ACCEPTED
01-24-00212-CR
FIRST COURT OF APPEALS
HOUSTON, TEXAS
10/30/2024 10:51 AM
DEBORAH M. YOUNG
CLERK OF THE COURT

01-24-00212-CR

IN THE COURT OF APPEALS

FOR THE FIRST DISTRICT OF TEXAS

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
10/30/2024 10:51:48 AM
DEBORAH M. YOUNG
Clerk of The Court

COREY PARKER

Appellant

v.

THE STATE OF TEXAS

Appellee

On Appeal from Cause Number 1643461
From the 177th District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

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PRESIDING JUDGE:	Hon. Roberti Johnson 177th District Court Harris County, Texas 1201 Franklin Ave., 19th floor Houston, Texas 77002
TRIAL PROSECUTOR:	Ms. Heather Axline Mr. Tyler Arner Assistant District Attorneys Harris County, Texas 1201 Franklin Avenue, Suite 600 Houston, Texas 77002
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STATEMENT REGARDING ORAL ARGUMENT

Counsel believes oral argument is not necessary to the resolution of this case after remand, and is not requesting oral argument.

STATEMENT OF THE CASE

Mr. Corey Parker was charged with the murder of Marcus Ealy. (C. R. at 51). After a jury trial, Parker was found guilty of murder and sentenced to seventy-seven (77) years imprisonment in the Texas Department of Corrections – Institutional Division.[1] (C.R. at 564). A motion for new trial was filed and after a hearing, the trial court denied the motion. (C.R at 652). This appeal follows.

ISSUES PRESENTED

> Issue One: Whether Appellant was denied his constitutional and statutory rights to be present during trial when the trial court found Appellant had voluntarily absented himself when Appellant was transported to the hospital for chest pains one morning during trial?
>
> Issue Two: Whether trial counsel rendered ineffective assistance of counsel when the sole independent witness who could testify regarding the complaining witness' character trait of violence did not appear at trial and counsel did not file a written motion for continuance or request a writ of attachment?
>
> Issue Three: Whether the judgment should be modified to reflect the amount of court costs in effect at the time of the offense as opposed to the time of trial?

[1] The record spells Mr. Parker's first name as Cory. The correct spelling is Corey.

STATEMENT OF FACTS

Corey Parker was convicted of the murder of Marcus Ealy by shooting Ealy in the chest. (C.R. at 51 & 564).

Prior to the shooting

In 2019, Annie Burks was living in a two-story townhome. (R.R.3 at 15-16). Burks and the complainant Marcus Ealy started dating in high school and dated on and off for approximately 15 years. (R.R. 3 at 18-19). Burks also knows the defendant, Corey Parker from high school. (3 R.R. at 19). In 2019, Burks and Parker reconnected through social media. (3 R.R. at 21).

On August 22, 2019, Parker went to Burks' home to help her hang some things in her home. (3 R.R. at 21). Parker arrived between 12 and 3:00 a.m. (3 R.R. at 21). Parker stayed a couple of hours and slept there. (3 R.R. at 22).

Even though Burks and Ealy had been broken up for approximately two months before August 22, 2019, Burks still babysat Ealy's nephew. (3 R.R. at 22-23 & 52). His mother was Burks' best friend. (3 R.R. at 51). The morning Parker was there, Ealy's sister used her own key to the townhome to bring the nephew inside around 6 a.m. (3 R.R. at 22-23 & 52). Burks testified that later that morning, Ealy started blowing up her phone and banged on the door. (3 R.R. at 24-25 & 52). Burks did not open the door or speak with Ealy through the door, she only texted him because she "didn't want any conflict between two individuals." (3 R.R. at 55). Burks woke Parker and told him not to be alarmed but there was someone knocking on the door. (3 R.R. at 26). Burks

testified she would not have allowed Parker to leave the apartment at that moment. (3 R.R. at 52). At some point, Ealy quit blowing up Burks' phone and she believed he had left. (3 R.R. at 56). Later that morning, Parker left the townhome. (3 R.R. at 27). Burks could not say exactly how much time passed between the two men leaving but stated it was "a long period of time". (3 R.R. at 27).[2] She never thought Ealy would wait for Parker in the parking lot. (3 R.R. at 56).

The shooting and collection of evidence

Howard Roquemore was working in the maintenance shop at the townhomes when he heard a loud boom. (3 R.R. at 59-61). His co-worker told him someone was shooting outside. (3 R.R. at 61). Approximately 10 to 12 seconds after the shooting, Roquemore saw a light blue sun-weathered box-like car quickly leaving the area. (3 R.R. at 63-64, & 68). Roquemore did not see Ealy fall. (3 R.R. at 68). It took Roquemore between thirty seconds and two minutes to reach Ealy. (3 R.R. at 70). Ealy had been shot in the chest and was lying on the ground between two cars where another person was trying to save Ealy's life. (3 R.R. at 64-65, 68, 73). Ealy was gasping for air and blood was soaking into Ealy's shirt. (3 R.R.at 75). Roquemore did not notice any other injuries to Ealy. (3 R.R. at 76).

[2] The 911 calls reporting the shooting were at 10:13 a.m. (4 R.R. at 20-21).

The police had not arrived yet when Roquemore got to Ealy. (3 R.R. at 70). Roquemore did not notice any weapons on Ealy or at the scene. (3 R.R. at 76). He did not search Ealy's pockets or see anyone else do so. (3 R.R. at 76). When asked about Ealy's car, Roquemore stated he believed the door was open. (3 R.R. at 69). He did not look inside the car or search it. (3 R.R. at 69).

Ivan Cantu was the first police officer to arrive on the scene. (3 R.R. at 89). After assessing the situation, Cantu took over rendering aid to Ealy. (3 R.R. at 91). Cantu could not find a pulse but continued rendering aid until EMS arrived. (3 R.R. at 91). During this process, Cantu cut off Ealy's shirt. (3 R.R. at 95). EMS transported Ealy to the hospital where he later died. (4 R.R. at 83).

After Ealy was transported to the hospital by EMS, Cantu began trying to preserve the scene. (3 R.R. at 96). While preserving the scene, it began to rain. (3 R.R. at 97). A single shell casing was found in the grass. (3 R.R. at 99 & 108) (State's Exhibit 12). Crime Scene Investigator Roy Glover arrived after Ealy had been transported to the hospital and the rain had stopped. (3 R.R. at 117, 119 & 134).

During his canvas, Glover collected several items. Glover did not find any weapons at the scene but admitted he did not search Ealy's car. (3 R.R. at 117, 120-121, 130). When asked about Ealy's car, Glover testified it was still idling when he arrived, the door was closed, and the windows were up. (3 R.R. at 119 & 130). Glover did not know how long the Town Car had been there before law enforcement arrived. (3 R.R.

at 131). The Town Car was towed for processing, but Glover was not aware of anyone ever processing it. (3 R.R. at 130-131).

Investigation

Medical Examiner, Jennifer Ross found Ealy's cause of death was a gunshot wound to the torso. (3 R.R. at 148). The autopsy revealed the bullet entered the chest, went through the heart and left lung and then went to the muscles of the left back. (3 R.R. at 148). Ross opined that the bullet traveled right to left, front to back and slightly downward. (3 R.R. at 145-146). Ross did not detect any type of defensive wounds on Ealy's body. (3 R.R. at 146). Ealy was 6'4" and 192 pounds at the time of his death. (3 R.R. at 146-147).

Harris County Sheriff's Office Investigator Michael Ritchie was the lead investigator in this case. (3 R.R. at 172). When Ritchie arrived at the apartments, Ealy had already been transported to the hospital. (3 R.R. at 171). After walking the scene and interviewing a few witnesses, Ritchie went to the hospital and interviewed Annie Burks. (3 R.R. at 173-174).[3]

Burks named Parker as a suspect in the shooting. (3 R.R. at 174). While at the hospital, Burks had a telephone conversation with Parker that Ritchie recorded and listened to. (3 R.R. at 174-175) (4 R.R. at 14) (State's Exhibit 8). Ritchie instructed Burks

[3] Burks testified went to the hospital after she had become upset on the scene, "lost it" and ended up with a knot on her forehead. (3 R.R. at 28).

not to tell Parker the police were there and to ask Parker what happened. (3 R.R. at 175). In that telephone conversation, Parker told Burks he did not see Ealy when he left and when asked about his vehicle, Parker said his car was different than what the witnesses had described. (3 R.R. at 175).

Ritchie called Parker later that day. (3 R.R. at 176). Over the phone, Parker told Ritchie the same thing he had told Burks, that he had not seen Ealy in the parking lot. (4 R.R. at 15) (State's Exhibit 44). Ritchie asked Parker to come in and discuss the situation. (3 R.R. at 176) (4 R.R. at 15) (State's Exhibit 44). Parker agreed to do so saying he wanted to clear his name, but then did not show for the appointment. (3 R.R. at 176). After Parker did not keep the appointment, charges were filed against him. (3 R.R. at 176-177).

Ritchie was able to interview Parker thirteen days later. (3 R.R. at 177) (4 R.R. at 22). At that time, Parker was in custody and a recorded statement was taken. (3 R.R. at 179). Ritchie agreed over the course of the investigation Parker gave multiple versions of what happened the day of the shooting. At first Parker stated he did not know who Ealy was and that he did not shoot him. (4 R.R. at 29). Parker's second version was that Parker shot Ealy in self-defense. Parker did not know who, but someone was coming around the back of Parker's car and opened the driver's door and Parker shot that person at point-blank range while sitting down in the car. (3 R.R. at 185-186) (4 R.R. at 29) (Statement at 1:25:20). In the final version, Parker told Ritchie Ealy opened the car door, said "hey" and then stepped back. (3 R.R. at 188) (4 R.R. at 30 & 70)

(Statement at 1:30:52). Then Parker got out of the car and shot Ealy from approximately four to six feet away. (4 R.R. at 30 & 70). (Statement at 1:32:15). Ritchie had Parker demonstrate his actions and agreed that the demonstration depicted the barrel of the gun was approximately two feet away from Ealy. (4 R.R. at 37).

When asked if there was any physical or medical evidence that would contradict Parker's version that he shot Ealy from approximately two feet away, Ritchie would not give a yes or no answer, saying he was not comfortable testifying to that because he was not there and there was not a video of the shooting. (4 R.R. at 52-53). Ultimately, Ritchie admitted that no one contradicted Parker's story that he was four to six feet away from Ealy (4 R.R. at 62).

State's Last Witness

The State's final witness was Ealy's childhood friend Roderick Chretin. (4 R.R. at 73-75). Ealy had been staying with Chretin when he was shot. (R.R. 4 at 79). On the day of the shooting when Ealy asked Chretin to drop Ealy off at work, Chretin told Ealy he did not have time to and told Ealy to take Chretin's car. (4 R.R. at 81). Ealy left at approximately 7 a.m. (4 R.R. at 81). Burks' home is 30 to 40 minutes away. (4 R.R. at 81-82). According to Chretin's testimony, when Ealy left, his mood was normal. (4 R.R. at 82).

While at work, Chretin received a call that Ealy had been killed. (4 R.R. at 82). Chretin went immediately to the hospital where the doctor confirmed that Ealy had died. (4 R.R. at 83). Chretin stated he had never seen Ealy with a weapon. (4 R.R. at

86). Chretin agreed Ealy would have been mad if he found out another man was at Burks' apartment, but he did not believe Ealy would have been violent. (4 R.R. at 89-90).

The state then rested, and the jury was released for the day with instructions to return on Monday, March 11, 2024, at noon. (4 R.R. at 96- 97) After the jury was released, the court held a hearing on Parker's *Theus* motion and the record ends with the court denying the motion. (4 R.R. at 109).

When court resumed on March 11, 2024, defense counsel approached the bench concerning Parker's absence and a missing defense witness as further discussed in points of error one and two. Once the trial court denied counsel's requests for a continuance, the defense recalled Chretin. (5 R.R. at 28). Chretin testified he had never seen Ealy carrying a gun but agreed the person in Defense Exhibit 8 holding a revolver was Ealy. (5 R.R. at 31-33).

The defense then rested and after deliberating the jury found Parker guilty of murder. (5 R.R. at 42-33 & 79). After the guilty verdict was received, Parker changed his punishment election, and the jury was released from service. (5 R.R. at 82-83).

Punishment

At punishment, Parker stipulation to his prior convictions. (State's Exhibit 55). Then both sides presented family members in support of Ealy and Parker accordingly. (6 R.R. at 8-69). Parker also testified. (6 R.R. at 69). Parker told the court what had happened the day of the shooting as is more fully discussed in point of error one below.

After hearing closing arguments, the court sentenced Parker to seventy-seven years in the Texas Department of Corrections as requested by the state. (6 R.R. at 117-118.).

SUMMARY OF THE ARGUMENT

Parker was not present during the defense's case-in-chief. His absence was not voluntary but was a result of being treated at a hospital for chest pains. Despite trial counsel's request to wait until the next morning, the trial continued. Parker arrived later that day while the jury was deliberating. As a result, the trial court violated Parker's constitutional and statutory rights to be present at every state of his criminal trial. Parker was harmed as he was denied the right to testify on his own behalf in support of his self-defense claim.

Parker was also denied effective assistance of counsel when a crucial independent witness did not appear for court and counsel failed to file a written motion for continuance or ask for a writ of attachment.

ARGUMENT

Issue One: Whether Appellant was denied his constitutional and statutory rights to be present during trial when the trial court found Appellant had voluntarily absented himself when Appellant was transported to the hospital for chest pains one morning during trial?

A. Applicable Facts

Facts known at time of ruling

Parker was present when his trial began on Wednesday March 6, 2024. (2 R.R. at 4). On the afternoon of Friday, March 8, 2024, after the state had rested, the court released the jury with instructions to return on Monday, March 11, 2024, at noon.[4] (4 R.R. at 97) (5 R.R. at 10). After the jury was released, the court held a hearing on Parker's *Theus* motion and the record ends with the court denying the motion. (4 R.R. at 109).

On Monday, March 11, 2024, Parker was not present at court. (5 R.R. at 6). At approximately 12:20 p.m., trial counsel made a record concerning Parker's absence.[5] (5 R.R. at 6). (C.R. at 800). Trial counsel informed the court Parker texted counsel at approximately 7:15 a.m. informing him that Parker was being transported to the hospital via ambulance for chest pains and nauseousness. (5 R.R. at 6). Counsel did not receive the text until around 8:15 a.m. (5 R.R. at 6). Counsel advised the Court and the prosecutor of the texts close to 9:30 a.m. (5 R.R. at 9). Counsel texted both Parker and

[4] The record reflects the late start time was due to the court reporter not being available until noon. (2 R.R. MNT at 114).

[5] The colloquy on the record was not the first time defense approached the court on this matter. The parties approached without a court reporter at approximately 9:30 a.m. (5 R.R. at 9).

his investigator, Mike Peterson, that he needed specifics such as: the start time of symptoms, the time of his arrival at the hospital, the name and phone number of the hospital, the name of the head nurse and treating physicians and when Parker would be released to return to court. (5 R.R. at 16). Counsel's investigator also left messages on Parker's mother's and girlfriend's phones. (5 R.R. at 16-17). Counsel represented to the court there had been texts between himself and Parker throughout the morning, but Parker had not given counsel the specific details such as the name of the hospital and when he would be released to return to court. (5 R.R. at 6-7). Counsel read into the record excerpts of texts between counsel and Parker's mother concerning Parker being in the hospital and that trial could continue without Parker present and ultimately that Parker's mother intended to be at court.[6] (5 R.R. at 10-11).

Under the court's questioning, counsel admitted he had not been able to "substantiate [Parker's] claim of being in the hospital; specific information such as the name of the hospital, the treating physician." (5 R.R. at 11). Counsel clarified with the court he was seeking a one-day continuance. (5 R.R. at 14). At 12:42 p.m., the court denied counsel's request. (5 R.R. at 20). (C.R. at 800). Trial proceeded without Parker and counsel called a state's witness to authenticate a photo showing Ealy holding a weapon and making some hand signs. (5 R.R. at 31-33). The defense rested without

[6] Parker's mother was not in court during the bench conference. (5 R.R. at 11 &19).

calling any other witnesses. (5 R.R. at 43). It appears Parker arrived at court sometime between 3:50 p.m. when the jury began deliberating and 4:15 p.m. when a jury note was read into the record. (5 R.R. at 78-79) (C.R. at 800). The jury found Parker guilty at 6:00 p.m. on March 11, 2024. (C.R. at 800).

Additional Facts Shown at Motion for New Trial Hearing

Parker filed a timely Motion for New Trial which included a claim the trial court committed material error by ruling Parker voluntarily absented himself from trial. (2 MNT R.R. at 7) (C.R. at 609).[7] Trial counsel Wood and Parker were the only witnesses who testified at the hearing. (2 MNT R.R. at 30 & 121). Wood admitted he did not review his file or do anything to prepare for the hearing. (2 MNT R.R. at 70). As a result, his testimony is not crystal clear.

Trial Counsel's Testimony

When asked about Parker missing part of the trial, Wood could not remember all the details but did remember discussing with the judge that Parker was not voluntarily absenting himself from the courtroom. (2 MNT R.R. at 77). Wood stated he asked for a continuance and had asked Parker for details of why Parker was not present, but he did not receive those details. (2 MNT R.R. at 78). Wood agreed that he

[7] Initially, the Harris County Public Defender's Office was appointed to represent Parker on appeal. (C.R. at 576). However, Parker hired different counsel for the sole purpose of filing and litigating a motion for new trial. (C.R. at 601). The Harris County Public Defender's Office was re-appointed after the motion was denied. (C.R. at 790).

put on the record his and his investigator's efforts to obtain the details regarding Parker's absence. (2 MNT R.R. at 100).

After both sides finished questioning Wood, the trial court asked some clarifying questions. (2 MNT R.R. at 114). In response to the court's questions, Wood stated that at the time, he was told Parker was having chest pains, but he did not know what hospital Parker was in or the actual diagnosis Parker was given. (2 MNT R.R. at 115). Wood stated there was no specific information the court could verify at the time. (2 MNT R.R. at 115). Wood agreed he tried to contact Parker's mother and she did not provide detailed information either. (2 MNT R.R. at 116). Wood admitted he had been told Parker's girlfriend was giving birth the same day Parker failed to report to court but denied that is why Parker did not attend, stating Parker told him Parker was having chest pains. (2 MNT R.R. at 117). Wood could not specifically recall whether he had attempted to reach Parker by calling him, but he knew Parker had responded via text. (2 MNT R.R. at 117). Wood stated he believed his investigator also tried to locate Parker. (2 MNT R.R. at 117-118). Wood could not remember whether Parker provided written documentation from the hospital when Parker arrived at court but stated if Parker had done so, it was well after the court had concluded the hearing on whether Parker was voluntarily absence. (2 MNT R.R. at 118-119). Wood did not know if Parker contacted the court staff directly. (2 MNT R.R. at 119). Wood could not pinpoint when Parker arrived at court that afternoon but believed the jury had already started deliberating. (2 MNT R.R. at 120).

Parker's Testimony

Parker testified he did not voluntarily absent himself from court on March 11, 2024. (2 MNT R.R. at 127). Parker testified he did not appear for court at noon because he had to be taken to St. Joseph's Medical Center by ambulance that morning around 7 to 7:30 a.m. (2 MNT R.R. at 121-123 & 168). Parker was experiencing shortness of breath, and pains in his chest, back and leg.[8] (2 MNT R.R. at 121-123). Parker was also light-headed and dizzy. (2 MNT R.R. at 127). Parker rated his pain at the time as a 9 on a 10-point scale and said he could not even talk to EMS. (2 MNT R.R. at 122). Parker believed he was having a heart attack. (2 MNT R.R. at 123). Parker texted Wood immediately. (2 MNT R.R. at 124). Parker did not call Wood as EMS would only let him text. (2 MNT R.R. at 169).

Parker testified he had difficulties communicating with trial counsel while in the hospital. When Parker arrived at the hospital, he was placed in a room and was not allowed to have his cell phone with him. (2 MNT R.R. at 124). Additionally, Parker's phone was going dead and although he borrowed a charger from a nurse, it would not charge his phone. (2 MNT R.R. at 161-162, 169). Parker testified he and Wood were texting and Parker believed he told Wood the name of the hospital but not the address.

[8] Parker also reported that he had hurt his knee playing football the day before but testified he did not believe the chest pains were associated with him playing football. (2 MNT R.R. at 154 & 156).

(2 MNT R.R. at 163). Parker was also providing information to Wood's investigator and testified the investigator called and spoke to the nurse. (2 MNT R.R. at 163, 170).

Parker's medical records indicated he was discharged at 1:40 pm. (State's Exhibit 4 page 1). Parker testified he immediately went to court after being released. (2 MNT R.R. at 124-125). When he arrived, the jury was already deliberating his guilt. (2 MNT R.R. at 127). Parker testified he gave Wood written documentation from the hospital. (2 MNT R.R. at 174).

Upon questioning why it took so long to get from the hospital to court, Parker explained he did not have a ride and had to wait for a family member from another part of town to come and get him and take him to court. (2 MNT R.R. At 147, 151-152). Parker did not know how long it took for his wife's sister to arrive but admitted "it took a while." (2 MNT R.R. at 151-152). In response to the court's questioning, Parker admitted he did not think to ask Wood to come pick him up because Wood "kept suggesting [he] need[ed] to get to court as soon as [he] could." (2 MNT R.R. at 173).

After the jury found him guilty, Parker was taken into custody. (2 MNT R.R. at 124). Parker testified that same evening he had to be taken for medical treatment as the chest pains returned.[9] (2 MNT R.R. at 124-125, 160).

[9] The State's objection to medical records was sustained and Defense Exhibit 6 was not admitted into evidence. (3 MNT R.R. at 25).

When questioned about whether his wife was having a baby the morning Parker went to the hospital, Parker testified he went to the hospital for his own health issues not because his wife was having a baby that day. (2 MNT R.R. 122-123). Parker stated the child was not born until a month after the trial.[10] (2 MNT R.R. 122-123). Parker testified although his wife was having a fluid discharge and was in the same hospital he was, he left his wife at the hospital and went to court once he was discharged. (2 MNT R.R. at 152).

During cross-examination the prosecutor repeatedly questioned Parker regarding entries in Parker's medical records including a portion that Parker had denied pain *"at this time"* and reported his pain level as zero. (2 MNT R.R. at 154, 156, 159) (emphasis added). Parker stated he "didn't deny having chest pains. That's what I was at the hospital for." (2 MNT R.R. at 159). It appears the portion of the medical records the prosecutor was referring to is the triage note which is repeated throughout the partial records attached to the motion for new trial. (2 MNT R.R. at 147). The complete records were admitted the second day of the motion for new trial hearing as State's Exhibit 4. (3 MNT R.R. at 26-27). These records contain a notation that Parker did report pain at the hospital. Specifically, Parker reported a pain level of 4 while at the hospital and the pain was described as being "pressure type." (State's Exhibit 4 page 6).

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[10] Parker stated the child was born on the 24th of "last month". The Motion for New Trial Hearing was in May 2024 thus the child was born April 24th. Parker was absent for a portion of the trial on March 11, 2024. Furthermore, Ms. Menard testified for Parker during the punishment phase on March 12, 2024, and was still pregnant. (2 MNT R.R. at 172) (6 R.R. at 65).

Parker was also questioned about his desire to testify during the guilt innocence phase. Parker stated it was always his intention to testify and "tell the jury [his] side of the story and what happened to [him]." (2 MNT R.R. at 126 & 130). Parker testified Wood knew this and that he reiterated his desire to testify when he arrived at court after leaving the hospital. (2 MNT R.R. at 130).

Parker could have told the jury he would not have gone to Burks' apartment had he known Burks and Ealy were still in a relationship. (2 MNT R.R. at 137). Parker had wanted to tell the jury that he was afraid of Ealy and when Ealy came to Burks' home, Parker did not want him to know he was there. (2 MNT R.R. at 138). Parker waited for time to pass after Ealy was banging on the door before leaving, hoping that Ealy had left.[11] (2 MNT R.R. at 138).

Parker also testified that had he been able to testify during the trial he would have explained to the jury why he believed it was necessary for him to use lethal force against Ealy and that he believed Ealy had a weapon that day.[12] (2 MNT R.R. at 143). Parker explained he and Ealy had gone to high school together and Ealy had bullied Parker. (2 MNT R.R. at 135-136). Parker believed Ealy was a high-ranking member of

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[11] The prosecutor's relevance objection to the next question of how long Parker waited was sustained. (2 MNT R.R. at 139).

[12] On cross-examination, Parker could not recall if he previously told anyone that he believes Ealy was armed. (2 MNT R.R. at 166).

the "Gangsta Disciples" gang, which he knew to be violent and to carry guns. (2 MNT R.R. at 136-137).

B. Standard of Review

Appellate courts will review the trial court's determination that a defendant voluntarily absented himself from trial for an abuse of discretion. *Moore v. State*, 670 S.W.2d 259, 261 (Tex. Crim. App. 1984). Absent evidence to the contrary, an appellate court will uphold a trial court's determination that a defendant voluntarily absented himself from the proceedings. *Id.* However, in reviewing such a decision, the reviewing court may consider not only the evidence before the trial court at the time it ruled but also any later-developed evidence. *Id.* "In most instances, the appellate court must determine, from hindsight, the validity of the trial court's determination that the defendant's absence was voluntary." *Moore*, 670 S.W.2d at 261). A defendant must provide evidence to refute the trial court's determination. *Id.*

C. Applicable Law

The right to be present trial is rooted to a large extent in the right to confrontation, when the defendant is not confronting witnesses or evidence, the right to presence is rooted in due process. *Sandoval v. State,* 665 S.W.3d 496, 510 (Tex. Crim. App. 2022), *cert. denied*, 144 S. Ct. 1166 (2024) citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

A defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to

defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Hughes v. State*, 691 S.W.3d 504, 513 (Tex. Crim. App. 2024), *reh'g denied* (July 31, 2024) (quoting *Gagnon*, 470 U.S. at 526, 105 S. Ct. 1482).

Additionally, Tex. Code of Crim. Proc. Art. 33.03 contains the statutory authority of a defendant's right to be present at trial, providing in pertinent part:

> In all prosecutions for felonies, the defendant must be personally present at the trial, ... provided, however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when the trial is before a jury, the trial may proceed to its conclusion.

A defendant's right to be present is not unlimited and can be waived by his own actions. *See generally, Morrison v. State*, 480 S.W.3d 647, 656 (Tex. App. — El Paso 2015, no pet.).

D. Analysis

Appellant did not voluntarily absent himself from trial

Parker provided evidence that refutes the trial court's determination he voluntarily absented himself from trial. Parker's medical records show that Parker was in the hospital being treated for chest pains when trial was to begin. (State Exhibit 4) (C.R. at 800). Parker arrived via ambulance at 7:34 a.m. and was discharged at 1:40 p.m. (State's Exhibit 4 page 1).

The State pointed the court to *Moore v. State,* 670 SW.2d 259 (Tex. Crim. App. 1984) as the controlling case on voluntary absence. (3 MNT at 34). However, *Moore* is distinguishable on its facts. First, there was no evidence Moore was actually in the hospital. Moore's attorney was merely speculating as to a possible explanation for Moore's absence as there had been *no* communication between Moore and his attorney. *Id.* at 261. Here Wood testified both at trial and at the motion for new trial hearing that Parker had communicated with Wood via text and told Wood he was in the hospital. (5 R.R. at 6) (2 MNT R.R. at 117). Wood just did not have the specifics. (5 R.R. at 6-7). Additionally in *Moore*, no evidence was presented at a motion for new trial hearing to show Moore's absence was anything but voluntary. *Id.* Here Parker's medical records were introduced and showed he was being treated for chest pains. (State's Exhibit 4).

Most telling, however, is Moore never returned to court voluntarily. Moore returned to court only after he was arrested six months later in another state and had to be extradited. *Id.* at 260. That is not the case here. Parker voluntarily appeared in court sometime between 2 hours and 10 minutes and 2 hours and 35 minutes after being discharged from the hospital.[13] (5 R.R. at 78-79) (C.R. at 800).

At the motion for new trial hearing the state argued that Parker should have gotten to court faster, that he could take public transportation, Uber etc. (3 MNT R.R.

[13] The record reflects Parker was not present at 3:50 p.m. when the jury began deliberating but was present at 4:15 p.m. when a jury note was read into the record. (5 R.R. at 78-79) (C.R. at 800).

at 35 & 40). There is no evidence any of these methods would have allowed Parker to arrive any faster. There is also no evidence that Parker had the knowledge,[14] ability, or sufficient funds[15] to utilize any of these methods. What the evidence does show is that Parker was still in the hospital when the court began and when it made its ruling. (State's Exhibit 4) (C.R. at 800).

The state then argued Parker was voluntarily absent because he caused his own chest pains from playing football with his kids the Sunday before trial citing *Ashley v. State*, 404 S.W.3d 672, 680 (Tex. App. — El Paso 2013, no pet.) and *Sanchez v. State*, 842 S.W.2d 732, 733 (Tex. App. — San Antonio 1992, pet. ref'd). (3 MNT R.R. at 42-43). Neither case is applicable here. *Ashley* involves a situation where the defendant was in custody and on the morning of trial fought with the bailiffs, took off his clothes and refused to leave his cell. This is clearly not a case where Parker was voluntarily absent due to his own bad behavior.

In citing *Sanchez,* the state argued courts have found a defendant voluntarily absent when hospitalized after a suicide attempt.[16] To equate a suicide attempt with

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[14] Parker's intellectual abilities are diminished to some extent as is evidenced by his enrollment in Special Education classes while in school. (2 MNT R.R. at 128).

[15] The trial court has specifically found Parker personally indigent on two separate occasions during the pendency of this case when the Harris County Public Defender's Office was appointed on appeal. (C.R. at 576, 579). Mr. Wood was also appointed twice. (C.R. at 29) (2 MNT R.R. at 35).

[16] The state's citation to *Sanchez* is incorrect as *Sanchez* makes no mention of suicide. But other courts have held suicide attempt could render a defendant's absence voluntary. *See Bottom v. State*, 860 S.W.2d 266, 267 (Tex. App. — Fort Worth 1993, no pet.).

playing with one's children is ridiculous. Suicide is a voluntary action with a specific goal which, if successful, would necessarily mean one would not be present at court. It is unreasonable to believe one can plan or even anticipate playing football with one's own kids would cause chest pains and necessitate missing court. Taken to the extreme, what action should a defendant take? Not leave the courthouse at the end of each day because anything could happen, including being involved in a car accident on the way home that would require hospitalization. Playing football with your children is not a choice to miss court.

The state also argued Parker's medical condition was not severe enough to prevent him from appearing at court citing *Vaquez-Mata v. State*, No. 13-01-00743-CR, 2002 WL 1765582 (Tex. App. — Corpus Christi – Edinburg Aug. 1, 2002, no pet.)(not designated for publication). (3 MNT R.R. at 44). The state argued because Parker was discharged with just an aspirin it was a voluntary choice to miss court and go to the hospital instead, implying such a choice was unreasonable. (3 MNT R.R. at 45).

The state pointed to the triage notes which state Parker was not experiencing "at that moment" when he arrived at the hospital. (2 MNT R.R. at 154, 156, 159). But the State failed to note the medical records also indicate he was feeling a type of pressure pain that he rated as a 4 out of a 10-point scale. (State's Exhibit 4 page 6). The state's argument also fails to recognize a heart attack itself is not a prolonged event. Additionally, Parker continued to have chest pains even after he was found guilty and in custody. (2 MNT R.R. at 124-125, 160). Finally, as noted in the discharge papers "[i]n

most cases, people who come to the emergency room with chest pain don't have a problem with their heart." (State's Exhibit 4, page 13). It is the state's argument that is unreasonable not Parker's decision to seek medical treatment.

Furthermore, *Vasquez-Mata,* is distinguishable. The defendant was not at the hospital while court was in session. She had gone to the hospital the night before and been released from treatment approximately at 1:25 a.m. *Id.* at 1. Court was not due to start until 7 ½ hours later and the defendant still did not appear, nor did she attempt to contact the court or her attorney. *Id.* Additionally, like Moore, Vasquez-Mata had to be arrested to be brought into court. *Id.* As stated above, both Wood and Parker confirmed Parker contacted counsel approximately 4 ½ hours *prior* to when court was to begin and communicated his whereabouts. (5 R.R.at 6) (2 MNT R.R at 124). Parker was still at the hospital when court began, and he voluntarily appeared in court within three hours after he was discharged. Thus *Vasquez-Mata* is not determinative.

Finally, the state cited *Nauls v. State,* 762 S.W.2d 336 (Tex. App. — San Antonio 1988, no pet.) arguing that Parker was not a credible witness who chose to be absent from court because it could be inferred he went to hospital via ambulance because he believed his wife's water broke. (3 MNT R.R. at 32, 44-46). In *Nauls*, the defendant did not appear for court at 9 a.m. and did not contact anyone until he called the court around 12:30 p.m. *Id.* at 337. The clerk advised Nauls to appear in court immediately, but he did not do so. *Id.* At a motion for new trial hearing, Nauls introduced evidence that his girlfriend had a medical emergency and he needed to take her to the hospital at

7:30 a.m. because her roommate's tires had been slashed. *Id.* at 338. The girlfriend had surgery at 8:45 a.m. and testified that "someone" needed to stay with her. *Id.* Nauls testified he took his girlfriend to the hospital instead of letting the roommate borrow his car because the car was expensive. *Id.* Nauls testified he did not come to court because "he thought '…maybe the Court was over, everything had been solved I figured.'" *Id.* The court found Nauls did not refute the trial court's determination of voluntary absence because he "of his own volition, made the decisions not to communicate with the court on the morning of trial and, further, not to report in person to the courtroom where the trial was in progress *after* the hospital episode." *Nauls v. State*, 762 S.W.2d 336, 338 (Tex. App.—San Antonio 1988, no pet.) (emphasis added).

Parker did everything Nauls did not. Nauls never claimed to be the one who needed medical treatment. Parker did. Nauls contacted no one when he initially went to the hospital. Parker did. Nauls did not report to court after the episode was over. Parker did. Nauls did not refute the trial court's determination. Parker did. This court should find Parker was denied his constitutional and statutory rights to be present at trial.

Harm

Errors involving due process rights are constitutional errors. *Hughes v. State*, 691 S.W.3d 504, 523 (Tex. Crim. App. 2024), *reh'g denied* (July 31, 2024). As such, a reviewing court is required to reverse the judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the

conviction or punishment. *Id.* citing Tex. R. App. P. 44.2(a). In determining beyond a reasonable doubt whether a constitutional error was harmless, the reviewing court will consider any and all circumstances in the record that have a bearing on the analysis. *Id.* This harmful error analysis is performed in a neutral light rather than in a light most favorable to the prosecution and the State, as the beneficiary of the error, has the burden to show beyond a reasonable doubt the error was harmless. *Id.* citing *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016), *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020); *Wells v. State*, 611 S.W.3d 396, 411 (Tex. Crim. App. 2020). "If, after such analysis, the harm of the error simply cannot be assessed, then 'the error will not be proven harmless beyond a reasonable doubt,' and reversal is required." *Kapperman v. State,* No. 01-20-00127-CR, 2022 WL 3970081, at *26 (Tex. App. — Houston [1st Dist.] Sept. 1, 2022, no pet.) citing *Morris v. State*, 554 S.W.3d 98, 123 (Tex. App. — El Paso 2018, pet. ref'd).

In addition to reviewing for harmless error, the reviewing court is also to utilize the "reasonably substantial relationship test" *Hughes* at 523. The two are not interchangeable. *Id.* The harmless error test, in the context of the right to be present, seeks to determine the effect of the defendant's absence on the outcome of the proceeding, whereas the reasonably substantial relationship test seeks to determine the effect of the defendant's absence on the advancement of his defense. *Id. citing Adanandus v. State*, 866 S.W.2d 210, 219-220 (Tex. Crim. App. 1993).at 219–20.

A violation of article 33.03 is subject to a harm analysis under Texas Rules of Appellate Procedure 44.2(b). "[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 jury's verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App. — Houston [14th Dist.] 2022, pet. ref'd), citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

Parker was harmed by the trial court's continuing the trial without Parker present. There was but a single question the jury had to decide – whether or not Parker shot Ealy in self-defense. Parker was the only person who could provide the evidence justifying his actions. There were no witnesses to the actual shooting, no one to say exactly what happened between the two men. Additionally, Parker testified at the motion for new trial hearing that it was always his intention to testify in his own defense. (2 MNT R.R. at 126 & 130). Parker stated he wanted to explain to the jury why he believed it was necessary for him to use lethal force against Ealy and that he believed Ealy had a weapon that day. (2 MNT R.R. at 143). Had the court not continued without Parker, Parker could have told the jury about how Ealy bullied him when they were in high school together and Parker's belief that Ealy was a high-ranking member of a gang that Parker knew to be violent and to carry weapons. (2 MNT R.R. at 135-137).

A "defendant's absence from trial is not a trivial factor in the jury's decision-making process. On the contrary, it is palpable and its impact cannot readily be

assessed—and as such, …[the reviewing court] must assume it had some effect." *Morris v. State,* 554 S.W.3d 98, 126 (Tex. App. — El Paso 2018, pet. ref'd). This is true even in cases where "the defendant does not testify, his demeanor will play a role in the jury's determination of guilt and innocence." *Id.* Here the jury had been told from the beginning this was a self-defense case. (3 R.R. at 12-14). Of course, the jury expected to hear from a witness as to why Parker believed lethal force was necessary and those expectations were not met. It is true that part of Parker's self-defense claim was presented through his statement to the officer. However, had Parker been allowed to testify the jury would have had much more information to determine the validity of Parker's claim. "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Kapperman v. State,* No. 01-20-00127-CR, 2022 WL 3970081, at *18 (Tex. App. — Houston [1st Dist.] Sept. 1, 2022, no pet.) citing *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J. concurring).

Under Tex. R. App. 44.2(a), the substantial relationship test and even Tex. R. App. 44.2(b), Parker was harmed. Continuing trial without Parker resulted in the denial of Parker's right to testify and right to advance his self-defense claim. As a result, injury might reasonably be inferred from Parker's absence and continuing the case without Parker was not harmless beyond a reasonable doubt. Alternatively, Parker's absence

during the defense's case in chief caused a substantial and injurious effect on the verdict for the same reason.

Conclusion

Defense counsel asked but two things of the court, both of which the court declined. First, counsel asked the court to speak with Parker over the phone, but the court expressed his concerns that there was no guarantee who was speaking on the other side of the line. (5 R.R. at 7-8). Second, counsel asked for a continuance until the next day. Had the court granted the request to pause the trial for ***approximately four business hours*** Parker would not have been denied his constitutional and statutory rights to be present and his ability to fully present his claim of self-defense. This Court should reverse for a new trial.

Issue Two: Whether trial counsel rendered ineffective assistance of counsel when the sole independent witness who could testify regarding the complaining witness' character trait of violence did not appear at trial and counsel did not file a written motion for continuance or request a writ of attachment?

A. Applicable Facts

The defense subpoenaed Christopher Arroyo to appear at trial. (5 R.R. at 47) (C.R. at 5). Mr. Arroyo appeared at court on Friday, March 8, 2024, and was present for over five hours before being told to return at noon the following Monday. (5 R.R. at 17, 23, 46). Arroyo did not appear for court on Monday, March 11, 2024. (5 R.R. at 17 & 23). Prior to beginning testimony for the day there was a series a bench conferences regarding both Parker's and Arroyo's absence. Regarding Arroyo, counsel

advised the court Arroyo could testify regarding Ealy's character trait of violence and as the "sponsoring witness" for a photo of Ealy holding a gun and making "some kind of sign" with his hands. (5 R.R. at 21) (Defense Exhibit 8). Counsel asked for a continuance until the next morning stating Arroyo would be the defense's only witness unless Parker testified. (5 R.R. at 22). The trial court denied Parker's oral motion for a continuance. (5 R.R. at 24).

Counsel then called state's witness Roderick Chretin. (5 R.R. at 28). Chretin was the only witness in the defense's case in chief and his testimony consisted of identifying Ealy in a photo as the person who was holding a gun. (5 R.R. at 31) (Defense Exhibit 8).

After Chretin testified, counsel re-urged the need for a one-day continuance. (5 R.R. at 45). Trial counsel did not file a written motion for continuance or specifically request a writ of attachment. Despite failing to do either, counsel argued Arroyo's testimony was material to his defense, stating that Arroyo was "the only evidence that [he] had in [the] case unless Mr. Parker was going to take the stand." (5 R.R. at 45). Counsel had spoken in detail with Arroyo about Arroyo's testimony three days prior. (5 R.R. at 43). Counsel stated Arroyo would have testified to Ealy's character trait of propensity for violence and bullying, especially against those who spoke to Ealy's female friends. (5 R.R. at 44-45). Arroyo could have testified regarding multiple instances over a period of years where Ealy had threatened Arroyo with a weapon and told Arroyo to leave the area. (5 R.R. at 44-45). Arroyo could have also testified of an instance where

Ealy and his friends had assaulted him so badly, Arroyo had to seek treatment from a hospital. (5 R.R. at 44-45).

Counsel advised the court he believe Arroyo was attachable if counsel could find him and that "wouldn't happen within the constraints of getting to this jury today" and that he would not "represent to the Court [he] could accomplish that if [he] thought [he] could not." (5 R.R. at 47).

The court determined counsel's "rendition" did not qualify as an offer of proof under Tex. R. Evid. 103 because the court had not "excluded anything" and relied on *Gentry v. State*, 770 S.W.2d 780 (Tex. Crim. App. 1988) in continuing trial.

B. Standard of Review

Because Appellant presented this ineffective assistance of counsel claim in his Motion for New Trial, Appellant's claim is analyzed as a challenge to the denial of his Motion for New Trial. *Biagas v. State*, 177 S.W.3d 161, 170 (Tex. App. — Houston [1st Dist.] 2005, pet. ref'd). The appropriate standard of review is an abuse of discretion. *Id.*, citing *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). An appellate court views the evidence in the light most favorable to the trial court's ruling and will only reverse if the trial court's decision is arbitrary or unreasonable. *Id.*

C. Applicable Law

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. *Strickland* at 687. "Counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged as ineffective and affirmatively prove that they fell below the professional norm of reasonableness. *Milburn v. State*, 15 S.W.3d 267, 269 (Tex. App. — Houston [14th Dist.] 2000, pet. ref'd) citing *McFarland*, 928 S.W.2d at 500. "An ineffectiveness claim cannot be demonstrated by isolating any portion of counsel's representation but is judged on the totality of the representation. *Id.*, citing *Strickland*, 466 U.S. at 688.

In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. *Strickland* at 696 (1984).

D. Analysis

Deficient performance

"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 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 2006, no pet.).

Failure to file a Written Motion for Continuance

Article 29.13 of the Texas Code of Criminal Procedure provides a trial court may grant a continuance after trial has begun

> when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had.

However, a motion for continuance must be in writing and sworn to by a person having personal knowledge of the facts relied on. Tex. Code Crim. Proc. art. 29.03 and 29.08. "If a party makes an unsworn oral motion for a continuance and the trial judge denies it, the party forfeits the right to complain about the judge's ruling on appeal." *Anderson v. State*, 301 S.W.3d 276, 279 (Tex. Crim. App. 2009). Here counsel only made an oral motion for continuance and failed to comply with the statutory requirements of Tex. Code Crim. Proc. art. 29.03 & 29.08.

To establish ineffective assistance of counsel for failure to file a written and sworn motion for continuance, a defendant must demonstrate that the trial court would have erred in denying a sworn and written motion for continuance. *Lovell v. State*, No. 01-06-00152-CR, 2007 WL 14425, at *02 (Tex. App. - Houston [1st Dist.] Jan. 04, 2007,

pet. ref'd) (not designated for publication) (citing *Vaughn v. State*, 888 S.w.2d 62, 74 (Tex. App. - Houston [1st Dist.] 2007) *aff'd*, 931 S.W.2d 564 (Tex. Crim. App. 1996).

When a defendant's motion for continuance is based on an absent witness, the motion must show that (1) the defendant has exercised diligence to procure the witness's attendance, (2) the witness is not absent by the procurement or consent of the defense, and (3) the motion is not made for delay; and (4) the facts expected to be proved by the witness. *Kinnett v. State*, 623 S.W.3d 876, 906 (Tex. App. — Houston [1st Dist.] 2020, pet. ref'd) citing *Harrison v. State*, 187 S.W.3d 429, 434 (Tex. Crim. App. 2005).

Trial counsel actions fulfilled all four of these requirements. First, Arroyo was subpoenaed and appeared in court where he waited five hours to testify. (5 R.R. at 23 & 47) (C.R. at 550). Unfortunately, he was not reached that day and was told to return the following Monday. (5 R.R. at 23). Arroyo did not appear on Monday. (5 R.R. at 17). Trial counsel did not consent to his absence and in fact told Arroyo that he was the only person who could testify regarding Ealy's character traits. (5 R.R. at 23). The request for a continuance was not for delay. Counsel merely asked for a few hours continuance until the next morning to resume trial.[17] (5 R.R. at 22). Regarding Arroyo's testimony, counsel stated Arroyo could testify regarding Ealy's character trait of

[17] The trial court first denied the continuance at 12:50 p.m. (5 R.R. at 24). (C.R. at 800). Counsel re-urged the motion at 2:30 p.m. after the lunch break. (5 R.R. at 43) (C.R. at 800).

violence and as the "sponsoring witness" for a photo of Ealy holding a gun and making "some kind of sign" with his hands. (5 R.R. at 21) (Defense Exhibit 8). Counsel was not questioned regarding the failure to file a continuance at the motion for new trial hearing but was asked about the importance of Arroyo's testimony in the context of not asking for a writ of attachment. (2 MNT R.R. at 51-52). Counsel confirmed his plan had been for Arroyo to testify regarding the violent disposition of Ealy. (2 R.R. MNT at 51-52). Counsel stated he believed Arroyo's testimony could have "touched on the propriety of Mr. Parker's apprehension of fear or danger" as well as ensuring the photos of Ealy holding a gun would be admitted into evidence. (2 R.R. MNT at 74).

Had counsel filed a written motion for continuance the trial court would have abused its discretion in denying the motion. "To establish an abuse of discretion, the appellant must show that the trial court erred in denying the motion for continuance and that the denial actually and specifically prejudiced appellant's defense." *Kinnett v. State*, 623 S.W.3d 876, 906 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd). Here the denial of a continuance prevented Parker from presenting evidence of his self-defense claim.

Parker did not testify in the guilt innocence portion of the trial and as such the only evidence to support his claim of self-defense was his recorded statements. However, as the State pointed out in closing Parker's credibility was questionable in light of the fact, he gave multiple versions of what happened the day of the shooting. (5 R.R. at 71-72). Arroyo was an independent witness whose testimony regarding his

prior dealings with Ealy would support Parker's self-defense claim. From Arroyo's testimony the jury could have believed Ealy was capable of causing injuries requiring hospital treatment with his bare hands, and routinely carried a weapon and threatened those Ealy did not want around his female friends. (5 R.R. at 44-45). Arroyo's testimony would have given credence to Parker's statements that Ealy was the first aggressor the day of the shooting as well as justifying Parker's fear of Ealy.

Because the failure to file a written motion justified the trial court's denial of a continuance, counsel's inaction prejudiced Parker's right to present a defense, thus trial counsel's performance was deficient.

Failure to request a Writ of Attachment

A writ of attachment is the proper remedy when, after being subpoenaed, a witness fails to appear as directed. *Kinnett v. State*, 623 S.W.3d 876, 903 (Tex. App. — Houston [1st Dist.] 2020, pet. ref'd) citing *Gentry*, 770 S.W.2d at 785; *see Campbell v. State*, 551 S.W.3d 371, 377 (Tex. App. — Houston [14th Dist.] 2018, no pet.).

Tex. Code of Criminal Procedure art 42.12. provides that:

> When a witness who resides in the county of the prosecution has been duly served with a subpoena to appear and testify in any criminal action or proceeding fails to so appear, the attorney representing the state or the defendant may request that the court issue an attachment for the witness. The request must be filed with the clerk of the court and must include an affidavit of the attorney representing the state or the defendant, as applicable, stating that the affiant has good reason to believe, and does believe, that the witness is a material witness.

The Court of Criminal Appeals has established a three-step procedure for preserving error when a subpoenaed witness does not appear for trial. *Sturgeon v. State*, 106 S.W.3d 81, 85 (Tex. Crim. App. 2003) (citing *Erwin v. State*, 729 S.W.2d 709, 714 (Tex. Crim. App. 1987); *See also Kinnett v. State*, 623 S.W.3d 876, 905 (Tex. App. — Houston [1st Dist.] 2020, pet. ref'd). First, the party must request a writ of attachment, which must be denied by the trial court. *Id.* Second, the party must show what the witness would have testified to. *Id.* Third, the testimony that the witness would have given must be relevant and material. *Id.* If all three requirements are met, reversible error will result unless the error made no contribution to the conviction or to the punishment. *Sturgeon*, 106 S.W.3d at 85; *Kinnett*, 623 S.W.3d at 905.

Counsel met the second and third steps of the *Erwin/Sturgeon* test. Counsel initially told the court that Arroyo could have testified regarding Ealy's character trait of violence and as the "sponsoring witness" for a photo of Ealy holding a gun and making "some kind of sign" with his hands. (5 R.R. at 21) (Defense Exhibit 8). Prior to the charge being read, counsel provided the court with more details regarding Arroyo's testimony so that the trial court was aware of the materiality of Arroyo's testimony. (5 R.R. at 43). As stated above, trial counsel's rendition of Arroyo's testimony was based on counsel's in-depth and in-person interview of Arroyo three days before. (5 R.R. at 43). Counsel stated that Arroyo would have testified to Ealy's character trait of propensity for violence and bullying, especially against those who spoke to Ealy's female friends. (5 R.R. at 44-45). Arroyo could have testified regarding multiple instances over

a period of years where Ealy had threatened Arroyo with a weapon and told Arroyo to leave the area. (5 R.R. at 44-45). Arroyo could have also testified of an instance where Ealy and his friends had assaulted him so badly, Arroyo had to seek treatment from a hospital. (5 R.R. at 44-45). At the motion for new trial hearing counsel confirmed his plan had been for Arroyo to testify regarding the violent disposition of Ealy. (2 R.R. MNT at 51-52). Counsel stated he believed Arroyo's testimony could have "touched on the propriety of Mr. Parker's apprehension of fear or danger" as well as ensuring the photos of Ealy holding a gun would be admitted into evidence. (2 R.R. MNT at 74).

However, despite counsel's desire and plan to have Arroyo testify and the fact that Arroyo had been subpoenaed, counsel failed to ask for a writ of attachment. This was deficient performance.

Prejudice

To satisfy the second prong of an ineffective of assistance claim, an "appellant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "Reasonable probability means a probability sufficient to undermine confidence in the outcome," but "[a]n Appellant need not show…that counsel's deficient performance more likely than not altered the outcome of the case." *Id.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. *Strickland* at 694.

Here counsel's failure to file a written and sworn motion for continuance or request a writ of attachment for Arroyo allowed the trial court to continue the trial without Arroyo's testimony. Had counsel filed the motion for continuance the trial court would have abused its discretion in denying it as discussed above. Had counsel simply requested a writ of attachment, the trial court would have been bound to issue the writ. "The plain language of the applicable section, Article 24.12, makes it clear that attachment of a witness who has been duly served with a subpoena *is a matter of right"* and "the denial of a writ of attachment is in effect the denial of the right to present a defense." *Sturgeon v. State,* 106 S.W.3d 81, 85 & 90 (Tex. Crim. App. 2003).

Counsel's inaction on both counts resulted in Parker not being able to present evidence substantiating his claim of self-defense. The jury was deprived of testimony from Arroyo, the sole independent defense witness who could testify on Ealy's propensity for violence. As noted in *Sturgeon*, "the failure to secure the attendance of witnesses who would be the only impartial witnesses testifying to a particular matter has been found to be reversible error." *Sturgeon v. State,* 106 S.W.3d 81, 88–89 (Tex. Crim. App. 2003) citing *Bland v. State,* 152 Tex. Crim. 32, 211 S.W.2d 751(1948) (error to deny continuance to obtain attendance of defense witnesses who were "the only disinterested witnesses not related by blood or marriage to defendant."); *Belton v. State,* 110 Tex. Crim. 142, 7 S.W.2d 1076 (1928) (rule against granting continuances when additional testimony is only "cumulative" did not apply when defendant's wife was the only witness to testify at trial.).

Without the ability to secure Arroyo's testimony, defense counsel had nothing to argue that Parker acted in self-defense other than Parker's contradictory self-serving statements to the police and a photo of Ealy holding a gun. Thus, counsel's failure to request a continuance or writ of attachment prejudiced Parker's right to present a defense and Parker should be granted a new trial.

Issue Three: Whether the judgment should be modified to reflect the amount of court costs in effect at the time of the offense as opposed to the time of trial?

Parker was charged $1,730 in court costs. (C.R. at 568). "Section 133.102 [of the Texas Local Government Code] authorizes imposition of certain costs and fees against a person convicted of an offense." *Wiggins v. State*, 622 S.W.3d 556, 561 (Tex. App. — Houston [14th Dist.] 2021, pet. ref'd). Under the current version of this provision, the state consolidated court cost is $185.00 for a person convicted of a felony. TEX. LOCAL GOV'T CODE § 133.102(a)(1) (2022). Appellant was assessed this cost. (C.R. at 568). However, the current version of Section 133.102 applies only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of the act, which was January 1, 2020." *Wiggins*, 622 S.W.3d at 561, citing Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 5.01, 5.04.

Parker allegedly committed this offense on August 22, 2019, which was prior to the effective date of the legislative changes to Section 133.102. (C.R. at 51). The prior version of Section 133.102 which imposed a court cost of $133.00 should have been

assessed instead of $185.00. See TEX. LOCAL GOV'T CODE § 133.102(a)(1) (2016). Therefore, this Court should modify the judgment to reduce the assessed court costs by $52.00. See *Wiggins*, 522 S.W.3d at 561 (modifying trial court's judgment to reduce $52 in court costs).

Additionally, the cost bill also contains a $105.00 for "Consolidated Court Cost – Local. This cost was added by amendment in 2019 and applies only to offenses committed on or after January 1, 2020. TEX. LOCAL GOV'T CODE § 134.101. This Court should modify or order that the Bill of Costs be modified by deleting the Consolidated Court Cost – Local. See *Rhodes v. State*, 676S.W.3d 228 (Tex. App. — Houston [14th Dist.] no pet. h.) (in *Anders* context, modifying trial court's judgment to remove certain erroneous court costs).

Therefore, this court should modify the trial court's judgment be modified to reflect the amount of $133.00 for the State Consolidated Court Cost instead of $185.00, the amount assessed and remove the Local Consolidated Court Cost.

PRAYER

For these reasons, Parker prays this Court reverse the opinion of the court of appeals and remand for a new trial.

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via e-filing service on the 30th day of October 2024.

/s/ Angela Cameron
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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