

NO. 14-24-00627-CR

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

FILED IN  
14th COURT OF APPEALS  
HOUSTON, TEXAS  
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MAURICIO PAEZ-PEREZ

V.

THE STATE OF TEXAS

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Appealed from the 180th District Court  
of Harris County, Texas  
Cause Number 1744086

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BRIEF FOR APPELLANT

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ORAL ARGUMENT  
NOT REQUESTED

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180th District Court of Harris County  
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## **STATEMENT OF THE CASE**

Appellant pled not guilty to indecency with a child in cause number 1744086 in the 180th District Court of Harris County before Judge DaSean Jones. The jury convicted him, and the court assessed his punishment at eight years in prison on August 6, 2024.<sup>1</sup> Charles Banker represented him at trial.

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant does not request oral argument.

## **ISSUE PRESENTED**

The trial court abused its discretion by allowing the prosecutor to argue that, if the child's mother made her lie, the jury would have to believe that the child was able to deceive her father, the CPS investigators, the HPD investigators, the forensic interviewer, two doctors, and two therapists.

## **STATEMENT OF FACTS**

### **A. The Indictment**

The indictment alleged, in pertinent part, that, on or about May 1, 2019, appellant did "engage in sexual contact with G.E., a person younger than 17 years of age, by touching the genitals of G.E. with intent to arouse and gratify the sexual desire of [the defendant]" (C.R. 49).

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<sup>1</sup> Appellant rejected a plea bargain offer of ten years deferred adjudication probation after the trial court explained that, if he were convicted, he would not be eligible for probation because of the complainant's age, asserting, "I trust in the law" (2 R.R. 8-9, 12).

## B. The State's Case

Darlyn Villalobos Sanchez (“Mother”) testified that she came to the United States from the Honduras in 2016 (3 R.R. 26).<sup>2</sup> She was married to Nelson Guardado (“Father”) (3 R.R. 28). They have three children (3 R.R. 29). G.E., age 11 at the time of trial, was born on May 31, 2013 (3 R.R. 29). The family has had an asylum case pending since their arrival in 2016 (3 R.R. 57).

Mother testified that appellant’s wife, Martha Lainez, became her babysitter in January 2019 (3 R.R. 37). Mother would drop off G.E. and her younger sister at Martha’s home and pick them up after work; occasionally the girls were there at night (3 R.R. 37, 39).

Mother testified that she and Father were having dinner one night when Martha called and told her to pick up her girls (3 R.R. 41). When Mother arrived, Martha grabbed her hair and her “intimate part” and accused her of having an affair with appellant (3 R.R. 41-42). Mother denied it, took the girls home, and reported the assault to the police; the girls never went back (3 R.R. 42-45). Mother denied that she and appellant had an affair and also denied that he gave her money (3 R.R. 45).

Mother testified that, at the end of 2020, G.E. told her that the babysitter’s

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<sup>2</sup> Because Darlyn also is referred to as Patricia, to avoid confusion appellant will refer to her as “Mother” and to Nelson as “Father.”

husband had pulled down her panties, touched her “front part” and her “behind,” rubbed “his thing” against her, and had her touch him (3 R.R. 49-51). Mother called her immigration lawyer and asked what to do (3 R.R. 51). He told her to contact the police. Mother informed Father and her sisters of G.E.’s accusation and then called the police (3 R.R 52-54).

Mother testified that she first learned from a detective that an illegal alien can apply for a U-Visa and become a citizen if a family member has been the victim of a violent crime (3 R.R. 57-58). Mother denied that her immigration lawyer previously told her about a U-Visa, although she acknowledged that he applied to obtain a U-Visa for the family based on the sexual assault allegation against appellant (3 R.R. 79, 82-83). She denied that she had G.E. claim sexual abuse in an attempt to obtain a U-Visa (3 R.R. 80).<sup>3</sup>

G.E. testified that she slept on the living room couch at the babysitter’s home (4 R.R. 30). The babysitter and her husband slept in a bedroom (4 R.R. 35). One night, G.E. awoke about 1:30 a.m., was scared, and entered their bedroom (4 R.R. 35-36). The babysitter, her husband, and their child were asleep in the bed (4 R.R. 36). G.E. got in the bed next to the husband and fell asleep (4 R.R. 37-38). She awoke when the husband turned her around, pulled her pajama pants and underwear

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<sup>3</sup> Father testified that he knew about a U-Visa when he moved to the United States in 2016, that the family applied for one after this investigation started, and that they did not fabricate a sexual abuse claim in an attempt to obtain one (3 R.R. 104-06).

down, and touched her butt cheeks with his hand (4 R.R. 39-42). He then rubbed his finger in circles on her “other private part” but did not put it inside her (4 R.R. 43-44). He put her hand on his penis and moved his hand up and down (4 R.R. 46-47). He went to the sink, came back, and poured something wet on her butt cheeks (4 R.R. 52). When her mother arrived to pick her up and knocked on the door, he pulled her pants up and pretended to be asleep (4 R.R. 45). She identified appellant as the husband (4 R.R. 55-56). G.E. testified that she did not tell her mother what happened for a year because she did not know how her mother would react (4 R.R. 67, 82, 84).

G.E.’s physical examination was normal (4 R.R. 108-12). She saw a therapist 36 times between October 2021 and September 2022 (4 R.R. 194-95, 211-12, 223).<sup>4</sup> Jennifer Paz, the therapist, testified that G.E. had some symptoms of PTSD as a result of a traumatic event, and that the only traumatic event they discussed was the sexual abuse (4 R.R. 206, 224).

Dr. Whitney Crowson, a psychologist at the Children’s Assessment Center (CAC), testified generally about delayed outcry, the stages of disclosure, sensory details, coaching, the forensic interview, and memory (5 R.R. 37, 43-53). She concluded that G.E.’s therapy records are “consistent with someone who had

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<sup>4</sup> G.E. initially met with an intern and, after April 18, 2022, met with a therapist until she was discharged (4 R.R. 210-12; 9 R.R. 32).

suffered some sort of trauma" (5 R.R. 53-54).

Officer Fernando Cruz testified that he interviewed appellant (4 R.R. 140).

Appellant denied the allegations and said that he had texted with Mother and given her money, but had no supporting documentation (4 R.R. 141-142). Cruz called the Chief Prosecutor of the Child Sexual Abuse Division of the DA's Office because he was concerned that the accusation was motivated by G.E.'s family's desire to obtain a U-Visa (4 R.R. 147-49).

### **C. The Defense's Case**

Martha Lainez, appellant's wife, testified that she babysat for the girls for five months beginning in January 2019 (5 R.R. 104, 106, 109-10). The girls would watch television or sleep in the living room (5 R.R. 126-27). Martha did not go to bed until their parents picked them up (5 R.R. 126). Martha slept on the side of the bed closest to the door, and appellant slept on the far side next to the wall (5 R.R. 123-24). G.E. never entered their bedroom (6 R.R. 60-61).

Martha testified that the girls were at her home on a Saturday night when she saw text messages on appellant's phone indicating that was having an affair with Mother (5 R.R. 131-33). Martha confronted appellant, who admitted it (5 R.R. 136).<sup>5</sup> Martha then called Mother to come over (5 R.R. 139). When Mother arrived, Martha pulled her hair and squeezed her private part (5 R.R. 139; 6 R.R. 59-60).

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<sup>5</sup> Martha testified that appellant deleted the text messages (6 R.R. 75-76).

Appellant testified that Martha stayed with the girls in the living room, that G.E. never got in bed with them, and that he never touched her private parts (6 R.R. 116, 122). He flirted with Mother and gave her money three times in the hope they would have sex, but they never did (6 R.R. 91-97). When Martha asked him about the text messages from Mother on his phone, he “confessed” (6 R.R. 100-01, 105). Martha called Mother to pick up the girls and assaulted her when she arrived (6 R.R. 104, 107-09). Father’s parents came over the next day, and Martha made appellant apologize for pursuing a relationship with their son’s wife (6 R.R. 111-12). The police came over and talked to Martha (6 R.R. 112).

Four women testified that appellant had a good reputation for being loving, caring, and protective of children (5 R.R. 83, 94-95, 99, 102).

#### **D. The Closing Arguments**

Defense counsel argued that:

- G.E. could not have got in bed next to appellant because that side of the bed was against the wall (7 R.R. 39);
- It is not credible that appellant would sexually abuse G.E. with his wife and son in the bed (7 R.R. 40);
- If G.E. had been sexually abused, she had no reason to wait a year to make an outcry, as she had no continuing relationship or contact with appellant (7 R.R. 45); and
- Mother worked on G.E. for a year to make up this accusation so the family could obtain a U-Visa (7 R.R. 38).

The prosecutors argued that:

- G.E. described sensory details of sexual abuse, such as appellant putting something wet on her butt and putting her hand on his penis (7 R.R. 57);
- G.E. went to therapy 33 times (sic) (7 R.R. 60);
- Paz and Dr. Crowson believe that G.E. sustained a traumatic event, and the only trauma G.E. complained about in therapy was the sexual abuse (7 R.R. 60-62); and
- If Mother made G.E. lie, the jury would have to believe that G.E. was able to deceive her father, the CPS investigators, the HPD investigators, the forensic interviewer, two doctors, and two therapists (7 R.R. 62-63).

### **SUMMARY OF THE ARGUMENT**

The prosecutors, knowing that opinion testimony that a child is telling the truth about sexual abuse is inadmissible, elicited from the forensic interviewer, the doctor who conducted the sexual assault examination, the investigating officer, and the psychologist that it is not their job to determine whether the child is telling the truth about sexual abuse. These witnesses testified only to what they saw and heard. The prosecutors did not ask the child's father and therapist this question.

A prosecutor argued toward the end of the State's rebuttal closing argument that, for the jury to believe that the mother made the child lie, the jury would have to believe that the child was able to deceive her father, the CPS investigators, the HPD investigators, the forensic interviewer, two doctors, and two therapists.

Appellant objected that the witnesses testified it is not their job to determine whether the child is telling the truth and that the prosecutor had misstated the facts. The trial court allowed the prosecutor to continue this argument, and he did. The trial court abused its discretion by allowing the prosecutor to argue that all the witnesses believe the child. The argument was especially harmful in this hotly contested case in which the State relied entirely on the child's testimony to convict.

### **GROUND ONE**

**THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE PROSECUTOR TO ARGUE THAT, IF THE CHILD'S MOTHER MADE HER LIE, THE JURY WOULD HAVE TO BELIEVE THAT THE CHILD WAS ABLE TO DECEIVE HER FATHER, THE CPS INVESTIGATORS, THE HPD INVESTIGATORS, THE FORENSIC INTERVIEWER, TWO DOCTORS, AND TWO THERAPISTS.**

### **STATEMENT OF FACTS**

The prosecutors elicited from Claudia Hauser (the forensic interviewer), Dr. Reena Isaac (the doctor who conducted the sexual assault examination), Eduardo Cruz (the investigating officer), and Dr. Whitney Crowson (the psychologist) that it is not the witness's job to determine whether the child is telling the truth about sexual abuse (3 R.R. 144-45; 4 R.R. 114, 133; 5 R.R. 40-41). The prosecutors did not ask Nelson Guardado (the father) and Jennifer Paz (the therapist) this question.

A prosecutor argued toward the end of the State's rebuttal closing argument as follows (7 R.R. 62-63):

[If Mother] “made this up and that she’s coerced or made [G.E.] tell this gigantic lie, [G.E.] … would have to be able to deceive her father. She would have to be able to deceive CPS investigators.<sup>6</sup> She would have to be able to deceive HPD investigators who have investigated dozens, hundreds of child sexual abuse cases.<sup>7</sup> She would have to be able to deceive the forensic interviewer who had done over 3,000 forensic interviews. She would have to deceive Dr. Isaac, a specialized medical doctor with years of experience dealing with these kind of issues”

Defense counsel interjected, “I’m going to object to this line of argument. All these witnesses said that they’re not there to determine whether the child is telling the truth or not. He’s just using that as a way to say that they’re somehow making that child credible, when they themselves said that they’re not there to determine whether that child is telling the truth. Misstating the law—misstating the facts of the case” (7 R.R. 63).

The trial court stated, “I’ll let you continue your argument,” effectively overruling the objection (7 R.R. 63).

The prosecutor then continued, “Deceiving two different therapists,<sup>8</sup> all of these people. She would have to deceive Dr. Crowson, an expert in the field of child sexual abuse....” (7 R.R. 64).

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<sup>6</sup> No CPS investigator testified.

<sup>7</sup> Officer Cruz, the only HPD officer who testified, did not interview G.E. (4 R.R. 132).

<sup>8</sup> Jennifer Paz was the only therapist who testified. The first therapist, an intern, did not testify.

## **ARGUMENT AND AUTHORITIES**

### **A. The Standard Of Review**

An appellate court reviews the trial court's ruling on an objection to closing argument for abuse of discretion. Cole v. State, 194 S.W.3d 538, 546 (Tex. App.—Houston [1st Dist.] 2006).

### **B. Opinion Testimony That The Complainant Is Telling The Truth Would Have Been Inadmissible If Offered.**

The opinion testimony of a child's parents, a CPS investigator, a police officer, a forensic interviewer, a doctor, and a therapist that the child is telling the truth about sexual abuse clearly would have been inadmissible under Texas Rule of Evidence 701 if the State had offered it. "A determination of who is telling the truth is the sole province of the jury." Matter of G.M.P., 909 S.W.2d 198, 206 (Tex. App.—Houston [14th Dist.] 1995). Opinion testimony of this nature is inadmissible because it invades the province of the jury and constitutes impermissible bolstering. Black v. State, 634 S.W.2d 356, 357-58 (Tex. App.—Dallas 1982) (error to admit opinion of staff counselor at rape crisis center that complainant was telling truth). Furthermore, no witness is qualified as an "expert" to testify about witness credibility under Rule of Evidence 702. Kirkpatrick v. State, 747 S.W.2d 833, 837-38 (Tex. App.—Dallas 1987); Schutze v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Texas appellate courts have consistently held that the State cannot elicit the

opinion of a police officer,<sup>9</sup> medical doctor,<sup>10</sup> psychologist,<sup>11</sup> social worker,<sup>12</sup> staff counselor at a rape crisis center,<sup>13</sup> or relative<sup>14</sup> that the complainant is telling the truth.

The prosecutors knew that such testimony is inadmissible, as they made a point of eliciting from the forensic interviewer, the doctor, the police officer, and the psychologist that it is not their job to determine whether G.E. is telling the truth. They did not ask the complainant's father and therapist this question.

**C. The Prosecutor's Argument Suggesting That All The Witnesses Believe The Child Was Not Supported By Their Testimony And, Therefore, Was Outside The Record.**

No prosecution witness testified to an opinion that G.E. was telling the truth about the alleged sexual abuse. Nonetheless, a prosecutor clearly conveyed that message during his closing argument by asserting that, if G.E. were lying, she had succeeded in duping *the many people who believed her*—including (1) her father, (2) CPS investigators, (3) experienced law enforcement officers who specialize in

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<sup>9</sup> G.M.P., 909 S.W.2d at 205.

<sup>10</sup> Ochs v. Martinez, 789 S.W.2d 949, 958 (Tex. App.—San Antonio 1990).

<sup>11</sup> Kirkpatrick, 747 S.W.2d at 837; Ochs, 789 S.W.2d at 957.

<sup>12</sup> Ochs, 789 S.W.2d at 958; Kelly v. State, 321 S.W.3d 583, 600-01 (Tex. App.—Houston [14th Dist.] 2010).

<sup>13</sup> Black, 634 S.W.2d at 357.

<sup>14</sup> Ochs, 789 S.W.2d at 956.

sexual abuse cases, (4) a seasoned forensic examiner who had conducted over 3,000 forensic interviews, (5) the medical doctor who examined her, (6) two therapists who met with her 33 times, and (7) an expert on child sexual abuse. The clear import of this argument was that G.E. could not possibly have duped all those experts in child sexual abuse and, as a result, was *not* fabricating her accusation.

A prosecutor cannot properly argue matters outside the record during his closing argument. Baldwin v. State, 499 S.W. 2d 7, 9 (Tex. Crim. App. 1973). In Washington v. State, 16 S.W. 3d 70 (Tex. App.—Houston [1st Dist.] 2000), the trial court overruled an objection to the prosecutor's argument that the defendant's girlfriend had offered the victim money to drop the charges even though the girlfriend denied that when she testified. This Court held that the argument improperly injected new facts harmful to the defendant and reversed the conviction. Id. at 73.

The argument in Washington pales in comparison to the argument in appellant's case that the experts who had vast experience in child sexual abuse cases—some of whom did not testify—believe G.E. That argument was highly improper because it misstated the testimony and provided opinions that would not have been admitted if the prosecutors had offered them. The trial court clearly abused its discretion by allowing the prosecutor to continue the argument instead of sustaining appellant's objection and instructing the jury to disregard it.

#### **D. The Argument Denied Appellant A Fair Trial.**

An appellate court can reverse a conviction for a non-constitutional error that affected a substantial right of the defendant pursuant to Rule of Appellate Procedure 44.2(b). A prosecutor's improper closing argument, although non-constitutional error, may affect a substantial right of the defendant. Reed v. State, 991 S.W.2d 354, 364 (Tex. App.—Corpus Christi 1999). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict. King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A harmless error analysis requires an appellate court to consider (1) the severity of the misconduct, (2) any steps taken to cure it, and (3) the certainty of conviction absent the misconduct. Mosley v. State, 983 S.W.2d 249, 259-60 (Tex. Crim. App. 1998).

If an appellate court has “grave doubt” whether an error substantially influenced the verdict, the court must conclude that it did. Burnett v. State, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002). A “grave doubt” exists when “the matter is so evenly balanced” that the court is “in virtual equipoise as to the harmlessness of the error.” O’Neal v. McAninch, 513 U.S. 432, 435 (1995).

The prosecutorial misconduct in this, “she said, he said,” case was severe, as G.E.’s accusation was entirely uncorroborated. The State had a lot to overcome to convince the jury *beyond a reasonable doubt* that appellant was guilty.

G.E. testified that she got in the far side of the bed next to appellant, who was

asleep, instead of the side closest to the bedroom door next to Martha. The jury would have to believe that he woke up, unexpectedly saw a child next to him, and molested her with his wife and child in the bed. That is quite a stretch.

Furthermore, G.E. did not make an outcry for over a year. An abused child who remains in contact with her abuser may delay making an outcry. However, G.E. did not return to appellant's home after his wife assaulted her mother and never again had contact with him. Thus, the typical reasons for a delayed outcry do not exist in this case.

Finally, G.E.'s family was so obviously motivated to have her falsely accuse appellant of sexual abuse so they could obtain a U-Visa that Officer Cruz called the Chief of the Child Sexual Abuse Division of the DA's Office to express his concerns. Her parents believed that they could obtain a U-Visa and remain in the United States if a family member was a victim of a violent crime. Mother asserted that she first learned about the availability of a U-Visa from the officer at the conclusion of the investigation. Father acknowledged that he knew about a U-Visa when they moved to the United States in 2016. Clearly, Mother lied about this critical matter. And, of course, an immigration lawyer applied for a U-Visa for the family after G.E. made the accusation. Mother also was motivated to have G.E. make a false accusation because appellant's wife accused her of having an improper relationship with him and assaulted her. This case was as defensible as a child sexual abuse case can be.

Indeed, the State offered appellant deferred adjudication probation before trial.

The State presented no testimony that appellant had committed any extraneous sex offense or engaged in any other conduct to suggest that he would molest a child. To the contrary, he was a hard worker who supported his family and had a good reputation in his community. He voluntarily met with Officer Cruz and proclaimed his innocence. This accusation came from deep left field.

The hurdles the State had to overcome explain why the prosecutor believed it was necessary to misstate the testimony and inform the jury during his rebuttal closing argument that the experts who came in contact with G.E. believe her. The trial court could have cured the misconduct by sustaining the objection and instructing the jury to disregard the argument. Instead, the court allowed the prosecutor to continue the argument, which he did just before he concluded (7 R.R. 64-65). The proximity of the improper argument to the jury deliberations is a factor that supports that it was harmful. See Washington, 16 S.W. 3d at 74.

In our adversary system, a prosecutor assumes a special role unlike any other advocate in the courtroom. As the Supreme Court stated in Berger v. United States, 295 U.S. 78, 88 (1935):

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done....

The prosecutor wields the “sword of justice.” Therefore, “[i]t is his duty to recall that this sword, though forged in the flame heat of zeal is alloyed with the iron of restraint.” Houston v. Estelle, 569 F.2d 372, 384 (5th Cir.1978). The prosecutor represents the sovereign (and the people), which causes jurors to trust the prosecutor more than an ordinary advocate in court proceedings. Berger, 295 U.S. at 88 (“It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.”); see also Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 632 (1972) (“The assistant district attorney is the representative of an elected, presumably popular public official, and the mere fact that he is a state employee may create a sense of trust and an expectation of fairness that a defense attorney would find difficult to match through the most strenuous exertion of his charm”).

Finally, a conviction was by no means certain before the prosecutor made his improper argument, as G.E. gave the only testimony regarding the alleged sexual assault, and the jury had plenty of reasons to doubt her.

This Court cannot fairly be assured that the improper closing argument did not influence, or that it had only a slight effect on, the verdict. Washington, 16

S.W.3d at 75. A holding that the argument was harmless will encourage prosecutors throughout Texas to repeat this tactic. Id. (“We conclude that declaring this type of error harmless would lead the State to repeat such tactics.”) The error was not harmless.

### **CONCLUSION**

The Court should reverse the conviction and remand for a new trial.

Respectfully submitted,

  
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### **CERTIFICATE OF SERVICE**

I served a copy of this document on Jessica Caird, assistant district attorney for Harris County, by efile on January 10, 2025.

  
Randy Schaffer

## **CERTIFICATE OF COMPLIANCE**

The word count of the countable portions of this computer-generated document, as shown by the representation provided by the word-processing program that was used to create the document, is 4,099 words. This document complies with the typeface requirements of Rule of Appellate Procedure 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

  
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Randy Schaffer