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DEBORAH M. YOUNG
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No. 01-24-00388-CR

In The Court of Appeals
For the First District of Texas

FILED IN
1st COURT OF APPEALS
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DEBORAH M. YOUNG
Clerk of The Court

Jose Angel Renteria-Garcia,
Appellant

v.

The State of Texas,
Appellee

On Appeal from Cause No. 1780245
From the 230th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument in this matter would not significantly aid the Court in its decisional process, and that the argument is adequately presented in this brief and in the record. Appellant does not request oral argument.

ISSUES PRESENTED

I. Trial Counsel was ineffective when he failed to contest the previous designation of two outcry witnesses when it became clear that they were improperly designated, and resulted in the admission of the only testimony that proved an element of the offense for which Appellant was convicted.

II. The trial court reversibly erred in denying a mistrial after an alternate juror improperly participated in deliberations and cast a vote, thereby contaminating the jury's decision-making process, and where the jury's subsequent re-deliberation was so brief that it demonstrated they failed to follow the court's instructions to start over.

STATEMENT OF THE CASE

Jose Angel Renteria-Garcia was indicted by a Harris County Grand Jury on December 19, 2022, for continuous sexual abuse of a child (CR 63). The case proceeded to trial on May 6, 2024. (CR 492). The jury returned a guilty verdict on

May 15, 2024. (CR 462).

During the polling of the jury, the Court discovered that the alternate had deliberated and cast a vote, rather than one of the intended jurors.(12 R.R. 6). Defense counsel moved for a mistrial, which was denied (12 R.R. 8). The trial court ordered the correct jurors to convene, disregard their prior deliberations, and redeliberate. (12 R.R. 15). Shortly thereafter, they returned another guilty verdict.

The court immediately moved on to the sentencing phase of trial, and on May 16, 2024, the jury assessed a sentence of thirty (30) years in prison. (CR 473). No motion for new trial was filed. Appellant timely filed a Notice of Appeal on May 20, 2024. (CR 484). This appeal follows.

STATEMENT OF FACTS

In the early morning hours of July 26, 2022, Maria Orellana claimed that she heard her husband, Appellant, get out of bed and was surprised when he did not come back. 7 RR 28. She then noticed the motion-activated camera in her children's room was on. She looked at the view screen of the camera and discovered Appellant with his pants down and A.O.laying on the bed with her legs raised in the air.7 RR 29. After confronting Appellant, she called some family members who lived nearby and asked them to come over, including Appellant's mother and Maria's sister, Laura Orelleana. Laura arrived and called 911. 7 RR 20.

While waiting on police to respond, Laura took A.O. out of the house and sat with her in Laura's car. A.O. told Laura that A.O. wanted her "old daddy

back" and after Laura asked what she meant, A.O. clarified, "the one that didn't put his testicles in my vagina." 7 RR 21.

Emergency Medical Services paramedic Melissa Sears was one of the first responders to the call. She testified that A.O. reported to her that her stepfather, Appellant, "put his thing in [her]." 7 RR 99. A.O. was taken to the hospital and a sexual assault examination was performed by Sexual Assault Nurse Examiner Tuesday Sowers. 4 RR 31. Sowers testified that A.O. told her she "did not remember" when the first time Appellant had sexually assaulted her was, but that he had assaulted her "more than one time." 8 RR 52.

Later that morning, A.O. was subjected to a forensic interview with social worker Claudia Hauser. A.O. disclosed to Hauser that Appellant had previously told A.O. that he would "stop doing this to [her]." 9 RR 123. Hauser took this to mean that Appellant had assaulted A.O. more than once, prompting Hauser to ask for clarification. A.O. told Hauser that Appellant had also assaulted her when she was seven and eight years old. 9 RR 124.

Police Investigator Jose Herrera interviewed Appellant at the house that morning. Herrera reported that Appellant willingly spoke with him and tearfully admitted that he had pulled down A.O.'s shorts and that his penis made contact with her vagina. 15 RR 97. However, he insisted that no penetration happened, and that he had never done anything like this before. 15 RR 99.

DNA analyst Tammy Taylor testified that DNA from A.O.'s underwear

was compared to Appellant's DNA, and it was "extremely likely" that Appellant was a contributor to the profiles found in the underwear. 9 RR 72.

SUMMARY OF THE ARGUMENT

The two witnesses designated as "outcry" witnesses at a pretrial hearing were not actually outcry witnesses. This became apparent, at the latest, during trial, when other witnesses gave testimony that indicated that they would have actually been the proper outcry witnesses. Once this was discovered, defense counsel failed to object or otherwise raise the issue of the improper designations, instead allowing both of the improperly designated outcry witnesses to testify. This constituted ineffective assistance of counsel. There was no conceivable strategy behind allowing the improper outcry testimony in to trial, when counsel had previously fought against its admission at the pretrial hearing. Additionally, the evidence that was admitted through one of the wrongly-designated witnesses was the only evidence presented of the temporal requirement of the continuous element of the offense, which is obviously egregiously harmful to Appellant.

Further, an alternate was mistakenly sent to deliberate with eleven members of the jury, while the twelfth member of the jury was mistakenly excluded from deliberations. This mistake was uncovered as the jury was being polled, and the trial court's solution was to dismiss the alternate and order the twelve jurors to redeliberate. What this meant in reality was that

eleven members of the jury effectively participated in discussion of the case prior to true deliberations, with the alternate, an outside influence. The trial court's instruction to "redeliberate" were clearly disregarded because the initial improper deliberations took over 10 hours, but the second "proper" deliberations took 35 minutes. This is constitutional error and deprived Appellant of an impartial jury.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE OUTCRY EVIDENCE, WHICH RESULTED IN THE ONLY EVIDENCE OF THE "CONTINUOUS" ELEMENT OF THE ASSAULT BEING ADMITTED, HARMING APPELLANT

A. Standard of Review:

This Court should apply a two-pronged test to ineffective assistance of counsel claims. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Thompson v. State,* 9 S.W.3d 808, 812 (Tex.Crim.App.1999). First, Appellant must show that his counsel's performance was deficient; second, Appellant must show the deficient performance prejudiced the defense. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

In evaluating the effectiveness of counsel under the first prong, courts look to the totality of the representation and the particular circumstances of each case. *Thompson,* 9 S.W.3d at 813. The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. *Strickland,* 466 U.S. at 688–89, 104 S.Ct. at 2065. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S.Ct. at 2066. An allegation of ineffective assistance must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson,* 9 S.W.3d at 814. Our scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

The second prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, *i.e.,* a trial whose result is reliable. *Id.* at 687, 104 S.Ct. at 2064.

The applicant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State,* 9 S.W.3d 808, 813 (Tex.Crim.App.1999). Allegations of ineffectiveness must be based on the record, and the presumption of a sound trial strategy cannot be overcome

absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State,* 990 S.W.2d 263, 269 (Tex.Crim.App.1999). The reviewing court must look to the totality of the representation, and its decision must be based on the facts of the particular case, viewed at the time of counsel's conduct so as to eliminate hindsight bias. *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. In all cases, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Id.* at 696, 104 S.Ct. 2052. *Ex parte Martinez,* 330 S.W.3d 891, 901 (Tex.Crim.App.2011)

B. Determining Who Qualifies as an Outcry Witness

The Texas Code of Criminal Procedure allows admission of certain hearsay testimony in the prosecution of sexual offenses against minors. TEX. CODE CRIM. PROC. ANN. art. 38.072State. The statute allows the designation of an outcry witness to testify about a child's disclosure of abuse but requires that the outcry witness be the "first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense." *Id.* § 2(a)(3); *Garcia v. State,* 792 S.W. 2d 88 (Tex. Crim. App. 1990). To qualify, the disclosure must include more than "a general allusion that something in the area of child abuse was going on." *Garcia* , 792 S.W.2d at 91. It must "in some discernible manner describe[ ] the alleged offense." *Id.* Before a designated outcry witness may testify about the child's disclosure, 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." TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2). A trial court has broad discretion in determining the admissibility of the proper outcry witness. *Garcia*, 792 S.W.2d at 92. The exercise of that discretion will not be disturbed unless a clear abuse of that discretion is established by the record. *Id.; see also Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App. 1990) (stating that a trial court abuses its discretion when its ruling is outside the "zone of reasonable disagreement").

C. Analysis

Here, the issue is not with the trial court's designation of the outcry witnesses at the pretrial hearing, but rather with trial counsel's failure to act when it became clear during trial that the court had designated the wrong witnesses in both instances. Trial counsel was clearly ineffective because there can be no possible strategic reason to fight against an outcry witness' testimony in the pretrial outcry hearing and then fail to object to the *same witness'* outcry testimony when new and pertinent grounds have appeared.

In the instant case, the pretrial outcry hearing designated EMT Melissa Sears as the outcry witness for the sexual assault that was alleged to have occurred on July 26, 2022, and forensic interviewer Claudia Hauser as the outcry witness for the

additional assaults said to have happened in the past. Sears and Hauser were the only two witnesses the State called at the pretrial hearing. At that time, defense counsel made no argument that there were other people who instead qualified as the "first person" A.O. made outcry statements to, arguing only that the outcry statements were unreliable and then that only Sears should be able to testify, not Hauser.

At trial, the first witness to testify was Laura Orellana, A.O.'s aunt. She testified that she arrived to the scene where Appellant confessed to her, and then she called police and took A.O. out to her car to talk. Laura Orellana testified that A.O. told her what had just happened, and the Court admitted her statement that A.O. said she wanted her "old daddy" back, the one who "didn't put his testicles in [her] vagina." This is an outcry statement, and defense counsel should have objected to the previous designation of Melissa Sears as the outcry witness when he realized that Laura was the actual outcry witness.

Melissa Sears testified later in the case, pursuant to her outcry witness designation. This essentially allowed the State to bootstrap additional corroborative hearsay evidence in to their case by falsely designating an outcry witness that they ostensibly knew was not the first person the child had made an outcry to (assuming they had spoken to the other witnesses prior to trial). The State didn't need to have Laura Orellana qualified as an outcry witness, because

she spoke to A.O. in the immediate aftermath of the incident, and the State argued successfully that A.O. was making excited utterances. But Sears arrived on the scene later than Laura Orellana, and the argument the State could have made for an excited utterance exception was weaker. This allowed the State to cherry-pick the outcry witness designation by not mentioning or calling any of the other potential outcry witnesses in the hearing.

This might be less indicative of bad faith if it had only happened once, but it happened *twice*. Sexual Assault Nurse Examiner Tuesday Sowers testified prior to Claudia Hauser. The State sought (successfully) to have Sowers testify about statements made by A.O. as exceptions to the rule against hearsay because the statements were made for the purpose of medical diagnosis or treatment, pursuant to Tex. R. Evid. 803(4).

Nurse Sowers told jurors that A.O. disclosed to her at the SANE examination at the hospital early that morning that Appellant had previously sexually assaulted her. In fact, the disclosure to Nurse Sowers was more detailed than the disclosure A.O. later made to Claudia Hauser. Nurse Sowers testified that A.O. had described the assault that morning, and then affirmed that "it" had happened before (meaning that the Appellant had put his penis in her vagina). 8 RR 54. Nurse Sowers followed up by asking if A.O. knew how many times "it" had happened and A.O. told her, "No, I didn't count them on my fingers."8 RR 55. A.O.'s later

disclosure to Hauser was much more unclear in that she initially said the abuse had had never happened before, was unclear about her age at the time of the previous assault or assaults, and said she didn't remember where Appellant had put his penis in the previous assault or assaults. 8 RR 130-131.

Assuming that trial counsel for both the State and Appellant did not know that the proper outcry witnesses were Laura Orelleana and Tuesday Sowers in advance of their testimony at trial (which itself strains credibility) the revelation in their testimony was clear grounds for the defense to raise the issue with the Court and object to Hauser's prior designation as an outcry witness for the previous assaults. Hauser was now clearly *not* the first person over the age of 18 to whom A.O. had disclosed the facts about her previous instances of abuse to, and Sears was not the first person who A.O. had disclosed the events of that night to- which was the assumption that their pretrial designations of outcry witness were based on.

Failing to object to Sears' designation as an outcry witness after Laura Orelleana's testimony was harmful because it admitted cumulative hearsay evidence that improperly bolstered the accusations against Appellant. But those more general harms pale in comparison to the failure of defense counsel to contest Hauser's designation as an outcry witness after Sowers' testimony , which was not only unreasonable, but also exceptionally harmful. Had Hauser's testimony about the prior assaults been barred as hearsay, there would have been *no evidence* except

for Nurse Sowers' testimony supporting that this was a "continuous" sexual abuse of a child, and that evidence would have been insufficient to support a conviction. The statement A.O. made to Sowers with regard to the past assaults did not put a timeline on them, and the only evidence that the State presented to show that the prior acts had been committed in a period longer than 30 days, as required by statute, was Hauser's testimony that A.O. had said "it happened when I was seven, it happened when I was eight."

POINT OF ERROR NUMBER TWO:

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR BY ALLOWING AN ALTERNATE JUROR TO DELIBERATE AND VOTE ON THE VERDICT

In Appellant's case the trial court mistakenly allowed an alternate to deliberate in place of a properly selected juror. The mistake was only discovered when the Court began to poll the jury with regard to their verdict. The Court then dismissed the alternate, asked the correct juror to rejoin the jury, and asked the whole jury to redeliberate with the correct juror. The first deliberation lasted a bit over 10 hours. CR 497. The second deliberation lasted 35 minutes. CR 498. While the correct 12 jurors ultimately voted in the second deliberation, the fact remains that the jury's entire initial decision-making process was flawed because it excluded a juror and included an outside influence.

When an alternate deliberates with the jury, it constitutes improper outside influence on the jury. *Becerra v. State*, 685 S.W.3d 120 (Tex. Crim. App. 2024). *Becerra*, decided shortly before this case went to trial, controls here. In *Becerra*, an alternate deliberated and voted along with the properly seated jurors. The Court of Criminal Appeals held that when an alternate erroneously participates like this, it doesn't change the makeup of the actual jury that was empaneled- there weren't thirteen jurors in Becerra's case. There were still only twelve. *Becerra* at 132. Participating in the vote or deliberative process does not transform an outside person into a juror, it just means that an outside person, alternate or not, influenced the jury.

Becerra also did away with the notion that the outside influence was presumptively harmful, however, and held that the appellate court must conduct an independent harm analysis under Rule 44.2(b) to determine whether the error had a "substantial and injurious" effect on the verdict. *Becerra* at 139.

Appellant asks this Court to consider that what actually happened in his case was that eleven jurors prematurely deliberated with an outside influence, without the twelfth juror. At least part of the reason jurors are instructed not to talk about the case with each other prior to formal deliberations, is "the jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal." *United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993). If eleven of the jurors had gone to lunch, invited their waiter

to sit with them and discuss the case and participate in a vote, there would be no question about "redeliberating,"- the trial court would have certainly granted a mistrial. That's exactly what happened, though, without the benefit of lunch and with the addition of many more hours of influential and improper discussion.

In *Becerra*, all twelve of the actual jurors were also involved in all of the deliberations. Counsel has not been able to discover a Texas case where, as here, an alternate was mistakenly allowed to deliberate and vote *instead of* the juror, and then when the mistake was uncovered, the jury redeliberates. Because of this different circumstance, Appellant urges this Court to instead evaluate whether the error was likely to have had a substantial influence on the *juror*. If it did, this error was constitutional error because it violated Appellant's right to due process of law and a fair trial before an impartial jury, and constitutes reversible error without a need for determining harm. See Tex. R. App. Proc. §44.2, Texas Constitution (Art. I, §§ 10 & 15), and the Sixth and Fourteenth Amendments to the US Constitution.

The juror was clearly substantially influenced in this case. The first major indication of that is the vast difference in deliberation times. Though the record is silent as to whether the juror knew of the previous guilty verdict, it seems extremely likely that she did, and even if she didn't before she went into the deliberation room, it seems impossible that no one told her that the previous outcome had been a guilty verdict. The jury were not engaging in fresh discussions, they were ratifying their prior

decision. This Court can assume that there was significant pressure on the formerly excluded juror to hurry up and vote with the majority. The trial court erred by denying trial counsel's motion for a mistrial. Appellant was denied his right to a fair and impartial jury, an error of both state and federal constitutional magnitude, and this Court should reverse and remand for a new trial.

CONCLUSION AND PRAYER

It is not easy for anyone in society to look at a case like this one and think about the procedural errors in it over the human suffering. In researching case law with regard to what kind of specificity about the abuse is required to constitute a proper outcry statement, it is clear that some courts have tied themselves in knots trying to prevent convictions like this one from being overturned. But those kinds of decisions make for bad and confusing law, which ultimately prevents the law from protecting us. These are the cases that test the mettle of our convictions, and the promises of our founding fathers that our nation values the fairness of the process as much as the justness of the result.

Whatever else we might think of him, Jose Renteria-Garcia did not have a fair trial.

WHEREFORE PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court REVERSE his conviction and REMAND his case to the district court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

/s/Allison Mathis
Allison Mathis

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 4,100 words printed in a proportionally spaced typeface.

/s/Allison Mathis
Allison Mathis

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