NO. 14-24-00039-CR

IN THE

COURT OF APPEALS

FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

CHARLIE HAROLD CARLEE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
of Galveston County, Texas
Cause No. 21CR3058

BRIEF FOR APPELLANT

Greg Russell
711 59th Street
Galveston, Texas 77551
(409) 497-4743
(409) 497-4721
SBN: 17411550

Attorney for Appellant

IDENTITY OF PARTIES AND COUNSEL

Parties and counsel in this case are as follows:

1. Charlie Harold Carlee, Appellant, represented at trial by Tony Lopez, 107 1st Street, West, Suite 202B, Humble, Tx. 77338 and Kingsley Okpara, 6671 S.W. Freeway, Suite 442, Houston, Tx. 77074; represented on appeal by Greg Russell, 711 59th Street, Galveston, Tx. 77551.

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

CITATION TO THE RECORD

Clerk's Record…… CR 1 (21CR3058) (volume & page)
CR 2 (23CR1173) (volume & page)

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

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BRIEF FOR APPELLANT

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TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

NOW COMES, Charlie Harold Carlee and files this Brief for Appellant.

STATEMENT OF THE CASE

Appellant was charged by two separate indictments with Indecency with a Child by Contact, both second degree felonies. (CR 1, 6; CR 2, 5) Both indictments were consolidated for trial and were tried in the 56th District Court of Galveston County, Texas, the Honorable Lonnie Cox, presiding.

The jury found Appellant guilty in both cases, and Appellant elected that the trial court assess punishment which it did at nine (9) years in the Institutional Division of the Texas Department of Criminal Justice. (RR 4, 15) On December 13, 2023, Appellant timely filed Notice of Appeal in each case. (CR 1, 68; CR 2, 56)

ISSUES PRESENTED

1. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING APPELLANT, DURING GUILT-INNOCENCE, TO INTRODUCE "*BRADY"* EVIDENCE IN THE FORM OF CPS RECORDS INTO EVIDENCE, AND THIS DENIED APPELLANT A FAIR TRIAL AND AFFECTED APPELLANT'S SUBSTANTIAL RIGHTS.

2. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL NOT MAKING AN OFFER OF PROOF OR BILL

OF EXCEPTION AS TO THIS "*BRADY*" EVIDENCE AFTER IT WAS NOT ALLOWED INTO EVIDENCE BY THE TRIAL COURT.

STATEMENT OF FACTS

Appellant, Charlie Harold Carlee, was charged by two separate indictments with second-degree felonies alleging that he committed Indecency with a Child by Contact pursuant to Texas Penal Code §21.11. (CR 1, 6; CR 2, 5) The cases were consolidated at trial and both were tried together to the jury.

The indictments read in pertinent part:

…… on or about the 24th day of May, 2021 and anterior to the presentment of this indictment in the County of Galveston and State of Texas, did then and there, with the intent to arouse or gratify the sexual desire of the defendant, engage in sexual contact with A.K.B., hereafter styled the complainant, by touching the genitals of the complainant, a child younger than 17 years of age.

(CR 1, 6)

….. on or about the 24th day of May, 2021 and anterior to the presentment of this indictment in the County of Galveston and State of Texas, did then and there, with the intent to arouse or gratify the sexual desire of the defendant, engage in sexual contact with A.M.B, hereafter styled the complainant, by touching the genitals of the complainant, a child younger than 17 years of age.

(CR 2, 5)

The complainants in the indictments, A.K.B. and A.M.B, are sisters and both are Appellant's granddaughters. (RR 3, 28, 51, 88).

A.K.B., who was seventeen years old at the time of trial, testified that her father got custody of her when she was about ten years old. (RR 3, 45, 49) A.K.B. went to the RV Park where her grandmother, Deborah Carlee and great-grandmother, Margaret Juliana, were living. A.K.B. went to the RV Park from middle school until she was fourteen years old. (RR 3, 50-51) All of her sisters would be at the RV Park with her. (RR 3, 50) A.K.B. further testified that beginning at seven years old, Appellant would hug her from behind and touch her chest every time she went to the RV Park. (RR 3, 54-55) She reported it when she was fourteen years old. (RR 3, 55) A.K.B. further testified that when she was about ten years old, on a portable bed in the RV, Appellant laid down next to her and put his hands down her pants and rubbed her vagina. (RR 3, 58) This only happened once. (RR 3, 59) A.B.K. first told a friend at the school she attended, Alvin High School, and then an officer at school. She then told her father, Oscar Hernandez and step-mother, _____. She also spoke about it with her older sister, A.M.B. (RR 3, 60-61) A.K.B. further testified that when she spoke to A.M.B. about it, A.M.B. told her Appellant did the same thing to her. (RR 3, 62) A.K.B. testified that she has been going to therapy because of this. (RR 3, 64)

A.M.B., who was nineteen years old at the time of trial, testified that she began going to the RV Park when she was approximately twelve or thirteen years old. (RR

3, 84, 89) A.M.B. testified that when she was between fourteen or fifteen years old, she was lying on bunk bed in RV when Appellant came into the room, stood near the bed and touched her vagina over her clothes. (RR 3, 98) A.M.B. further testified that when she was twelve or thirteen years old, Appellant began touching her breasts over her clothes when he would give her hugs. (RR 3, 100-101, 104) Appellant would hug her from the front and grope her breast. (RR 3, 101, 104). A.M.B. testified that everything happened in the RV. (RR 3, 113) The first person A.M.B. told was her father and this was in May 2021. (RR 3, 105-106) A.M.B also "briefly" spoke about this with her sister A.K.B. (RR 3, 107)

Appellant who was sixty-five at the time of trial, testified that he is innocent of the charges and that he loved and took care of the girls. (RR 3, 139) The girls would visit the RV in 2021 where he lived with his wife, Debra Carlee, and his wife's mother, Margaret Juliana. (RR 3, 140-141) Appellant testified that while at the RV, he was never alone with the girls. (RR 3, 142) Appellant further testified that he was an electrician and worked out the state most of the time and would only see the A.K.B and A.M.B., a couple of times a year. (RR 3, 139, 157)

Appellant's second witness was his wife, Debra Carlee, who testified that they had been married 38 years and conceived two children: Kristy and Charlie, Jr. (RR 3, 128) Debra's mom, Margaret Juliana, was 82 years old. (RR 3, 129) Debra testified

that she does not believe Appellant committed these sexual acts against A.K.B. and A.M.B.. (RR 3, 133) Debra Carlee testified that the RV was 36 feet long. (RR 3, 138)

SUMMARY OF ARGUMENT FOR ISSUE NUMBER ONE

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING APPELLANT, DURING GUILT-INNOCENCE, TO INTRODUCE "*BRADY"* EVIDENCE IN THE FORM OF CPS RECORDS INTO EVIDENCE, AND THIS DENIED APPELLANT A FAIR TRIAL AND AFFECTED APPELLANT'S SUBSTANTIAL RIGHTS.

Appellant informed the trial court that he was in possession of *Brady* evidence in the form of CPS records, nevertheless the trial court would not allow Appellant to introduce these records into evidence.

ARGUMENT IN SUPPORT OF APPELLANT'S ISSUE NUMBER ONE

As a prerequisite to presenting a complaint for appellate review, the record must show that "the complaint was made to the trial court by a timely request, objection, or motion" stating "the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. 33.1(a)(1), TEX. R. APP. PROC.. When an appellant does not object to the admission of evidence, he fails to

preserve the issue for review. *Mays v. State*, 318 S. W. 3d 368, 391-92 (Tex. Crim. App. 2010).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex.Crim.App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. A reviewing court will uphold the trial court's ruling if it is reasonably supported by the evidence and is correct under any theory of law applicable to the case. *Johnson v. State*, 490 S.W. 3d 895, 908 (Tex.Crim.App. 2016).

Because the trial court's error implicates the Rules of Evidence rather than a Constitutional right, it is subject to the "substantial right" harm analysis under Rule TRAP, 44.2(b) ("any . . . error . . . that does not affect a substantial right must be disregarded"). A substantial right of Appellant was violated if, viewing the record as a whole, the error had a substantial injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997).

Before the cross-examination began of the complainants' father, Oscar Buenrostro, Appellant attempted to introduce what he told the trial court was *Brady* evidence:

MS. SAUNDERS: I'll pass the witness, Judge.
THE COURT: Any questions?
MR. LOPEZ: May we approach, your Honor?
THE COURT: Sure. (Discussion at the Bench as follows:)

MR. LOPEZ: Judge, I wanted to introduce some information on the CPS investigation that was done on Mr. Buenrostro. Mr. Buentrostro, he had an open investigation that was done. There was some information that, my opinion, is of Brady material, Judge. And I think we should be able to use it for impeachment purposes.

THE COURT: Response?

MS. SAUNDERS: I'm not sure what in particular he's wanting to use from the records; but in context of the records themselves, Judge, after this report had already been documented, League City had conducted their investigation, sometime later CPS got a referral because they noticed that Alicia had an injury on her face. And so they conducted an investigation regarding physical abuse. But according to those reports, that investigation by CPS was closed at intake and that there were no sustained findings regarding Mr. Buenrostro or the household.

During those interviews when they were -- they interviewed all of the children, they -- you know, how they gather information. There were no reports of physical abuse that were found. The only reports that were made during those investigations were regarding the sexual abuse that was already filed with League City. So objection is, one, relevance; also hearsay; also 403, prejudicial more than probative value.

MR. LOPEZ: So Judge, in regards to relevance, it's going to be used as impeachment evidence on the -- on the witness. There's some statements that were made by him that contradict the victim in this case. He was also -- you know, so I think in that regard it's important that we're able to use that because, again, it contradicts what the victim told CPS. So that in itself is impeachable. As far as the prejudicial, it would be even more prejudicial to my client if -- if we're not able to use this.

> THE COURT: It just doesn't seem like it's proper impeachment evidence. It's not a criminal conviction. I don't know how it comes in as impeachment evidence. I know -- I understand your theory, but doesn't come in. So no, you may not introduce it. (RR 3, 41-43)

In the case at bar, I do not see how it could be argued that by not allowing Appellant to introduce what trial counsel referred to as "*Brady*" evidence evidence, did not have a "substantial injuries effect or influence the jury's verdict."

The trial court abused its discretion in not allowing, or not inquiring into this "Brady" evidence that Appellant attempted to introduce, and this did affect Appellant's substantial rights. *See* TEX. R. APP. PROC. 44.2(b); *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002).

It is conceivable that Appellant would not have been convicted had the jury been allowed to hear Appellant's "*Brady*" evidence in the form of statements made Oscar Buenrostro to CPS that contradicted the complainants' statements in this case.

The reviewing court reviews error under the non-constitutional harm analysis of Rule 44.2(b), disregarding the error unless it adversely affects a defendant's substantial rights. *Barshaw v. State,* 342 S.W.3d 91, 93 (Tex.Crim.App. 2011). Neither the defendant nor the State bears the burden of demonstrating harm; instead, the reviewing court assess harm after reviewing the entirety of the record, including the evidence, jury charge, closing arguments, voir dire, and any other relevant

information. *Schutz v. State,* 63 S.W. 3d 442, 444-45 (Tex.Crim.App. 2001). Overwhelming evidence of guilt is a relevant factor in any Rule 44.2(b) harm analysis. *Motilla v. State,* 78 S.W.3d 352, 356-57 (Tex.Crim.App. 2002); *Whitaker v. State,* 286 S.W.3d 355, 363-64 (Tex.Crim.App. 2009)

In this case at bar, by not allowing Appellant to introduce what Appellant described as *Brady* evidence, did affect Appellant's substantial rights and contributed to his conviction and punishment and had a substantial or injurious affect on the jury verdict.

SUMMARY OF ARGUMENT FOR ISSUE NUMBER TWO

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF TRIAL BY TRIAL COUNSEL NOT MAKING AN OFFER OF PROOF OR BILL OF EXCEPTION REGARDING HIS *BRADY* EVIDENCE AFTER IT WAS NOT ALLOWED INTO EVIDENCE BY THE TRIAL COURT.

Appellant informed the trial court that he was in possession of *Brady* evidence in the form of CPS records that were exculpatory in nature, nevertheless when the trial court would not allow Appellant to introduce the records into evidence, trial counsel failed to make an offer of proof or bill of exception.

ARGUMENT IN SUPPORT OF APPELLANT'S ISSUE NUMBER TWO

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).

Trial counsel as an officer of the court, represented to the trial court that there was *Brady* evidence contained within the CPS records due to the complainants' father made statements that contradicted the complainants' statements. (RR 3, 43) Despite this representation Appellant's trial counsel failed to make an offer of proof or bill of exception regarding what he told the court was "*Brady*" evidence. (entire record)

The purpose of an offer of proof is to create a record "unless the substance was apparent from the context." Tex. R. Evid. 103(a)(2) states: A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

Tex. R. Evid. 103: Rulings on Evidence, states in relevant part:

> (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
> ……..
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
> ……
> (c) Court's Statement About the Ruling; Directing an Offer of Proof. The court

> may make any statement about the character or form of the evidence, the objection made, and the ruling. The court must allow a party to make an offer of proof as soon as practicable. In a jury trial, the court must allow a party to make the offer outside the jury's presence and before the court reads its charge to the jury. At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.
>
> …….
>
> (e) Taking Notice of Fundamental Error in Criminal Cases. In criminal cases, a court may take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved.

Additionally, Tex. R. App. P. 33.2 states: "To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception." As this Court has previously acknowledged, "[t]he right to make a bill of exception is absolute" and "a trial court does not have discretion to deny a request to perfect a bill of exception." *Kipp v. State* , 876 S.W.2d 330, 333 (Tex. Crim. App. 1994); *Rogers v. State*, 677 S.W.3d 705 (Tex. Crim. App. 2023); See also*, Johnson v. State*, 624 S.W.3d 579 (Tex.Crim.App. 2021).

Tex. R. App. P. 33.2, Formal Bills of Exception, states in relevant part:

> To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.
>
> (a) Form. No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the

complaint …….

(c) Procedure.

(1) The complaining party must first present a formal bill of exception to the trial court.

The CPS records in this case were not filed with the trial court, nor were they part of an offer of proof or a formal bill of exception. (entire record).

"We have held, and the Rules of Evidence make clear, that to preserve error in the exclusion of evidence, the proponent is required to make an offer of proof and obtain a ruling." *Suniga v. State*, NO. AP-77,041 (Tex.Crim.App. 2019). *See also*, *Reyna v. State*, 168 S.W.3d 173, 176 & n.8 (Tex.Crim.App. 2005)

By trial counsel not creating an offer of proof or bill of exception that showed the court what this *Brady* evidence exactly was, constituted ineffective assistance of counsel which was harmful to Appellant, and it surely cannot be construed as any trial strategy. What possible strategy could be involved in trial counsel not creating a record of *Brady* evidence that contradicted the complainants' statements?

Trial counsel's actions constituted error and such error was not harmless. The error here rises to the level of constitutional error. *Martinez v. State*, 17 S.W.3d 677, 692 (Tex.Crim.App. 2000). Determining harm requires a balancing of the following factors: (1) severity of the misconduct (the magnitude of the prejudicial effect caused by the State's improper jury argument), (2) curative measures (the effectiveness of

any cautionary instruction given by the trial court), and (3) certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Mosley v. State*, 983 S.W. 2d 249, 259 (Tex.Crim.App. 1998).

Trial counsel was ineffective and this, surely, could not be construed as trial strategy. It is difficult to imagine what possible "plausible basis" trial counsel would have for not making a record of this *Brady* evidence after the trial court failed to

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant prays that the judgment of the trial court be reversed and judgment of acquittal be entered or in the alternative that appellant will be granted a new trial or that appellant's sentence will be set aside and for such other and further relief to which appellant may be justly entitled.

Respectfully Submitted,

/S/ Greg Russell
Greg Russell
Attorney At Law
711 59th Street
Galveston, Texas 77551
(409) 497-4743
(409) 497-4721 Fax
SBN: 17411550

CERTIFICATE OF SERVICE

As Attorney of Record for Appellant, I do hereby Certify that a true and correct copy of the above and foregoing document was this date provided to the Attorney for Appellee, by email/e-file service to Mr. Jack Roady, District Attorney of Galveston County at the offices of the District Attorney of Galveston County, Texas, 600 59th Street, Galveston, Tx. 77551, on the 4th day of September 2024.

/s/ Greg Russell____
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I do hereby certify that this brief is in compliance with rule 9.4(i) of the Texas Rules of Appellate Procedure because it is computer generated, and its relevant portions contain 4,171 words.

/s/ Greg Russell___
Attorney for Appellant

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Greg Russell
Bar No. 17411550
greg@gnrlaw.com
Envelope ID: 91657114
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Associated Case Party: CharlieHaroldCarlee

Name	BarNumber	Email	TimestampSubmitted	Status
Greg Russell		greg@gnrlaw.com	9/4/2024 10:20:06 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Rebecca Klaren		rebecca.klaren@co.galveston.tx.us	9/4/2024 10:20:06 PM	SENT