire by stating the accused is "presumed to be innocent *until* guilt is established…?"

ISSUE TWO: Whether the trial court's comments during voir dire that the accused is "presumed to be innocent *until* guilt is established…" deprived Appellant of due process and an impartial judge, and vitiated Appellant's presumption of innocence?

ISSUE THREE: Whether the trial court committed reversible error by allowing S.M. to testify as a witness regarding hearsay statements of the child complainant?

ISSUE FOUR: The trial court erred in assessing a $100 fine as it was not orally pronounced as required by Tex. Code Crim. Proc. art. 42.03 § 1(A).

Statement of Facts

Guilt/Innocence Proceedings

S.M.- complainant A.S.'s mother and designated hearsay statement witness

Appellant is the complainant's grandfather and the former father-in-law of S.M.—the complainant's mother. (3 R.R. at 69; State Ex. 13-Demonstrative of Family Tree). S.M., was married to Appellant's now-deceased son. (3 R.R. at 69). After establishing the family tree, S.M. recalled Thanksgiving Day of 2021. (3 R.R. at 70; State Ex. 13). Her family was celebrating the holiday at Appellant's home. (3 R.R. at 71; State Ex. 3). After the festivities, A.S. had a sleepover with her cousin, A.G., on Thanksgiving night. (3 R.R. at 73). The next night (Friday) A.S. called

S.M. "begging me to come pick her up." (3 R.R. at 74). Since it was late, S.M. went to pick up her daughter early the next morning at A.G.'s house. (3 R.R. at 74-75).

It was S.M.'s testimony that the girls were "close with each other" and kept repeatedly asking if A.G. could then come spend the night with them at their home. (3 R.R. at 75-76). This was not a normal occurrence, and A.G. did not go with them. (3 R.R. at 76). S.M. stated that as soon as they got in the car to leave, A.S. told her they had gone to their grandparents' house and that Appellant "tickled her private." (3 R.R. at 77). She stated her daughter was "upset and scared." (3 R.R. at 77).

S.M. described what A.S. reported: that when they (A.G. and A.S.) were in the hot tub her grandfather rubbed her "vaginal area." (3 R.R. at 79). A.S. was seven years old at the time. (3 R.R. at 79). After A.S. reported the incident to S.M., S.M. got out of the car and went to speak with A.G.'s mother, L.S. (3 R.R. at 83). It was S.M.'s testimony that L.S. was "shocked" and did not believe her. (3 R.R. at 83). After this disclosure, L.S. called her mother, the girls' grandmother, Francis. (3 R.R. at 83). Over objection, L.S. stated that Francis came over and tried to convince her not to call the police. (3 R.R. at 84). According to S.M., when Francis arrived, they "didn't even have to tell her what happened" because "she already knew." (3 R.R. at 85). She stated Francis told them she already knew and tried to minimize the incident. (3 R.R. at 85). Upon leaving, S.M. called the police. (3 R.R. at 85-86).

Police spoke with S.M. and A.S. once they arrived at home. (3 R.R. at 86). It was S.M.'s testimony that, after the alleged incident, she had sporadic contact with Francis and L.S. and none with Appellant. (3 R.R. at 87). She also stated Francis offered to pay for therapy for A.S. (3 R.R. at 87). Defense counsel objected and was granted a running objection to testimony about this issue. (3 R.R. at 87). On cross-examination, S.M. noted Appellant was not present when Francis offered to pay for her daughter's counseling. (3 R.R. at 90). She stated there was no indication that Francis made the offer at Appellant's behest. (3 R.R. at 90).

According to S.M., A.S. is "still very fun-loving," but has "anger issues" that began after the alleged incident. (3 R.R. at 89). A.S. spent some time in counseling, but S.M. stopped the sessions because she said her daughter did not want to talk to strangers about what happened. (3 R.R. at 89).

Claudia Reyes-Hauser former Children's Assessment Center (CAC) social worker

It was Reyes-Hauser's testimony that the Children's Assessment Center offers a "multi-disciplinary team" that investigates allegations of child abuse and provides access to therapy services. (3 R.R. at 99-100). She discussed the particulars of a "forensic interview" and how interviewers follow a protocol to engage the child in a structured conversation. (3 R.R. at 101).

In a Tex. R. Evid. 702 hearing outside of jury's presence and pursuant to defense counsel's objection to testimony about the "stages of dislosure," the court

asked the prosecution to ask Reyes-Hauser "everything you're going to ask her, including any expert opinions that you might be eliciting from this witness." (3 R.R. at 106-107). It was noted that Reyes-Hauser was designated as an expert witness. (3 R.R. at 107; C.R. at 130). Once the jury returned to the courtroom, Reyes-Hauser described the "stages of disclosure." (3 R.R. at 114). Over a hearsay objection, Reyes-Hauser stated that A.S. was "in active disclosure." (3 R.R. at 118).

The state asked Reyes-Hauser whether she worked for law enforcement or the Harris County District Attorney's Office, and she stated she did not. (3 R.R. at 119). The state followed up by asking Reyes-Hauser, "As a forensic interviewer, are you a neutral third party?" (3 R.R. at 119). "Yes, I am," she replied. (3 R.R. at 119).[1]

[1] The Children's Assessment Center Foundation, "a Texas nonprofit corporation, was established in January 1995 to support Harris County, Texas (the County) in its operation of The Children's Assessment Center (the Center). The Center's mission is to provide a professional, compassionate and coordinated approach to the treatment of sexually abused children and their families and to serve as an advocate for all children in our community." *See* Blazek & Vetterling | Certified Public Accountants, *The Children's Assessment Center Foundation Financial Statements and Independent Auditors' Report for the years ended September 30, 2024, and 2023* (Jan. 15, 2025) at https://cachouston.org/wp-content/uploads/2025/01/Childrens-Assessment-Center-2024-FS.pdf at *9. (Hereinafter "Report"). The total assets listed in the 2024 Report add up to $46.5 million. *See* Report at *3. A sizeable portion of the Center's funding comes from the U.S. Department of Justice ($2.4 million grant in 2024) and from the Texas Office of the Attorney General ($2.3 million grant in 2024)—both law enforcement agencies. *See* Report at *14; *Our Work*, JUSTICE.GOV, https://www.justice.gov/our-work; *About the Attorney General*, TEXASATTORNEYGENERAL.GOV, https://www.texasattorneygeneral.gov/about-office. Moreover, the Center's website boasts of "partnerships" with "**60 agencies**"—the vast majority of which are law enforcement entities—including: the Federal Bureau of Investigation, Homeland Security, the Harris County Sheriff's Office and Constables, 24 area police departments, school district police departments, and the Harris County District Attorney's Office. *About the CAC*, CACHOUSTON.ORG, https://cachouston.org/about-the-cac/partnerships/, (Emphasis in original).

Dr. Lien Le—Pediatrician

Dr. Le explained the process of being evaluated at the CAC and the number of different "outpatient services" provided. (3 R.R. at 123-125). As it had asked Reyes-Hauser, the prosecution asked Le, "So do you work for law enforcement" or "for the District Attorney's Office?" (3 R.R. at 126). Le replied, "No, I work for Texas Children's Hospital and Baylor College of Medicine." (3 R.R. at 126).

Over defense counsel's notice and hearsay objections, State Exhibit 9—CAC medical records of A.S—were entered into evidence. (3 R.R. at 131-133). According to State Ex. 9, the CAC medical examination was performed on May 15, 2023—a year and a half after the alleged incident. Le read from the report:

> Mom states that the paternal grandfather is a registered sex offender, and that [A.S.]'s aunt -- this is Dad's sister -- left [A.S.] and her cousin, [A.G.], home alone with the paternal grandfather when [A.S.] was 6 or 7 years old. [A.S.] disclosed inappropriate touching to Mom the next day. And Mom reported to the sheriff immediately. And Mom reports since that event, [A.S.] had behavioral issues and anger problems. Mom reports that [A.S] has had passive S.I. That's suicidal ideation in the past, but nothing recently.

(3 R.R. at 137).

Le continued reading details from State Exhibit 9. At first, A.S. did not know why she was at the CAC. Next, Le asked her, "Has anyone ever touched you in a way you don't like or want?" (3 R.R. at 138). A.S. responded, "Yeah, but it was a long time ago." (3 R.R. at 138; State Ex. 9). A.S. told Dr. Le that it was her "dad's dad" who touched her. (3 R.R. at 139; State Ex. 9). When asked where, A.S. stated,

" 'Right here, my private part.' And she pointed to her GU area, and that stands for genitourinary, so vaginal area." (3 R.R. at 139; State Ex. 9). A.S. reported that Appellant touched her with his hand on one occasion over the clothes. (3 R.R. at 139-140; State Ex. 9). She also reported that no one else had ever touched her inappropriately. (3 R.R. at 141; State Ex. 8, 9). At the interview, A.S. believed that Appellant also had inappropriate physical contact with her cousin, [A.G.] (3 R.R. at 140; State Ex. 9).

Bench Conference and *In Camera* Hearing with Dr. Le

Defense counsel alerted the court to an apparent inconsistency revealed in Le's testimony regarding whether A.S. had been touched inappropriately prior to this allegation. (3 R.R. at 142-143). State Exhibit 9 indicates that A.S. had not experienced such an incident, but defense counsel noted that she had, indeed, "previously made an allegation about being abused by another family member." (3 R.R. at 142). Appellant requested a Texas Rule of Evidence 412 hearing to examine evidence of the complainant's prior sexual history and to rebut or explain the medical evidence offered by the state. (3 R.R. at 143). The state argued the evidence Appellant sought to introduce was "impeachment, not rebuttal, and that rule is not specifically allowed for." (3 R.R. at 144).

After the 412 hearing, Dr. Le stated that everything she learned about these allegations came from A.S. and her mother. (3 R.R. at 146-147). During Dr. Le's

examination of A.S., A.S. reported that she had not been touched inappropriately before this allegation. (3 R.R. at 147; State Ex. 9). Defense counsel asked, "Are you aware if [A.S.] has ever claimed that she was touched inappropriately by someone besides my client? (3 R.R. at 147). "She did not talk about that, no," Dr. Le replied. (3 R.R. at 147).

A.G.—A.S.'s 10-year-old cousin and extraneous complainant

A.G. stated that she had a good relationship with Appellant "throughout [her] life," but that he touched her inappropriately when they swam in Appellant's backyard pool. (3 R.R. at 151-152). She stated she was six years old when it happened. (3 R.R. at 152). She further testified that Appellant also had inappropriate physical contact with A.S., but she was "scared to say anything" because "I still loved him at that time, and I thought I would ruin my relationship with him." (3 R.R. at 152). She did not remember what time of year it was when the inappropriate physical contact occurred. (3 R.R. at 153, 154).

On cross-examination, A.G. testified that she and A.S. did get into the hot tub with Appellant, and it was the kind of hot tub with bubbles. (3 R.R. at 154). She was not able to see under the water "most of the time," but claimed she witnessed an incident of Appellant touching A.S. under the water. (3 R.R. at 154). She could not recall what happened before or after the alleged incident or what time of year it was when she witnessed it. (3 R.R. at 154-155). When asked who was the first

person she told about this, A.G. stated, "Hmm, I think I told my grandma." (3 R.R. at 155). She did not know the first adult to whom A.S. made these allegations. (3 R.R. at 155).

A.S.—the complainant

A.S. was ten years old at the time of her testimony. (3 R.R. at 158). She recalled an incident when she was in a hot tub with A.G. and Appellant. (3 R.R. at 160). When asked by the prosecution which private area Appellant touched, A.S. stated, "The one I go pee with." (3 R.R. at 160). She stated A.G. told her Appellant had also touched her while they were in the hot tub. (3 R.R. at 161). According to A.S., her grandmother was the first person to whom she reported the incident. (3 R.R. at 162).

On cross-examination, A.S. agreed with defense counsel that her testimony was that her grandmother was the "first person [she] told about this." (3 R.R. at 163). Counsel continued:

> Defense Counsel: And did you tell her the details about what happened?
>
> A.S.: Most of them.
>
> Defense Counsel: The same details that you told your mom?
>
> A.S.: Yes, sir.

(3 R.R. at 163).

Hearing about prior inconsistent statement

A bench conference was had regarding defense counsel's desire for a Texas Rule of Evidence 412 hearing "to discuss the same facts that we discussed when Dr. Le was testifying for the purposes of showing prior inconsistent statement." (3 R.R. at 164). All parties were excused from the hearing except for the judge, the witness(es), the attorneys and the court reporter. (4 R.R. at 4).[2]

The jury returned and questioning began about the issue of A.S.'s prior experience with CPS. (3 R.R. at 165). A.S. agreed that her family had experienced involvement with CPS when she was five years old. (3 R.R. at 165). The involvement began after A.S. told her sister that someone (not Appellant) had touched her inappropriately on her genitourinary area. (3 R.R. at 166).

A.S. was "pretty sure" that, after the incident that initiated this investigation, she spoke with a doctor. (3 R.R. at 166). She agreed that the doctor asked if anyone had ever touched her inappropriately, but did not agree that she had answered "no." (3 R.R. at 166). Defense counsel continued:

> Q: If you did say to the doctor, no, no one else has touched me inappropriately, that would be false, right?
>
> A: Yes, sir.

[2] Volume 4 of the Reporter's Record was sealed. A Joint Motion to Permit Appellate Attorneys to Review Sealed Sections of the Appellate Record was granted and made a part of the record. (Supp. C.R. at 9-11). The testimony from Volume 4 is not included in the Statement of Facts.

(3 R.R. at 167).

Regarding the case at bar, A.S. agreed with defense counsel that during the incident in the hot tub, she, A.G. and Appellant remained clothed in their swimsuits. (3 R.R. at 167). When asked whether she knew about "what kind of parts boys have for their genitals," A.S. answered affirmatively. (3 R.R. at 168).

Though defense counsel used simplistic language, A.S. appeared to be confused by his question about whether she had seen Appellant experiencing an erection during the incident. (3 R.R. at 168-169).

Francis Sharpless[3]

Francis Sharpless is Appellant's wife. (3 R.R. at 170). She stated that she and Appellant had lived at their home where the incident occurred for fifty years. (3 R.R. at 177). She remembered a time when an incident occurred with A.S. and A.G. in the pool. (3 R.R. at 173). On the evening of the incident, she was inside with her other daughter, "who was in hospice care" while the children were "roughhousing in the pool like they always did." (3 R.R. at 173).

At some point there was a commotion outside, someone yelled "stop," and her daughter asked, "Did you hear that?" (3 R.R. at 173). Francis went outside and told the children to get out of the pool. (3 R.R. at 174). She stated she did not recall

[3] Ms. Sharpless had been subpoenaed previously, but did not appear in the trial court until after the issuance of a Writ of Attachment. (C.R. at 197-201; 2 R.R. at 10).

whether they told her anything about what may have happened. (3 R.R. at 174). It was her testimony that she did speak with Appellant about what happened in the pool, but insisted it was "a conversation about them acting up and horsing around." (3 R.R. at 174). She remembered taking the children to another family member's house after the incident. (3 R.R. at 175). When asked whether there was a "disclosure of sexual abuse," Francis stated: "They told me they were touched." (3 R.R. at 175). It was her testimony that the children said it was Appellant who touched them. (3 R.R. at 175).

The state asked Francis, "Do you remember your husband telling you that he touched [A.S.] on her vagina?" (3 R.R. at 177). Francis replied, "I'm not sure. I really don't know. I guess he did, but I'm not – I know – I don't know." (3 R.R. at 177). Defense counsel asked no questions of her. (3 R.R. at 177).

S.G.—Complainant from Appellant's prior indecency deferred adjudication

S.G. is one of Appellant's granddaughters and cousin to A.G. and A.S. (3 R.R. at 180, 181). Before S.G. began her testimony, the trial court granted defense counsel's running objection to it. (3 R.R. at 178). It was her testimony that she was first touched inappropriately by Appellant on a family camping trip when she was six years old. (3 R.R. at 182). She stated it happened in the shower. (3 R.R. at 182). She described an incident in Appellant's back yard pool and another that occurred in Appellant's bedroom. (3 R.R. at 183, 184). After entering a certified copy of the

Order of Deferred Adjudication, the state then noted Appellant had pleaded guilty to Indecency With a Child and been placed on probation in 2011 for an offense committed against S.G. (3 R.R. at 184-185; State Ex. 11). Defense counsel had no questions of S.G. (3 R.R. at 185).

Danielle Lefevre-Investigator

At the time of her testimony, Lefevre was a detective in the Harris County Sheriff's Office Child Abuse Unit. (3 R.R. at 186). During the time that this case was being investigated, however, Lefevre worked for the Harris County Constable's Office, Precinct 5. (3 R.R. at 187, 190). After LeFevre's brief phone call with Appellant, he voluntarily went to the Children's Assessment Center to meet with investigators. (3 R.R. at 192-193).

It was Lefevre's testimony that during the interview, Appellant made statements about these allegations. (3 R.R. at 195). She agreed with the prosecution that he spoke about a time that he touched A.S. with his hand while in the hot tub with his granddaughters. (3 R.R. at 195). The state published State Exhibit 10, the redacted recording of Lefevre's conversation with Appellant. (3 R.R. at 197). Lefevre testified that Appellant freely left the building when their interview was concluded. (3 R.R. at 197).

After a hearing, Appellant was allowed to play the unpublished portions of the statement for the jury's consideration. (5 R.R. at 10-11). On cross-examination,

Lefevre acknowledged she had testified that "yes," during the interview Appellant admitted to his wife that he had committed the alleged offense. (5 R.R. at 51). However, defense counsel inquired further:

> Q. And you understand that the elements of the offense are that Jim Sharpless intentionally and knowingly touched the vagina of [A.S.] with the intent to arouse and gratify himself?
>
> A. Yes.
>
> Q. But he actually did not admit to touching the vagina of [A.S.], did he?
>
> A. Not [A.S.]

(5 R.R. at 51).

Defense counsel published Defense Exhibit 1—an unredacted audio recording of Lefevre's interview with Appellant. (5 R.R. at 51). Lefevre indicated that, during the interview, Appellant admitted to and commented on various things, including: accepting responsibility for committing a prior offense, placing blame only on himself, emphasizing that he was the adult in the situation and accepting that it was his fault. (5 R.R. at 64-65). Lefevre acknowledged that Appellant admitted to details of his previous deferred adjudication offense, to touching A.G. inappropriately, that he had agreed to touch A.S. inappropriately, and that he had spoken with CPS investigators. (5 R.R. at 65-68). Further, Lefevre acknowledged Appellant apologized for touching A.G. inappropriately after A.G. reported the incident to his wife. (5 R.R. at 67). She acknowledged that Appellant confessed to having gone

through a sex offender treatment program and identified the swimming pool as a trigger to offend because it provides a hiding place. (5 R.R. at 67). Appellant admitted to going back to sex offender therapy again after this most recent incident, and to being a narcissist who engaged in the process of grooming. (5 R.R. at 68). Lefevre agreed with defense counsel that in the recorded interview, Appellant said both [A.S.] and [A.G.] told his wife that Appellant "had been touching [them]." (5 R.R. at 72). After having admitted to numerous bad acts, Appellant told Lefevre that he had not touched A.S.' genitourinary area because at the time of the incident, "she recoiled backwards." (5 R.R. at 68; Defense Ex. 1 at minute 49:32).

Motion for Directed Verdict

At the conclusion of Lefevre's testimony, the state rested. (5 R.R. at 73). Defense counsel moved for a directed verdict and the motion was denied. (5 R.R. at 74-75).

Closing arguments

Regarding the element of intent to arouse one's sexual desire, the state argued it had proven it based on the location of the alleged touching: "[W]hat other reason would he have to touch her vagina other than his own sexual gratification? That act alone proves that element." (6 R.R. at 9). Additionally, the state argued Appellant's statement about the location of the incident revealed his conscious objective or intent to gratify his sexual desire because "[h]e knew no one could see him there." (6 R.R.

at 9). Defense counsel argued that what A.G. witnessed was: "A conversation about agreeing to tickle [A.S.] there, an attempt to tickle her there and her recoiling." (6 R.R. at 14). He argued that A.G. could not actually see the alleged act because the bubbles obscured her view. (6 R.R. at 14). Defense counsel also argued that Appellant admitted he tried to commit the bad act of which he was accused, but did not complete it. (6 R.R. at 15). The jury found Appellant guilty of indecency with a child as charged. (6 R.R. at 28; C.R. at 266).

Punishment

The State re-offered all guilt/innocence evidence at punishment and called Michael Wilson, latent print examiner. (6 R.R. at 34-35). Wilson established that the fingerprints in State Ex. 14—Appellant's fingerprints—match the prints on State Ex. 15 and State Ex. 16 (Order for Deferred Adjudication and AFIS "ten print" card; 6 R.R. at 37).

Having been previously "convicted" of indecency with a child according to Texas Penal Code §12.42(g)(1) pursuant to a guilty plea and Order for Deferred Adjudication (State Ex. 15), the trial court sentenced Appellant to a term of life in the Texas Department of Criminal Justice Institutional Division. (6 R.R. at 41).

Summary of the Argument

During voir dire, the trial court misstated the presumption of innocence: "The defendant is presumed to be innocent until guilt is established by legal evidence

received before you in the trial of this case beyond a reasonable doubt." When Appellant objected, the trial court repeated the error in such a way as to communicate to the jury panel that it believed that a finding of Appellant's guilt was inevitable. As a result, Appellant contends that the trial court's comments during voir dire violated Article 38.05 of the Texas Code of Criminal Procedure, deprived Appellant of due process and a fair trial, and vitiated Appellant's presumption of innocence. Upon reviewing the record, it cannot be said that the trial court's improper comments did not cause Appellant to suffer any harm.

Additionally, the trial court erred in designating the complainant's mother as the Texas Code of Criminal Procedure art. 38.072 hearsay witness. All witness testimony—including that of the designated hearsay witness herself—indicated that the child's grandmother was the first person to whom the complainant articulated elements of the alleged offense. Further, the error was not harmless because of the difference between the testimony of the complainant and the designated hearsay witness. This Court should reverse Appellant's conviction and remand for a new trial. Alternatively, if the judgment is affirmed, it should be modified to reflect the oral pronouncement of the trial court that did not include a fine assessment.

Argument

Facts applicable to Issues One and Two

Visiting Judge Christi Kennedy presided over the proceedings. During her voir dire, Judge Kennedy used the incorrect wording regarding the presumption of innocence: "The defendant is presumed to be innocent *until* guilt is established by legal evidence received before you in the trial of this case beyond a reasonable doubt." (2 R.R. at 28) (Emphasis added). Defense counsel objected: "to the use of the word 'until' because it presumes that my client's guilt would be established. I would say that 'unless' would be the more appropriate word." (2 R.R. at 28). The court responded by instructing the jury: "I think they are both used. The Court also instructs the jury that it would be unless or until guilt is established by legal evidence received before you in the trial in the case beyond a reasonable doubt." (2 R.R. at 28).

Later, a venireperson repeated the court's wording while defense counsel discussed people's perceived credibility of complainants in cases alleging sexual misconduct. Defense counsel called upon Juror No. 9 and asked, "Would you start a person who is making a claim of being the victim of sexual violence, would you start that person with slightly more credibility?" (2 R.R. at 90). The venireperson stated, "Like you said, you presume that person to be innocent *until* proven guilty. I have to give somebody who's bringing forth the accusation the benefit of the doubt

until I find out further." (2 R.R. at 91) (Emphasis added). Defense counsel then noted, "But one of them has got the presumption of innocence. The other one doesn't have any presumption at all." (2 R.R. at 91-92). The venireperson responded:

> No, but I still have to give -- it's not whether or not they're innocent. They brought forth an accusation in which I feel like I would lead to give them the benefit of the doubt and – how can I say this? A prime example is being a parent, when your child tells you something, or just adults, when you -- depending on the age of the kids, especially younger kids, sometimes we may tend to ignore, and you shouldn't ignore. You need to find out what's really going on because there may be something that's there. That is why I'm saying I will give them the benefit of the doubt when they tell me that and do my due diligence to find out whether there's credibility to that or not.

(2 R.R. at 92). Juror No. 9 was selected to serve on the jury. (C.R. at 202).

> **ISSUE ONE: Whether the trial court violated Texas Code of Criminal Procedure Article 38.05 during voir dire by stating the accused is "presumed to be innocent *until* guilt is established…?"**

A. Applicable Law and Standard of Review

"The trial judge shall maintain an attitude of impartiality throughout the trial." *Ex parte Scott*, 541 S.W.3d 104, 125 (Tex. Crim. App. 2017), quoting *Lagrone v. State*, 84 Tex. Crim. 609, 209 S.W. 411, 415 (Tex. Crim. App. 1919). "[I]t has been often held his views or impressions of the weight of the evidence or upon the issues in the case may be conveyed to the jury as effectively by other means as by charge of the court." *Anderson v.* State, 83 Tex. Crim. 261, 202 S.W. 944, 946 (Tex. Crim. App. 1918). As the Court of Criminal Appeals explained in *Lagrone*:

> To the jury the language and conduct of the trial court have a special and peculiar weight. The law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved. The delicacy of the situation in which he is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret.

Lagrone, 209 S.W. at 415 (internal citations omitted).

Article 38.05 of the Texas Code of Criminal Procedure "prohibits the trial judge from commenting on the weight of the evidence in criminal proceedings or otherwise divulging to the jury [their] opinion of the case[.]" *Proenza v. State*, 541 S.W.3d 786, 791 (Tex. Crim. App. 2017). Article 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Texas Penal Code §2.01 provides in pertinent part: "All persons are presumed to be innocent and no person may be convicted of an offense *unless* each element of the offense is proved beyond a reasonable doubt." (Emphasis added). This presumption is repeated in Tex. Code of Crim. Proc. art. 38.03. Regarding the right to an impartial jury, Texas Code of Criminal Procedure §1.04 provides that "[i]n all criminal prosecutions the accused shall have a speedy public trial by an impartial jury."

"In evaluating a claimed violation of article 38.05, we first determine whether the trial court's comments were, in fact, improper under the article." *Moore v. State*, 624 S.W.3d 676, 681 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd), citing *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App. — Houston [14th Dist.] 2006, no pet.). "If so, we must determine whether the comments were material." *Id*. "A comment is material if the jury was considering the same issue." *Id*. at 682, citing *Simon*, 203 S.W.3d at 592. "If the comments were both improper and material, we address harm, using the standard for non-constitutional harm set forth in Texas Rule of Appellate Procedure 44.2(b)." *Id*, citing *Proenza*, 541 S.W.3d at 801.

B. Analysis

1. *Appellant's point of error may be considered, as the Court of Criminal Appeals has determined that a violation of Article 38.05 may be raised for the first time on appeal*

Trial counsel objected to Judge Kennedy's comments during voir dire, but did not specifically raise Article 38.05 as grounds for the objection. (2 R.R. at 28). While Judge Kennedy implicitly overruled defense counsel's objection with her immediate instruction, trial counsel did not have to object to the trial court's comments under Article 38.05 to preserve error for appeal. Normally, to preserve error for appeal, a litigant must make a timely complaint in the trial court. *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013). However, in *Proenza*, the Court of Criminal Appeals determined that "claims of improper judicial comments raised

under Article 38.05 are not within *Marin's* third class for forfeitable rights. Rather, we believe that the right to be tried in a proceeding devoid of improper judiciary commentary is at least a category-two, waiver-only right." *Proenza*, 541 S.W.3d at 801. As a result, this issue is properly before this Court.

> 2. *The Trial Court's comments violated Appellant's presumption of innocence and conveyed to the jury her opinion of the case—that Appellant's guilt was a foregone conclusion (that his trial was merely a formality)*

The word "unless" is defined by *Merriam-Webster* as follows:

unless – conjunction.

1: except on the condition that : under any other circumstance than;

2: without the accompanying circumstance or condition that: but that:

BUT

unless – preposition.

: except possibly : EXCEPT.[4]

The word "until" is defined as:

until – preposition.

1. *Chiefly Scotland* : TO
2. Used as a function word to indicate continuance (as of an action or condition) to a specified time;

[4] *Unless*, MERRIAM-WEBSTER.COM, https://merriam-webster.com/dictionary/unless.

3. : BEFORE sense 2

until – conjunction.

: up to the time that : up to such time as.[5]

Put another way, "unless" indicates a conditional thing that *may* happen in the future: "All persons are presumed to be innocent and no person may be convicted of an offense *unless* each element is proven beyond a reasonable doubt." That means living freely is the natural condition of a person *unless* each element of an offense is proven beyond a reasonable doubt. The "business end" of that sentence—the actual presumption itself—is the main clause followed by the conditional thing that comes after "unless."

On the other hand, "until" indicates that a condition *will end* at a specified time: The bookstore is open *until* 7 p.m. or "The defendant is presumed to be innocent *until* guilt is established by legal evidence received before you in the trial of this case beyond a reasonable doubt." (2 R.R. at 28) (emphasis added). Rather than maintaining the presumption of innocence *unless* a condition is met, this inaccurate wording "presumes that [Appellant's] guilt would be established" as an obvious foregone conclusion. (2 R.R. at 28).

Judge Kennedy made the following objected-to comments during the trial court's voir dire:

[5] *Until*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionaryt/until.

> THE COURT: …The defendant is presumed to be innocent *until* guilt is established by legal evidence received before you in the trial of this case beyond a reasonable doubt.
>
> DEFENSE COUNSEL: Your Honor, I apologize for interrupting the Court. I just object to the use of the word "until" because it presumes that my client's guilt would be established. I would say that "unless" would be the more appropriate word.
>
> THE COURT: I think they are both used. The Court also instructs the jury that it would be *unless* or *until* guilt is established by legal evidence received before you in the trial in the case beyond a reasonable doubt.

(2 R.R. at 28) (emphasis added).

These words are not interchangeable. The devaluing mischaracterization of the presumption of innocence lingered beyond this exchange between the court and the defense. About sixty-three pages later in the record, defense counsel and Juror No. 9 discussed the perceived credibility of complainants in cases alleging sexual misconduct:

> DEFENSE COUNSEL: … Who feels that way, that, you know, anybody who makes a claim of being the victim of sexual violence, they should be -- they're immediately entitled to be believed? Who feels that way? I see cards going up. Let's do it row by row again. On the first row, who feels that way, that someone who complains of sexual violence they're entitled to be believed?
>
> Juror No. 9, I see you.
>
> Juror No. 9, let's start with you, and I'll loop this through.
>
> Would you start a person who is making a claim of being the victim of sexual violence, would you start that person with slightly more credibility?

VENIREPERSON: I wouldn't necessarily say I would start them off with more credibility, but I would give them the benefit of the doubt and do my due diligence to try and find out. But, yes, I would give them the benefit of the doubt.

MR. GOMMELS: Gotcha. So in other words, you know, all other witnesses being equal, they're slightly more equal, right? They get a little more credibility because of where, you know, their position is as the complaining witness, we'll call them, in the case.

…

VENIREPERSON: And that's just my opinion alone. You give somebody the benefit of the doubt. Like you said, *you presume that person to be innocent until proven guilty.* I have to give somebody who's bringing forth the accusation the benefit of the doubt until I find out further.

MR. GOMMELS: Now you understand that those two things -- this is why we do this. This is an interesting exercise, right?

VENIREPERSON: Yeah.

MS. BARLOW: Those two things don't necessarily go together because if the tie goes to the runner and he's the runner, then you can't give her the tie of the runner either –

VENIREPERSON: I won't know until I hear the evidence.

MR. GOMMELS: But one of them has got the presumption of innocence. The other one doesn't have any presumption at all.

VENIREPERSON: No, but I still have to give -- it's not whether or not they're innocent…

(2 R.R. at 90-92) (Emphasis added).

Later, Juror No. 9 was called up for a bench conference to further explore this area of inquiry. They were still under the impression that judging the "credibility of

witnesses" meant giving witnesses "the benefit of the doubt." (2 R.R. at 135). Though the court stated, "we don't really talk about it in the sense of giving the benefit of the doubt," Juror No. 9 persisted in the mistaken understanding or belief that seemed to conflate witness credibility with the presumption of innocence afforded the accused. (2 R.R. at 135-136). Defense counsel asked, "Do you believe that a victim is entitled to be believed?" (2 R.R. at 137). Juror No. 9 responded, "Everyone's entitled to be believed until you hear the evidence of what's going on." (2 R.R. at 137). Ultimately, defense counsel withdrew his objection after Juror No. 9 said they were "starting everybody at ground zero." (2 R.R. at 137). None of this cleared up the notion of the presumption of innocence and the fact that it overrides any other principle in operation.

The U.S. Supreme Court and the Court of Criminal Appeals have explained that "[the] principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Kimble v. State*, 537 S.W.2d 254, 254-255 (Tex. Crim. App. 1976) (quoting *Coffin v. U.S.*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895)). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right

to the 'presumption of innocence,' *i.e*. the right to be free from criminal conviction unless the State can prove his guilt beyond a reasonable doubt by probative evidence adduced at trial." *Miles v. State*, 204 S.W.3d 822, 825 (Tex. Crim. App. 2006), citing *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) and *Madrid v. State*, 595 S.W.2d 106, 110 (Tex. Crim. App. 1979). The presumption of innocence is also guaranteed by Texas state law, as "the statute itself arises from a constitutional guarantee, that of a fair and impartial trial." *Miles v. State*, 154 S.W.3d 679, 681 (Tex. App.— Houston [14th Dist.] 2004), aff'd, 204 S.W.3d 822 (Tex. Crim. App. 2006), citing U.S. Const. amend. XIV; Tex. Code Crim. Proc. art. 38.03; *Estelle*, 402 U.S. at 503; and *Oliver v. State*, 999 S.W.2d 596, 599 n. 3 (Tex. App.— Houston [14th Dist.] 1999, pet. ref'd). "The presumption of innocence is a fundamental right, and 'its enforcement lies at the foundation of the administration of our criminal law.'" *Walker v. State*, 469 S.W.3d 204, 208 (Tex. App.—Tyler 2015, pet. ref'd), *Taylor*, 436 U.S. at 483, and *Ex parte Clark*, 545 S.W.2d 175, 177 (Tex. Crim. App. 1977).

As it was reasoned when the court of appeals reversed a conviction due to the trial court's improper voir dire disclosure (that the accused had two prior convictions) in *Clark v. State*, 878 S.W.2d 224 (Tex. App. – Dallas 1994):

> A trial court improperly comments on the weight of the evidence if it makes a statement that:
>
> (1) implies approval of the State's argument, *Ward v. State,* 156 Tex.Crim. 472, 243 S.W.2d 695, 696–97 (1951);

(2) indicates any disbelief in the defense's position, *McClory v. State,* 510 S.W.2d 932, 934 (Tex.Crim.App.1974);

(3) diminishes the credibility of the defense's approach to its case, *see, e.g., Jackson v. State,* 756 S.W.2d 82, 85 (Tex.App.—San Antonio 1988), *rev'd on other grounds,* 772 S.W.2d 117 (Tex.Crim.App.1989).

Clark v. State at 226.

In misstating the presumption of innocence, and doing it again over defense counsel's objection, Judge Kennedy communicated to the panel that: 1) defense counsel was wrong when he was, in fact, correct, thereby "indicat[ing] [] disbelief in the defense's position" and "diminish[ing] the credibility of the defense's approach to its case"; and 2) she believed that a finding of Appellant's guilt was inevitable. "A comment is material if the jury was considering the same issue." *Moore*, 624 S.W.3d at 682. Here, Appellant's guilt or innocence was the material issue that the jury considered. As a result, Judge Kennedy's comments violated Article 38.05 and the trial court committed error.

C. Harm

"To constitute reversible error under article 38.05, the trial court's improper comments must be reasonably calculated to benefit the State or prejudice the defendant's rights." *Moore*, 624 S.W.3d at 682. This error is reviewed under Texas Rule of Appellate Procedure Article 44.2(b). *Proenza*, 541 S.W.3d at 801. "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error

had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). "The focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict." *Hankston v. State*, 656 S.W.3d 914, 919 (Tex. App.— Houston [14th Dist.] 2022, pet. ref'd), citing *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011). "A conviction must be reversed if this court has 'grave doubt' that the result of the trial was free from the substantial effect of the error." *Id*. "'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced he feels himself in virtual equipoise as to the harmlessness of the error." *Id*., quoting *Barshaw,* 342 S.W.3d at 94. When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001).

Judge Kennedy's erroneous comments were made near the end of her voir dire. (2 R.R. at 28). The incorrect wording was repeated later by Juror No. 9, who served on the jury, and the misplaced presumption continued during discussions with the same juror at the bench, as shown by the juror's comment: "Everyone's entitled to be believed until you hear the evidence of what's going on." (2 R.R. at 90-92; 137; C.R. at 202). Judge Kennedy did not make these comments with the "manifest intent to benefit the defendant and to protect his rights[.]" *Unkart*, 400 S.W.3d at

101. The trial court's statements were camouflaged with other words resembling the law, but nonetheless, revealed an opinion that presumed Appellant's guilt. These comments "impart[ed] information to the venire panel that…tainted appellant's presumption of innocence[.]" *Soto v. State*, No. 05-01-00589-CR, 2003 WL 1492378 at *5 (Tex. App. — Dallas March 25, 2003, no pet.) (mem. op., not designated for publication). Appellant's guilt or innocence of the offense was the issue at trial. The trial court's earlier misstatement left an indelible mark on the lay persons who heard it. As a result, the trial court's comments during voir dire caused a substantial and injurious effect on the verdict and he should be granted a new trial.

ISSUE TWO: Whether the trial court's comments during voir dire that the accused is "presumed to be innocent *until* guilt is established…" deprived Appellant of due process and an impartial judge, and vitiated Appellant's presumption of innocence?

A. Applicable Law

The federal and state constitutions guarantee the right to a fair trial. U.S. Const. amend. V and XIV; Tex. Const. art. 1, § 10. "Due process requires a neutral and detached hearing body or officer." *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006), citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchinson*, 349 U.S. 133, 136 (1955).

As this court noted in *Rodriguez v. State*, No. 01-23-00664-CR, 2025 WL 1335328 at *6 (Tex. App. – Houston [1st Dist.] May 8, 2025, no pet. h.), "a trial court's comments become 'improper,' for purposes of due process, when the trial court takes on a role not permitted to a judge at common law—such as witness—or when the trial court takes on a permitted role—such as commenting on the evidence—in a manner that shows partiality. (citing *United States v. Marquez-Perez,* 835 F.3d 153, 158 (1st Cir. 2016). "A defendant has an absolute right to an impartial judge at both the guilt/innocence and punishment stages of trial." *Segovia v. State*, 543 S.W.3d 497, 503 (Tex. App. — Houston [14th Dist.] 2018, no pet.). "A judge should not act as an advocate or adversary for any party." *Luu v. State*, 440 S.W.3d 123, 128 (Tex. App. — Houston [14th Dist.] 2013, no pet.). "In Texas, a trial judge must also refrain from making any remark calculated to convey to the jury his opinion of the case." *Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003). "To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party." *Luu*, 440 S.W.3d at 128-129. The entire record is reviewed in making this determination. *Id*. at 129.

"The voir dire process is designed to effectuate a defendant's right to a fair trial by insuring, to the fullest extent possible, that the jury will be intelligent and impartial." *Drake v. State*, 465 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.]

2015, no pet.), citing *Armstrong v. State*, 897 S.W.2d 361, 368 (Tex. Crim. App. 1995) and *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. [Panel Op.] 1978). "The importance in selecting a jury cannot be overestimated in our judicial system since both the State and defendant have an interest in assembling a jury free of bias and prejudice." *Id*., quoting *Price v. State*, 626 S.W.2d 833, 835 (Tex. App. — Corpus Christi 1981, no pet.). "The trial court has broad discretion over the process of selecting a jury." *Sells v. State*, 121 S.W.3d 748, 755 (Tex. Crim. App. 2003).

B. Analysis

1. Should this Court determine that Appellant's objection was waived, Appellant contends that the right to an impartial judge is a category two Marin right and he may raise this claim for the first time on appeal.

Appellant raised a contemporaneous objection to the court's misstatement of the presumption of innocence. (2 R.R. at 28). The State did not dispute what trial counsel alleged. Although Judge Kennedy responded to defense counsel's objection, she made another incorrect statement and instructed the jury panel, but did not explicitly say the word "overruled:"

> DEFENSE COUNSEL: Your Honor, I apologize for interrupting the Court. I just object to the use of the word "*until*" because it presumes that my client's guilt would be established. I would say that "*unless*" would be the more appropriate word.
>
> THE COURT: I think they are both used. The Court also instructs the jury that it would be *unless* or *until* guilt is established by legal evidence received before you in the trial in the case beyond a reasonable doubt.

(2 R.R. at 28).

Undersigned counsel acknowledges that the error may not have been preserved for appellate review due to the lack of an additional objection to the trial court's response. *See McLean v. State*, 312 S.W.3d 912, 915 (Tex. App. – Houston [1st Dist.] 2010, no pet.) ; *Veras v. State,* 410 S.W.3d 354, 357-358 (Tex. App. – Houston [14th Dist.] 2013), citing *Young v. State*, 137 S.W3d 65, 69 (Tex. Crim. App. 2004) (en banc). Appellant can, nevertheless, raise this issue even if this Court determines that he failed to preserve error.

The Court of Criminal Appeals has "characterized *Marin* as holding 'that the general preservation requirement's application turns on the nature of the right allegedly infringed,' as opposed to 'the circumstances under which it was raised.'" *Proenza*, 541 S.W.3d at 796, quoting *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014) and *Ex parte Heilman*, 456 S.W.3d 159, 165-166 (Tex. Crim. App. 2015). "That is, a proper determination of a claim's availability on appeal should not involve peering behind the procedural-default curtain to look at the particular 'circumstances' of the claim's merits within the case at hand." *Id*.

The Court of Criminal Appeals has "explained that 'our system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.'" *Garcia v. State*, 149 S.W.3d 135, 144 (Tex. Crim. App. 2004), quoting

Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), overruled on other grounds by *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). "[R]ights in the second category 'do not vanish so easily. Although a litigant might give them up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record.'" *Id*., citing *Marin*, 851 S.W.2d at 280. "Regarding these rights, 'the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court." *Id*.

This Court has noted that "[i]t is an unresolved issue whether and when a trial court's comments constitute fundamental constitutional due process error that may be reviewed in the absence of a proper objection." *McLean*, 312 S.W.3d at 916. *See also Rice v. State*, No. 01-17-00391-CR, 2018 WL 3384634 at *2 (Tex. App. — Houston [1st Dist.] July 12, 2018, no pet.) (mem. op., not designated for publication) Appellant argues that the error in this case may be reviewed without a timely objection and contends that a trial court's comments that implicate a due process violation of an impartial judge should be determined to be at least a category two *Marin* right.

In *Proenza*, the Court of Criminal Appeals noted that "*Marin's* description of the adversarial system depends upon, or at the very least assumes, the decision-

maker's impartiality." *Id*. at 799. "[T]he utility associated with enforcement of forfeiture rules never outweighs 'fundamental systemic requirements or…rights so important that their implementation is mandatory absent an express waiver.'" *Id*. at 798, quoting *Marin*, 851 S.W.3d at 280. The Court of Criminal Appeals also acknowledged that "when the trial judge's impartiality is the very thing that is brought into question, *Marin's* typical justification for requiring contemporaneous objection loses some of its potency." *Proenza*, 541 S.W.3d at 799.

Other factors that lend in favor of allowing this type of error to be raised for the first time on appeal include the fear that a judge would have an animus or ill will against a defendant (and may even retaliate), and allowing the forfeiture regarding improper comments that implicate due process concerns would allow the public to view the proceedings as unfair. *See Proenza*, 541 S.W.3d at 799-800:

> "When a litigant contends that the trial judge has shirked her duty by openly 'convey[ing] to the jury [her] opinion of the case,' the litigant has necessarily alleged that an alarming perversion of this role has taken place. And because we have said that '[j]urors are prone to seize with alacrity upon any conduct or language of the trial judge,' we believe such an allegation to be sufficiently weighty as to merit appellate review even in the absence of a partisan objection at trial."

Based on the foregoing, a trial court's comments constituting fundamental constitutional due process error may be reviewed in the absence of a proper objection as the right to a fair trial and impartial judge are at least category-two *Marin* rights.

2. The Trial Court's comments violated Appellant's right to a fair trial and impartial judge as the trial court's comments infringed on

Appellant's presumption of innocence and conveyed to the jury her opinion of the case—that a finding of Appellant's guilt was inevitable

Again, Judge Kennedy made the following comments during the trial court's portion of voir dire:

> THE COURT: …The defendant is presumed to be innocent *until* guilt is established by legal evidence received before you in the trial of this case beyond a reasonable doubt.
>
> DEFENSE COUNSEL: Your Honor, I apologize for interrupting the Court. I just object to the use of the word "*until*" because it presumes that my client's guilt would be established. I would say that "*unless*" would be the more appropriate word.
>
> THE COURT: I think they are both used. The Court also instructs the jury that it would be *unless* or *until* guilt is established by legal evidence received before you in the trial in the case beyond a reasonable doubt.

(2 R.R. at 28) (Emphasis added).

Shortly thereafter, Judge Kennedy did state that the presumption of innocence "is sufficient to acquit a defendant," but by that point the damage was done. (2 R.R. at 29). The trial court had refuted defense counsel's insistence that the correct wording be articulated specifically because the trial court's phrasing "presumes that my client's guilt would be established." (2 R.R. at 28).

As discussed above, this mistaken notion continued during voir dire as evidenced by Juror No. 9's repetition of the court's language:

> And that's just my opinion alone. You give somebody the benefit of the doubt. Like you said, *you presume that person to be innocent until proven guilty.* I have to give somebody who's bringing forth the accusation the benefit of the doubt until I find out further.

(2 R.R. at 91) (emphasis added).

This Court recently addressed whether comments that violate Article 38.05 necessarily violate due process in light of the fact that "[t]he federal constitution allows judges to comment on and sum up evidence." *Rodriguez v. State*, No. 01-23-00664-CR, 2025 WL 1335328 (Tex. App. – Houston [1st Dist.] May 8, 2025, no pet. h.) Looking to the federal system, this Court noted:

> The test for determining whether a trial court's comments violate federal due process protections is 1) whether the comments were improper and, if so, 2) whether the complaining party can show serious prejudice. *United States v. Pena*, 24 F.4th 46, 72 (1st Cir. 2022). As with some other federal due-process protections, an analysis of prejudice is subsumed within the error analysis. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730, 747 (1987) (holding defendant did not show violation of due-process right to be present at hearing because record did not show prejudice from absence); *Linton v. State*, 275 S.W.3d 493, 509 (Tex. Crim. App. 2009) (holding defendant failed to show violation of due-process right to interpreter because record did not show prejudice from lack of more interpretation services).

Rodriguez at *5.

> Also noted in *Rodriguez* is that a reviewing court should:
>
> consider isolated incidents in light of the entire transcript so as to guard against magnification on appeal of incidences which were of little importance in their setting." (at page 14, citing *United States v. Rivera-Rodriguez*, 761 F.3d at 113 (quotation omitted). But "multiple interventions" by the trial court might produce a cumulative effect greater than any individual comment would suggest.. *Id*. at 112 n.8, 113.

(*Rodriguez* at *6).

When considered in the context of the entire record, the jury instructions here were not sufficient to overcome the prejudice injected into the minds of the panel by the trial court's comments. As an analogy, compare the effects of limiting instructions on the jury's deliberative process. In the right circumstances, limiting instructions can prevent the jury from giving inappropriate consideration to specific evidence. But sometimes a jury instruction is not sufficient to cure the error. In *Toombs v. State*,[6] Mr. Toombs was convicted of aggravated robbery after a 2022 incident involving a masked man holding a grocery store clerk at gunpoint. *Id.* at *1. The legal dispute that led to a reversal of his conviction arose from the erroneous introduction of extraneous laundromat burglaries. *Id*. at *10. In finding harmful error from the admission of the extraneous unadjudicated offenses, this Court reasoned:

> A limiting instruction is not sufficient to cure error when the testimony "is clearly calculated to inflame the minds of the jury and is of such a character to suggest the impossibility of withdrawing the impression produced on the jurors' minds." *Castillo v. State*, 865 S.W.2d 89, 93–94 (Tex. App.—Corpus Christ-Edinburg 1993, no pet.). Considering the "inherently prejudicial" nature of extraneous offense evidence, *McGee v. State*, 725 S.W.2d 362, 366 (Tex. App.—Houston [14th Dist.] 1987, no pet.), coupled with the State's emphasis of the laundromat burglaries during closing arguments and its remark that "the DNA doesn't lie," the trial court's limiting instruction was incapable of "withdrawing the impression produced on the jurors' minds." *Castillo*, 865 S.W.2d at 93–94.

[6] No. 01-23-00229-CR, 2024 WL 5126852, at *1 (Tex. App. – Houston [1st Dist.] Dec. 17, 2024) (mem. op., not designated for publication), pet. filed (May 28, 2025).

Toombs at *11.

Similarly, instructions in this jury charge about the presumption of innocence were not sufficient to "[withdraw] the impression produced on the jurors' minds." *Id*. In misstating the presumption of innocence, Judge Kennedy directly communicated to the panel that the trial court believed that a finding of Appellant's guilt was inevitable. This violated Appellant's presumption of innocence. *See Wilson v. State*, 473 S.W.3d 889, 903 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("A trial court's comments do not constitute fundamental error unless they rise to 'such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury.'"), quoting *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). These comments violated Appellant's due process rights to a fair trial from an impartial judge and vitiated his presumption of innocence. Judicial impropriety was committed. *See Luu*, 440 S.W.3d at 128-129.

C. Harm

Initially, Appellant contends that because the trial court's comments violated his due process rights to a fair and impartial judge, the error in this case was structural error. *See Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008) (A 'structural error' "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself" and render[s] a trial fundamentally

unfair.") As a result, Appellant contends that the error in this case is not subject to a harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991).

However, assuming that a harm analysis must be performed, Appellant contends that the analysis must be done pursuant to Texas Rule of Appellate Procedure 44.2(a). "Constitutional error is harmful unless a reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing TEX. R. APP. P. 44.2(a). "While the rule does not expressly place a burden on any party, the 'default' is to reverse unless harmlessness is shown." *Merrit v. State*, 982 S.W.2d 634, 636 (Tex. App.—Houston [1st Dist.] 1998). "The State has the burden, as the beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard*, 612 S.W.3d at 328, citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall v. State*, 184 S.W.3d 730, 746 n.53 (Tex. Crim. App. 2006).

Judge Kennedy's erroneous comments were made near the end of her voir dire, immediately before the State began its voir dire presentation. (2 R.R. at 28). The trial court incorrectly overruled defense counsel's objection regarding the misstatement of the presumption of innocence, creating a false impression about the meaning of the presumption and about the inappropriateness of defense counsel's advocacy. (2 R.R. at 28). Her later references to Appellant's presumption of innocence were brief, but they did not address the comments she made prior

regarding the statutory definition of the presumption of innocence.[7] (2 R.R. at 29). The incorrect wording was repeated later by Juror No. 9 (who served on the jury) and the misplaced presumption continued during discussions with the same juror at the bench, as shown by the juror's comment: "Everyone's entitled to be believed until you hear the evidence of what's going on." (2 R.R. at 90-92; 137; C.R. at 202). That is not what the presumption of innocence allows. Though the correct wording of the presumption of innocence was included in the jury instructions (C.R. at 260), these were provided at the end of trial, with no mention of the fact that defense counsel's earlier assertion was correct. This imparted to the panel the trial judge's own opinion that, perhaps, the trial was a mere formality on the road to conviction. As the trial court's comments were not based in the law, they would amount to an opinion based on some extrajudicial source. *See Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (Judicial remarks may show bias and lack of impartiality "if they reveal an opinion that derives from an extrajudicial source," and "they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.") (emphasis in original). Judge Kennedy did not make these comments with the "manifest intent to benefit the defendant and to protect his rights." *Unkart,*

[7] One can imagine a very different result had the trial court responded by correcting itself either in the moment after reviewing the corresponding statutes, or at any time later by referring back to defense counsel's valid objection on the record; it could have smoothed over the jury's perceptions. Instead, the mischaracterization remained.

400 S.W.3d at 101. By weakening the presumption of innocence, her opinion prejudged Appellant and "impart[ed] information to the venire panel that…tainted appellant's presumption of innocence[.]" *Soto,* 2003 WL 1492378 at *5. Appellant's guilt or innocence of the offense was certainly the central issue at his trial. As a result, the trial court's comments during voir dire were not harmless beyond a reasonable doubt and he should be granted a new trial.

ISSUE THREE: Whether the trial court committed reversible error by allowing S.M. to testify as a witness regarding hearsay statements of the complainant?

A. Applicable Facts

Appellant is the complainant's grandfather and former father-in-law of S.M.—the complainant A.S.'s mother. (3 R.R. at 46; State Ex. 13-Demonstrative of Family Tree). S.M. stated that on November 27, 2021, her daughter fearfully made a statement about being abused when she picked her up from the home of L.S. (mother of A.G., extraneous complainant) (3 R.R. at 47). S.M. testified that A.S. reported the allegations first to her grandmother before telling her that Appellant "tickled her private area." (3 R.R. at 48). Specifically, S.M. testified that A.S. said she had been in the pool with her cousin, A.G., and that Appellant had put A.G. on his lap. (3 R.R. at 50). She continued:

> And [A.S.] got uncomfortable and tried to get out of the pool to go to -- or the hot tub to go to the big pool. And -- hmm -- she was, like, trying to get [A.G.] to go with her. And Mr. Sharpless was holding [A.G.] and

> would not let her leave. So [A.S.] got back into the pool where he touched her private.

(3 R.R. at 50).

S.M. reiterated that the children first told their grandmother what happened. (3 R.R. at 50). On cross-examination, she stated that when she called Francis Sharpless (grandmother) to discuss the matter, Francis was already aware of it. (3 R.R. at 51).

State Ex. 1 (Hearing Only)—Appellant's Voluntary Statement to Investigators

State Exhibit 1 (Hearing Only)—Appellant's redacted voluntary statement to investigators—outlines details of the incident and corroborates S.M.'s testimony regarding who was the first adult to whom allegations of a crime were articulated.

Argument and ruling

Arguing that the complainant and extraneous complainant first articulated "details alleging any offense" to S.M. rather than their grandmother, the state asked for S.M. to be designated as the art. 38.072 hearsay witness. (3 R.R. at 52). Appellant argued that Francis Sharpless would be the appropriate hearsay witness as she was "the first adult to whom the child spoke about the offense…[with] more than words which give a general elusion that something in the area of child abuse is going on, it must be made in some discernable manner and even specific." (3 R.R. at 53-54). Defense counsel argued *Lopez v. State*, 343 S.W.3d 137 (Tex. Crim. App. 2011)

supported Appellant's contention, rather than the state's, based on the facts revealed in the witness' testimony. (3 R.R. at 53). The court overruled Appellant's objection and designated S.M. as the hearsay witness. (3 R.R. at 54).

B. Applicable Law and Standard of Review

Article 38.072 of the Texas Code of Criminal Procedure exempts from the hearsay rule certain statements made by a child 14 years of age or younger or a person with a disability who is the victim of certain offenses, including Indecency With a Child. *See* Tex. Code Crim. Proc. Art. 38.072; Tex. R. Evid. 801(d) & 802. To be admissible in the guilt-innocence phase of a trial, the statement must describe the alleged offense and be made by a person against whom the act was committed. The witness testifying about the outcry must be 'the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense…" *Id*. § 2(a). The trial court must find "in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement." *Id*. § 2(b)(2).

The Court of Criminal Appeals has opined:

> In picking the particular wording of the "first person" requirement, the legislature was obviously striking a balance between the general prohibition against hearsay and the specific societal desire to curb the sexual abuse of children. See generally *Ohio v. Osborne,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). That balance is the focal point of our analysis.

Garcia v. State, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990).

This court reviews a trial court's admission of Tex. Code Crim. Proc. Article 38.072 hearsay testimony under an abuse of discretion standard. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Rhomer v. State*, 569 S.W. 3d 664, 669 (Tex. Crim. App. 2019). "The admission of inadmissible hearsay constitutes nonconstitutional error…" *Chapman v. State*, 150 S.W.3d 809, 814 (Tex. App. – Houston [14th Dist.] 2004, pet. ref'd); *Berg v. State,* No. 01-22-00248-CR, 2023 WL 5616200 at * 25 (Tex. App. – Houston [1st Dist.] Aug. 21, 2023, pet. ref'd) (mem. op.).

C. Analysis

The trial court conducted a hearing outside the presence of the jury to determine whether the complainant's mother could testify as a hearsay witness under Article 38.072 of the Texas Code of Criminal Procedure. S.M. (A.S.'s mother) testified that A.S. reported the allegations first to her grandmother before telling her Appellant "tickled her private area." (3 R.R. at 48). On direct examination regarding A.S.'s statements when S.M. picked her up after the alleged incident, the following exchange occurred:

> STATE: Okay. And to your knowledge, were you the first person, other than the defendant, who A.S. told about the acts of sexual abuse in any serious detail?
>
> S.M.: No, she told me that she told her grandmother after it happened.

(3 R.R. at 47-48).

Specifically, S.M. testified that A.S. said she had been in the pool with her cousin and that Appellant had put her cousin on his lap. (3 R.R. at 50). She continued:

> S.M.: And [A.S.] got uncomfortable and tried to get out of the pool to go to -- or the hot tub to go to the big pool. And -- hmm -- she was, like, trying to get [A.G.] to go with her. And Mr. Sharpless was holding [A.G.] and would not let her leave. So [A.S.] got back into the pool where he touched her private.
>
> STATE: Okay. And then what did [A.S.] say happened after that?
>
> S.M.: That they got -- after they had got out of the pool, they went and told their grandmother.
>
> STATE: Did she tell you what she told her grandmother?
>
> S.M.: No. She just told me that she told her what happened, but she didn't go into detail what she said to her. She just said she told her grandmother -- or they told the grandmother.

(3 R.R. at 50).

On cross-examination, S.M. reiterated that the children's grandmother, Francis Sharpless, was the first person to whom details of the event were disclosed. (3 R.R. at 51). Defense counsel asked:

> DEFENSE COUNSEL: You said that the first person that A.S. told about this event in any discernable manner was her grandmother, right?
>
> S.M.: That's what she told me, yes.
>
> DEFENSE COUNSEL: And that's Francis Sharpless?

S.M.: Yes.

Moreover, S.M. noted that when she called Francis Sharpless on the phone to discuss the matter the next day, Francis was already aware of it. (3 R.R. at 51).

State Exhibit 1 (Hearing Only)—Appellant's redacted voluntary statement—describes the incident. He admitted that he committed an act of indecency with A.G. and twice admitted to investigators that he unsuccessfully attempted to do the same with A.S. (State Ex. 1 [Hearing Only] at time stamps 11:10:41; 11:11:09–13; 11:16:04 and 11:44:32-44). Then, there was a commotion outside:

> Appellant: My daughter had heard what was going on. My wife came out and said what was going on. And, uh, A.S. said, "Granddad's touching me." So, we went from there. I apologized. They went inside. They went on back to L.S.'s house.

(State Ex. 1 [Hearing Only] Timestamp 11:11:26-50).

Later during the interview, Lefevre asked Appellant, "I remember that you talked about the girls—A.G. and A.S.—went to tell your wife that you were touching her, correct?" Appellant replied, "Well, they heard the squealing and yelling, and my wife came outside to see what was going on." (State Ex. 1 [Hearing Only] Timestamp at 11:54:15-28). Then Lefevre asked what happened next and Appellant replied, "When she, when A.S. said, 'He's been touching me,' and A.G. said, 'He's been touching me,' then Francis, of course, *knew*. And I said, 'Yeah.' And so, I admitted it and I apologized. (State Ex. 1 [Hearing Only] Timestamp at 11:54:33—54) (Emphasis added).

To support Appellant's theory that Francis Sharpless was the proper hearsay witness, defense counsel cited *Lopez v. State*, 343 S.W.3d 137 (Tex. Crim. App. 2011). In the trial of Mr. Lopez, the state had presented three hearsay witnesses who "testified to the same events; thus, the testimonies of at least two outcry witnesses constituted inadmissible hearsay and were improper bolstering of B.R.'s testimony, serving solely to enhance B.R.'s credibility—the sole issue in this case—in violation of rule 613(c) of the Texas Rules of Evidence." *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011). The question in *Lopez* was one of ineffective assistance of counsel because no objections were raised to the improper hearsay testimony. *Id.* Because the Court of Criminal Appeals found the record was silent about trial counsel's lack of objection to the hearsay witness testimony, it reversed the judgment of the court of appeals as error and remanded the case for consideration of *Lopez'* additional requested grounds for relief. *Id*. at 144.

To the extent that *Lopez* was cited as supporting authority, it supports Appellant's argument that, when the evidence supplied by purported hearsay witnesses would be identical, the proper witness is the first one to whom the allegations were disclosed. ("Hearsay testimony from more than one outcry witness may be admissible under article 38.072 only if the witnesses testify about different

events." *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011), citing *Broderick v. State,* 35 S.W.3d 67, 73–74 (Tex. App. — Texarkana 2000, pet. ref'd).[8]

In *Nino v. State*, 223 S.W.3d 749 (Tex. App. – Houston [14th Dist.] 2007), the prosecution argued that though the complainant's mother was the first adult to receive his statement, the forensic interviewer should be the hearsay witness because "the forensic interviewer [ ] received a more detailed account of the events relating to the offense." *Id*. at 752. Nino contended that the trial court should have designated the complainant's mother because she was the first adult "to whom [complainant] made a statement that in some discernible manner described the alleged offense." *Id*. at 753. The court of appeals agreed with Nino and found the trial court had abused its discretion. *Id*. It went on to hold the error harmless, however, because "[w]ithout objection, both [complainant] and [mother] testified at trial, each providing substantially the same account of the offense as [forensic interviewer] provided in her testimony." The holding in *Nino* is not binding on this Court and is also clearly distinguishable because an examination of the record here reveals that the testimony of S.M. and A.S. were not "substantially the same." Here,

[8] Though S.M.'s testimony and Appellant's statement (State Ex. 1 [Hearing Only]) were the only evidence before the trial court during the art. 38.072 hearing, later witnesses did not dispute that Francis Sharpless was the first person to whom A.S. reported these allegations. When asked who was the first person she told about this, A.G. stated, "Hmm, I think I told my grandma." She was not sure who A.S. told first. (3 R.R. at 155); A.S. testified that her grandmother was the first person to whom she reported the allegations. (3 R.R. at 162).

the complainant's testimony described in clear detail a brief incident that—while it articulated an offense—did not communicate that she had experienced fear or terror, or that she had tried to rescue her cousin from physical danger. The adult's hearsay-based testimony paints a much darker picture of the incident as it included an element of force being used to prevent escape from the hot tub. Based on the evidence presented, the trial court abused its discretion when it ruled that S.M. qualified as the art. 38.072 hearsay witness.

D. Harm

Nonconstitutional error must be disregarded unless it affects a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when the error has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. U.S.,* 328 U.S. 750, 776 (1946)). If the error had no influence or only a slight effect on the verdict, then the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

An art. 38.072 hearsay witness is vitally important to the state's case precisely because children are children and, thus, highly impressionable. Though a person can be convicted based on the testimony of one witness—even a child witness—it is

exponentially more helpful to the jury state's case if there is a competent adult who can testify to the child's original hearsay statements.[9]

In *Nino v. State*, 223 S.W.3d 749, 752 (Tex. App. – Houston [14th Dist.] 2007), the prosecution argued that though the complainant's mother was the first adult to receive his statement, the forensic interviewer should be the hearsay witness because "the forensic interviewer [ ] received a more detailed account of the events relating to the offense." While the Court in *Nino* found the trial court erred in not correctly designating the "first person," it found the error harmless because "[w]ithout

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[9] *See* Judge Clinton's dissent, joined by two others, in *Garcia v. State*, 792 S.W.2d 88 (Tex. Crim. App. 1990) (En Banc):

> The safeguard deemed particularly important by the Legislature is the limitation of hearsay witnesses to the *first person* to whom the child reports the offense. The requirement that the hearsay witness be the first person to receive the child's story represents a balance between the necessity of introducing the child's statements through an adult witness and the necessity of avoiding the dangers implicit in hearsay itself. As commentators have observed,
>
> > "Human belief evidence is inherently susceptible to certain defects, which fall into four categories traditionally called the 'hearsay dangers.' First, a belief may be erroneous because it results from a false impression of objective reality—a defect in perception—a lamentably common product of our imperfect physical and psychological faculties. Second, even a true perception may yield a false belief at a later time because of the tricks of human memory: the unconscious scrambling and regrouping of elements drawn from disparate experiences and from fantasies. Third, even an accurate memory of one person may mislead when used as evidence by another, if it is accidentally communicated imperfectly. However carefully focused, our instruments of communication, both verbal and nonverbal, may be clouded by ambiguity and its counterpart, misinterpretation. Finally, a valid memory may be falsified intentionally."
>
> Goode, Wellborn, and Sharlot, Texas Rules of Evidence: Civil and Criminal, § 8.01.1 (Texas Practice 1988).
>
> (792 S.W.2d 88, 92-93) (Emphasis in original).

objection, both [complainant] and [mother] testified at trial, each providing substantially the same account of the offense as [forensic interviewer] provided in her testimony." *Id.* at 754. The *Nino* court opined: "Thus, after examining the record as a whole, we conclude that the trial court's error in admitting [forensic interviewer's] testimony about the offense did not have a substantial and injurious effect or influence in determining the jury's verdict. (internal citations omitted). *Id*.

The holding in *Nino* is clearly distinguishable because an examination of this record as a whole reveals that the testimony of S.M. and A.S. was not "substantially the same account of the offense." *Id.* The important difference comes from the sense of danger relayed through S.M.'s testimony that was not present in A.S.' description of events. Consider S.M.'s statements:

> STATE: And can you tell me exactly what [A.S.] told you?
>
> S.M.: She said that they went to the grandparents' house to go swimming. They were in the hot tub. Mr. Sharpless was in the hot tub with them. He had grabbed A.G. and was, like, holding her down in his lap. And A.G. got uncomfortable and tried to get -- well, she went to get out to go to the big pool and was trying to get A.G. to go with her, and was like, "Come on" -- …
>
> S.M. …So she wasn't able to get out of the pool because Mr. Sharpless was holding her in his lap. So A.S. got back in the pool because she didn't want A.G. to be by herself.
>
> STATE: And then what happened next?
>
> S.M.: He touched them inappropriately.

> STATE: And when you say touching inappropriately, what do you mean by that?
>
> S.M.: Well, she said he tickled her private. But I asked her exactly, and she grabbed her hand and rubbed it on her vaginal area.

(3 R.R. at 78-79).

Compare the above statements to A.S.'s testimony. A.S. did not testify as S.M. did that Appellant was "holding A.G. down in his lap." (3 R.R. at 78). A.S. did not testify as S.M. did that she "got uncomfortable and tried to get…to the big pool and was trying to get A.G. to go with her." (3 R.R. at 78). In fact, when the state asked her, "Why did you get in the pool?" A.S. responded, "Be - - I don't even know. I think I just wanted to go in the pool." (5 R.R. at 161).

The State's position was that the complainant first articulated "details alleging any offense" to S.M. rather than grandmother, but witness testimony and historical context show otherwise. (3 R.R. at 52). Then why S.M.? Maybe because grandma did not want to involve police in their family crisis? Not agreeing with the police about what may have happened to A.S. in her own backyard or how to address it is not a reason to disqualify a witness under this provision. The trial court erred in designating S.M. as the hearsay witness. The harm that resulted from designating the incorrect hearsay witness is not theoretical. The adult who testifies to a child's hearsay statements alleging abuse is likely to be extremely important to jurors—and rightly so. If they were not important, the State would not bother to offer such

testimony in the first place. The conviction should be reversed and remanded for a new trial.

ISSUE FOUR: The trial court erred in assessing a $100 fine as it was not orally pronounced as required by Tex. Code Crim. Proc. art. 42.03 § 1(A).

A. This Court has the power to reform or modify a judgment in cases even if it finds no other error.

This court has the power to reform or modify a judgment even if it finds no other error to reverse or remand to the trial court. *See* TEX. R. APP. P. 43.2(b) (allowing an appellate court to modify trial court's judgment and affirm as modified); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993) (a court of appeals may modify the lower court's judgment by correcting or reforming it); *Rodriguez v. State*, No. 01-23-00721, 2025 WL 1373693 at *16 (Tex. App. – Houston [1st Dist.] May 13, 2025).

B. Fine not orally pronounced

When the trial court adjudicated Appellant's punishment it did not include the $100 fine, but the written judgment did. (6 R.R. at 40-41; CR at 262, 272A trial court must orally pronounce a defendant's sentence in the defendant's presence. *See* TEX. CRIM. PROC. CODE ANN. art. 42.03 §1(a); *Taylor v. State*, 131 S.W.3d 497, 502 (Tex. Crim. App. 2004). Fines are punishment and generally must be orally pronounced. *See Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). The trial court's oral pronouncement controls over its written judgment to the extent

they conflict. *Taylor*, 131 S.W.3d at 502. Because the trial court did not orally pronounce the fine, the judgment should be modified accordingly.

Prayer

Appellant, James Reid Sharpless, prays that this Court reverse the trial court's judgment and remand this case back to the trial court for a new trial. Alternatively, if the judgment is affirmed, Appellant prays that it be modified to reflect the oral pronouncement of the trial court. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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