NO. 01-24-00362-CR

IN THE

COURT OF APPEALS

FOR THE

FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

ALYNN BLAKE CHAPPELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Cause No. 21CR0167

BRIEF FOR APPELLANT

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IDENTITY OF PARTIES AND COUNSEL

Parties and counsel in this case are as follows:

1. Alynn Chappell, Appellant, represented at trial by Winston Cochran, P.O. Box 2945, League City, Tx. 77573; represented on appeal by Greg Russell, 711 59th Street, Galveston, Tx. 77551.

2. The State of Texas, Appellee, represented at trial by Hillary Miller and Rebecca Millo, Galveston County Assistant District Attorneys and on appeal by Jack Roady, Criminal District Attorney for Galveston County, 600 59th Street, Suite 1001, Galveston, Tx. 77551.

CITATION TO THE RECORD

Clerk's Record……..... CR (page)

Reporter's Record……..... RR (volume & page)

In accord with Tex. Rule App. Proc. 9.10 (a)(3) (2024), the name of any person who was a minor at the time of the offense has been reduced to initials. Since two minors have the same initials and no middle initials are mentioned in the record, the complainant in the Indictment will be referred to LW1.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES — PAGE

STATUTES PAGE

CONSTITUTIONS PAGE

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BRIEF FOR APPELLANT

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW, ALYNN BLAKE CHAPPELL, hereinafter referred to as "Appellant," and submits this brief pursuant to the provisions of the Texas Rules of Appellate Procedure and would respectfully show as follows:

STATEMENT OF THE CASE

Appellant was charged by Indictment with Aggravated Sexual Assault of a Child. (CR, 7)

The jury found Appellant guilty and assessed Appellant's punishment at Life in the Institutional Division of the Texas Department of Criminal Justice. (RR 10, 159, 258)

On April 12, 2024, Appellant timely filed Notice of Appeal. (CR, 182)

ISSUES PRESENTED

1. Appellant received ineffective assistance of counsel at the guilt-innocence phase of trial by trial attorney not objecting during guilt-innocence to the prosecutor eliciting testimony from multiple witnesses who testified that they believed the complainant was telling the truth.
2. The trial court abused its discretion by allowing testimony and records of appellant's prior military conviction as proof of the offense during guilt innocence and also to use the same conviction to enhance his punishment.

STATEMENT OF FACTS

Appellant was charged by indictment with Aggravated Sexual Assault of

a Child. (CR, 7) It was alleged that on December 18, 2020, Appellant penetrated the sexual organ of LW1, a child younger than fourteen years old, with Appellant's finger. (CR, 7)

Hannah Nash has two daughters, LW1 who at the time of trial was eleven years old and LW who was ten years old. (RR 7, 44) Appellant and Ms. Nash are first cousins. (RR 7, 45) Appellant lived on the same property as Ms. Nash and her daughters, however Appellant lived in a separate residence. (RR 7, 67-68) Although disputed by Appellant, Ms. Nash testified that Appellant was at their house almost every day. (RR 7, 68; RR 9, 233)

According to Ms. Nash, on December 17, 2020, when LW1 was eight years old, LW1 made an outcry to her, and the next day Ms. Nash reported it to the school office and school counselor. (RR 7, 77, 80)

The State's first witness, Aaron Agrelius, was a retired Air Force Special Agent who testified regarding an extraneous offense: that in September 2015 he was working Interstate Crime Against Children and created an online persona of a thirteen-year-old girl named "Lisa" which specifically targeted military members and Appellant was in the Navy at the time. (RR 6, 19, 20, 23) On an app called MEET24, Appellant contacted "Lisa" and indicated that he was twenty-four years old. (RR 6, 24, 28) On the app, Appellant stated that he was okay with her being thirteen as he likes his girls very young. (RR 6, 28)

Appellant sent four pictures of his exposed erect penis and asked "Lisa" if she has ever had a finger inside of her and that he wanted to have sex with her. (RR 6, 31, 37, 39) Appellant interacted with "Lisa" for a couple of months. Appellant plead guilty to this while he was in the Navy and received thirty months in the Brig. (RR 6, 45, 86; State's exhibit # 13)

The State elicited testimony without objection from the State's third witness, Detective Remmert with the Galveston County Sheriff's Office who testified that he "believed Appellant committed this offense." (RR 6, 157)

The State's fourth witness, Kim Keever from the Child Advocacy Center, also basically testified that she believed the complainant because "she made eye contact" and "there were no red flags." (RR 7, 12)

The State's fifth witness was Hannah Nash, the mother of the complainant. (RR 7, 43) Ms. Nash testified that "she believes her daughter." (RR 7, 93) Additionally, Ms. Nash testified that Aaron Chappell, Appellant's brother, told her that "he didn't think LW1 would lie about something like this." (RR 7, 101)

Ms. Nash's boyfriend, Caleb Sobnosky, lived with her, LW1 and LW in one trailer on the property and Appellant lived on another trailer on the property. (RR 8, 7-8) Mr. Sobnosky's son, Leeam, also lived with them in the trailer. (RR 8, 8-9) Mr. Sobnosky testified that he walked into the room at the time LW1

was making her outcry to Ms. Nash. (RR 8, 10)

LW1 testified that her mom is Hannah Nash and her great-grandmother is Marie Speich, a/k/a "Mammers" and Ms. Speich is Appellant's grandmother. (RR 8, 75; RR 9, 30-31) LW1 told her mother that Appellant put his finger inside her vagina. (RR 8, 80) According to LW1, Appellant was sitting in a chair in her room and she was sitting on his lap with a blanket covering them and this is when Appellant put his finger inside her vagina. (RR 8, 80-81) According to LW1, this happened multiple times over more than a month. (RR 8, 97-98) LW1 also testified to the following extraneous offenses:

1) one time while outside, Appellant pulled her sister's pants down. (RR 8, 86)

2) Appellant took pictures of LW1 and LW while they were in the shower. (RR 8, 87)

3) Appellant would kiss LW1 and LW inappropriately. (RR 8, 89-90)

4) Appellant told her that he wishes she was older so she could be his girlfriend. (RR 8, 83)

The State also called JB who was twenty-three at the time of trial who testified that she is LW1's first cousin and Appellant's second cousin. (RR 8, 118, 121) Appellant is nine years older than her and she has not seen Appellant since she was five years old. (RR 8, 124, 127) JB testified that when she fourteen years old Appellant reached out to her via Facebook Messenger and

said "Hi, do you remember what we used to do when you were little." (RR 8, 121-122) According to JB, when she five years old at "Mammer's" house, Appellant took her into a closet to play hide-and-seek and pulled out his penis and said, "kiss it – touch it" and she did touch his penis. (RR 8, 125) JB further testified that when Appellant reached out to her via Facebook Messenger, he also sent her a picture of his penis. (RR 8, 127)

LW testified that that when she was approximately six years old, Appellant took picture of her and LW1 while they were in the shower together. (RR 8, 51-52)

The jury found Appellant guilty of Aggravated Sexual Assault of a Child and assessed Appellant's punishment at Life. (RR 10, 159, 258)

SUMMARY OF ARGUMENT FOR ISSUE NUMBER ONE

1. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF TRIAL BY TRIAL ATTORNEY NOT OBJECTING DURING GUILT-INNOCENCE TO THE PROSECUTOR ELICITING TESTIMONY FROM MULTIPLE WITNESSES WHO TESTIFIED THAT THEY BELIEVED THE COMPLAINANT WAS TELLING THE TRUTH.

This testimony was improper, inadmissible and prejudicial to Appellant. Appellant received ineffective assistance of counsel by trial counsel not

objecting to these statements.

ARGUMENT IN SUPPORT OF ISSUE NUMBER ONE

Under the Sixth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 333 (1980), and by the "Right to be heard" provision of Article I, Section 10 of the Bill of Rights of the Texas Constitution, *Ex Parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980), defendants are entitled to effective assistance of counsel in criminal cases whether counsel is retained or appointed.

With regard to whether the defendant received effective assistance of counsel at the guilt-innocence phase of trial and at the punishment phase of capital cases, Texas follows the two prong test set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986); *Ex Parte Walker*, 777 S.W.2d 427 (Tex. Crim. App. 1989). That test is (1) whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) whether there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

In reviewing an attorney's assistance, a court must examine the totality of the representation. *Ex Parte Walker*, 794 S.W.2d 36 (Tex. Crim. App. 1990); *Ex Parte Cruz*, 739 S.W.2d at 58 (Tex. Crim. App. 1987). Counsel need not be errorless and should not be judged by hindsight but must be reasonably likely to render effective assistance. *Mercado v. State*, 615 S.W.2d 225 (Tex. Crim. App. 1981).

"Matters of trial strategy will be reviewed only if an attorney's actions are without any plausible basis." *Brown v. State*, 866 S.W.2d at 678, citing *Hill v. State*, 666 S.W.2d 663, 668 (Tex. App. - Houston [1st Dist.] 1984), aff'd 686 S.W.2d 184 (Tex. Crim. App. 1985) and *Simms v. State*, 848 S.W.2d 754, 757 (Tex. App. - Houston [1st Dist.] 1993, pet. ref'd).

On direct examination of Hannah Nash, the prosecutor elicited the following inadmissible testimony:

Q. All right. Let me ask you, do you believe your daughter?
A. I do. (RR 7, 93)

Additionally, Kim Keever from the Child Advocacy Center on direct examination, basically testified that she believed the complainant because "there were no red flags" and "she made eye contact." Ms. Keever testified as follows:

Q. All right. Were there any red flags that you saw?

A. No.

Q. Was she descriptive in describing what was happening with her body language as well?

A. Yes.

Q. And I'm showing you on the screen State's Exhibit 47. Does she appear to be making eye contact?

A. Yes.

Q. Did she have decent eye contact?

A. Yes.

Q. Okay. (RR 7, 12)

Additionally on direct examination of the lead detective, Detective Remmert, the prosecutor elicited the following testimony:

Q. After conducting the interviews, watching the CAC forensic interviews, do you have an opinion as to whether or not Mr. Chappell committed the offense of aggravated sexual assault of a child?

A. I do.

Q. And what is that opinion?

A. I believe that he did. (RR 6, 157)

Additionally, on direct examination of Hannah Nash, the prosecutor elicited the following inadmissible testimony regarding her opinion as well as Uncle Aaron's opinion of whether the complainant was telling the truth:

Q. And at that time did it seem like he had – I guess, how would you describe his relationship?

A. He initially seemed surprised. He stated he didn't want to believe that that is what happened but that he didn't think LW1 would lie about something like that.

Q. Okay. And where was he living at the time?

A. With Alynn.

Q. Was he in the fire academy at the time?

A. I believe so, yes, ma'am.

Q. Do you believe that your daughter LW1 is telling the truth about her Uncle Algyn, also known as the defendant in this case?

MR. COCHRAN: She's not allowed to vouch.

THE COURT: Sustained. (RR 7, 101)

This was the first time that trial counsel made any objection to this inadmissible credibility evidence and the jury had already been aware and heard this type of inadmissible testimony at least four times. (entire record) Appellant's trial counsel did not object to Ms. Nash "vouching" for Uncle Aaron until the jury heard this evidence and there was no request for mistrial or to disregard this testimony.

Additionally, on cross examination of the Appellant's brother, Aaron Chappell, the prosecutor elicited the following testimony to attempt to impeach him:

Q. Do you think that LW1 would lie about something so important like this?

A. I'm not sure what she would do.

Q. Did you tell Hannah back when it first happened that you don't think that LW1 would lie about something like this?
A. Can you repeat the question?
Q. Do you recall telling Hannah that you don't think that LW1 would lie about something like this?
A. No, I don't recall that. (RR 9, 136)

In *Sessums v. State*, the court held that counsel was ineffective for failing to object to expert testimony concerning complainant's credibility. (Texarkana – 2/6/04 – 06-02-00149-CR) Expert testimony about the truth or falsity of the allegations or the truthfulness of the complainant is prohibited. *Yount v. State,* 872 S.W.2d 706, 708 (Tex.Crim.App. 1993); *Lane v. State,* 257 S.W.3d 22, 27 (Tex.App. – Houston [14th Dist.] 2008, pet. ref'd); *Kelly v. State,* _ S.W.3d _, *12-14 (Tex.App.14-09-0166-CR-Houston [14th Dist.], June 17, 2010) (expert should not have been allowed to imply children were telling the truth by claiming she would not have agreed to be a witness in the case if she saw evidence of deception).

In this case Detective Remmert and Kim Keever were both experts in the case and provided inadmissible expert credibility testimony to the jury.

It was a direct comment on the veracity of LW1 and is improper because it should be left for the jury to decide whether LW1 was being truthful. There was no conceivable trial strategy or "plausible basis" on the part of trial counsel

in allowing the inadmissible testimony concerning the only real issue at trial: the LW1's credibility.

Appellant's attorney failed to make an objection to the prosecutor's prejudicial and improper questions regarding the credibility of the complainant until it had already come into evidence four times. Additionally, subsequent to this, the prosecutor then attempts to impeach Aaron Chappell that he previously made statements to Ms. Nash that he believed the complainant was telling the truth. Trial counsel never objected, requested that the jury be instructed to disregard or moved for a mistrial. (entire record)

For these reasons Appellant received ineffective assistance of counsel at trial.

SUMMARY OF ARGUMENT FOR ISSUE NUMBER TWO

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING TESTIMONY AND RECORDS OF APPELLANT'S PRIOR MILITARY CONVICTION AS PROOF OF THE OFFENSE DURING GUILT INNOCENCE AND ALSO TO USE THE SAME CONVICTION TO ENHANCE HIS PUNISHMENT.

The Trial Court allowed the State to admit testimony and records concerning Appellant's prior military conviction, as proof of the offense under Texas Code of Criminal Procedure article 38.37 and as proof of the

sentencing enhancement allegation culminating in his life sentence.

ARGUMENT IN SUPPORT OF ISSUE NUMBER TWO

During guilt-innocence, pursuant to Texas Code of Criminal Procedure article 38.37, the State was allowed to introduce Appellant's prior military conviction, and also was allowed to use the same conviction to enhance his punishment from a minimum of five years to a minimum of fifteen years. The enhancement read:

FIRST ENHANCEMENT

And it is further presented in and to said Court that, prior to the commission of the aforesaid offense (hereafter styled the primary offense), on the 30th day of August, 2017 the Defendant was sentenced by the Navy-Marine Corps Trial Judiciary, Southern Judicial Circuit, General Court-Martial Order No. 2 – 18. The Defendant Alynn Blake Chappell was found guilty on four counts of violating U.C.M.J. Art. 80, by attempting to commit a lewd act on a child who had not attained the age of 16 years, by intentionally communicating to the child indecent vulgar language with the intent to gratify the Defendant's sexual desires (3 counts) and transmitting digital image(s) of naked erect penis to the child. (CR, 62)

At trial, Appellant objected to this enhancement in a written motion to quash and also orally. The Trial Court overruled those objections and admitted the evidence. (RR 4, 4-16) The jury found the enhancement allegation true.

(CR, 119)

Appellant complains of the Trial Court's admission of the complete facts and circumstances and the fact there was a conviction, being admitted during the guilt-innocence phase to convict him and using that same conviction to enhance his punishment.

The code of criminal procedure provides that when prior convictions are alleged for purposes of enhancement and are not jurisdictional, enhancement paragraphs shall not be read to the jury until the punishment phase begins. Tex. Code Crim. Proc. Ann. art. 36.01(a)(1). The purpose of article 36.01 is to prevent prejudice against a defendant during the guilt-innocence stage from the jurors having heard or read the specific allegations in any enhancement paragraphs. *Frausto v. State*, 642 S.W. 2d 506, 508 (Tex.Crim.App. [Panel Op.] 1982). This article prohibits the mentioning of the specific allegations contained in any enhancement paragraphs. Id. at 509. However, the trial court may inform the jury panel in hypothetical terms of the range of punishment applicable if the State proves any prior convictions for enhancement purposes. See Id.

Through the State's very first witness at trial, Aaron Agrelius, the Trial Court allowed the prosecutor to elicit testimony of the specific allegations concerning Appellant's previous military conviction. (RR 6, 19) In *Clark v.*

State, 878 S.W.2d 224, 227) (Tex.App.--Dallas, 1994, no pet.) it was held that it was improper and prejudiced the defendant's right to a fair trial, when the trial court informed the voir dire panel that that defendant had been previously convicted of a felony offense.

In *Clark,* the only information the jury had during the guilt-innocence phase of trial concerning the defendant's prior conviction came from the trial court during voir dire. In the case at bar, considerable time and testimony was spent during guilt-innocence regarding the facts and circumstances concerning Appellant's prior conviction.

The State informed the Trial Court, pursuant to Texas Code of Criminal Procedure article 38.37 of its intent to offer Appellant's prior military conviction during guilt-innocence, and additionally filed a formal notice of enhancement of its intent to offer the same military conviction to enhance his punishment. (CR, 62). Additionally, the prosecutor stated on the record at a pre-trial hearing that the military conviction would be used for an enhancement:

MS. MILLER: Your Honor, I understand that for the hearing regarding an extraneous victim this is not relevant. But it actually goes straight to the point of the state's notice of enhancement showing that the prison sentence at the naval brig is appropriate and should stand. This goes directly on point because -- well, we haven't gotten there yet. But full disclosure, we do have the Navy's

certified documentation showing that this defendant was convicted in the Navy, and he pled guilty to four different counts and was sentenced to 30 months in the brig. (RR 3, 35)

Also, on the record regarding using the military conviction for an enhancement was the following:

THE COURT: Are you ready to talk to me about the motion to quash?
MS. MILLO: I have some cases, Judge, so we can talk about it if you'd like. Or if you want to save it until after the witnesses have testified, we can do it at that time.
THE COURT: Well, I guess I want to talk about it but maybe not go into the meat of it. But if it were quashed it would change the range of punishment, correct?
MS. MILLO: Yes.
THE COURT: I mean, would it change the range of punishment?
MS. MILLO: Yes.
THE COURT: And it would change the range of punishment to what?
MS. MILLO: A minimum of 15.
THE COURT: That's what it is now, isn't it?
MS. MILLER: If it's quashed, Your Honor, then it would be a minimum of five. It's currently with the notice of enhancement, it's 15 to life. But he would be five to life if there is no enhancement paragraph. (RR3, 7-8)

It was clear that from the pre-trial hearings and the State's filed Notice of Enhancement, that it was their intention to use the military conviction as an

enhancement and this is what was conveyed to the Trial Court as their intent.

It was fundamentally unfair and prejudicial to Appellant that the State was allowed to use a conviction to elevate his punishment and used that same conviction during guilt-innocence to convict him an this contributed to Appellant's conviction.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Appellant respectfully asks that the judgment of the Trial Court be reversed, and appellant's case be remanded to the Trial Court for a new trial on guilt-innocence or punishment and for such further relief to which Appellant be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Brief for Appellant was delivered to Mr. Jack Roady, District Attorney of Galveston County, Texas, via certified electronic service provider in compliance with the Texas Rules of Appellate Procedure on this the 9th day of March 2025.

/s/ *Greg Russell*
Greg Russell

CERTIFICATE OF COMPLIANCE

I do hereby certify that this brief is in compliance with rule 9.4(i) (3) of the Texas Rules of Appellate Procedure because it is computer generated, and its relevant portions contain 4,131 words.

/s/ *Greg Russell*
Greg Russell

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