No. 14-24-00756-CR
In the Court of Appeals for the
Fourteenth District of Texas at Houston

No. 1732503
In the 263rd Criminal District Court
of Harris County, Texas

THE STATE OF TEXAS
Appellant

V.

RYAN PHILIP RIBBECK
Appellee

STATE'S APPELLATE BRIEF

SEAN TEARE
District Attorney
Harris County, Texas

CLARISSA ESCOBEDO
STEPHANY ABNER
Assistant District Attorneys
Harris County, Texas

VICTORIANO FLORES, III
Assistant District Attorney
Harris County, Texas
State Bar Number: 24108606
1201 Franklin Street, Suite 600
Houston, Texas 77002
Tel. (713) 274-5826
Fax. (832) 927-0180
flores_victoriano@dao.hctx.net

ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.1, the State requests oral argument because it would aid the decisional process of this Court.

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1, is a complete list of the names of all interested parties is provided below:

Counsel for the State, Appellant:
Sean Teare
Harris County District Attorney
teare_sean@dao.hctx.net

Victoriano Flores, III
Asst. District Attorney on Appeal
flores_victoriano@dao.hctx.net

Clarissa Escobedo
Asst. District Attorney at Trial
escobedo_clarissa@dao.hctx.net

Stephany Abner
Asst. District Attorney at Trial
abner_stephany@dao.hctx.net

1201 Franklin St., Suite 600
Houston, Texas 77002

Judge Presiding at Trial:
The Honorable Melissa Morris
263rd Criminal District Court
1201 Franklin Street,
Houston, Texas 77002

Judge Presiding at Voir Dire:
The Honorable Stacy Allen Barrow
Felony Associate Judge

Counsel for Appellee:
Dick DeGeurin
Defense Attorney on Appeal
(713) 655-9000
300 Main St., Suite 300
Houston, Texas 77002

Neal Davis
Defense Attorney on Appeal
(713) 227-4444
1545 Heights Blvd., Suite 700
Houston, Texas 77008

Richard Martin P. Canlas
Defense Attorney on at Trial
(936) 788-6999
1095 Evergreen Circle, Suite 477
Houston, Texas 77380

Trinidad Zamora
Defense Attorney at Trial
(855) 587-7838
3010 Engelke St., Suite 3
Houston, Texas 77003

Christian Carlson
Defense Attorney at Trial
(832) 876-1551
228 Westheimer Rd.,
Houston, Texas 77006

Appellee:
Ryan Philip Ribbeck
Criminal Defendant

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TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

STATEMENT OF THE CASE

A grand jury indicted the appellee for sexual assault of a child under the age of seventeen.[1] At trial, a jury convicted the appellee of sexual assault of a child under the age of seventeen as charged in the indictment.[2] The appellee elected to have the trial court assess his punishment and the trial court sentenced him to four years confinement.[3] Subsequently, the trial court held a hearing on appellee's motion for new trial and granted him a new trial.[4] The State timely filed a notice of appeal.[5]

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[1] CR—40.

[2] CR—217.

[3] CR—160, 217.

[4] CR—228, 234.

[5] CR—280.

ISSUES PRESENTED

1. Whether the trial court granted a new trial on its own motion when it rejected the appellee's alleged grounds for new trial and granted a new trial on a ground that was not pled in the appellee's new-trial motion or argued by the appellee during the new-trial hearing?

2. Whether a new trial may be granted upon a claim that a defense lawyer deprived a defendant of the right to testify, if the claim is not based on ineffective assistance of counsel?

STATEMENT OF FACTS

I. Before trial began, the appellee's lawyer explained his right to testify and he informed his attorney he would not be testifying at trial.

Before trial started, the appellee's trial counsel advised him of his right to testify at trial.[6] The appellee's attorney warned him that if he testified at trial, his testimony would likely open the door to extraneous sexual acts committed by him against the victim.[7] Before trial began, the appellee told his defense attorney he did not want to testify at trial.[8]

II. On the first day of trial, the judge put the appellee on notice that he had the right to testify, even if his attorney advised him not to testify.

On the first day of trial, the appellee was present for jury selection.[9] The associate judge, who presided only over the jury selection process, informed everyone present in the courtroom that the appellee had the right to testify, even over

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[6] RR VII—12, 27-28, 37.

[7] RR VII—16.

[8] RR VII—11-12, 59.

[9] RR II—15 (stating, "…as well as the accused whose presence here today is telling you, 'I'm not guilty of this offense.'"); RR VII—35, 37-38 (at the motion for new trial hearing, the appellee stated he was present for voir dire).

his attorney's "advice" or "instruction" not to testify.[10] Specifically, the judge stated the following:

> ...ultimately the constitution says that you have the right and everyone accused of an offense has the right to remain silent, that you don't have to take the stand. And there's a number of reasons why someone may elect not to testify. Mr. Ribbeck is represented here today by counsel. And they could get to the point where he has to make a decision as to whether or not he may testify. And they could say, listen, you have sat through this trial. We have tried hundreds of cases between the both of us and I'm telling you the State doesn't have sufficient evidence as to this part and that part and that part of the indictment. They have not met their burden and so ***our instruction and our advice to you is we don't think you should testify. It's your choice, but we don't think you should.***[11] (emphasis added).

III. At the conclusion of the guilt-phase of trial, the State and defense rested, and then the appellee told his attorney he wanted to testify.

After the State rested its case-in-chief, the appellee's defense counsel rested its case-in-chief also.[12] The appellee's defense attorney rested without calling the

[10] RR II—38-39.

[11] RR II—38-39.

[12] RR VII—7-8.

appellee to the stand to testify because of the appellee's previous representation that he would not be testifying.[13] The trial court then recessed for lunch.[14]

After the defense rested and lunch was over, the appellee formulated the desire to testify.[15] Then, after the lunch break, the appellee told his attorney he wanted to run "the idea of testifying" by his attorney.[16] The appellee had been represented by his defense attorney for over two years and this was the first time the appellee ever represented a desire to testify.[17] The appellee's defense lawyer informed him it was too late for him to testify because the defense had already rested.[18] Then the parties proceeded to give closing arguments to the jury.[19]

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[13] RR VII—12, 16.

[14] RR VII—9-10.

[15] RR VII—9-10, 17-18, 26-28.

[16] RR VII—17-18.

[17] RR VII—10-11.

[18] RR VII—17-18.

[19] RR V—29, 38.

IV. The jury found the appellee guilty of sexual assault of a child under the age of seventeen and he was sentenced to four years in prison.

After the parties gave their closing arguments, the jury deliberated and returned a guilty verdict.[20] The jury convicted the appellee of sexual assault of a child under the age of seventeen as charged in the indictment.[21] The appellee elected to have the trial court assess his punishment.[22] During punishment, the appellee chose not to testify.[23] The trial court sentenced him to four years confinement.[24] Sentencing occurred on July 25, 2024.[25]

V. After punishment, the appellee filed a motion for new trial alleging that his attorney's ineffective assistance denied him the right to testify.

After being sentenced by the trial court, the appellee timely filed a motion for new trial on August 23, 2024.[26] The motion alleged that the appellee's lawyer failed adequately to advise him of his right to testify and that his attorney did not consult

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[20] RR V—43-44; CR—217.

[21] CR—217.

[22] RR VI—57; CR—160, 217.

[23] RR VII—24-25.

[24] RR VI—57; CR—160, 217.

[25] CR—217; RR V—1, 57.

[26] CR—228-33.

with him before resting his case.[27] The motion begins by simply stating the appellee has the right to testify.[28] The motion then complains about the following in the next three paragraphs:

> Defense Counsel shoulders the primary responsibility to inform the defendant of his right to testify, including the fact that the ultimate decision belonging to the defendant.
>
> The defendant did not get a fair trial because his trial counsel deprived him of his constitutional right to testify.
>
> Trial counsel's performance was deficient and amounts to ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution…[29]

After these legal assertions, the motions lays out facts that show—according the appellee—that his trial counsel was ineffective, and furthermore it explains how additional testimony from both the appellee and other witnesses would have been beneficial to him if offered and admitted.[30] The appellee's motion also states that he did not "knowingly waive his right to testify at trial."[31] The motion further states

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[27] CR—228-31.

[28] CR—228 (paragraphs 1-4).

[29] CR—229 (paragraphs 5-7) (citations, quotations, and formatting omitted).

[30] CR—229-30 (paragraphs 8-19).

[31] CR—230 (paragraph 13).

that the appellee "did not know that [he] had the right to make the ultimate decision to testify at trial."[32] The appellee's motion was an ineffective assistance of counsel claim.[33]

VI. During the new trial hearing, the appellee's trial counsel testified that he advised the appellee of his right to testify.

The trial court held a hearing on appellee's motion for new trial.[34] The testimony at the hearing revealed that before trial started, the appellee's trial counsel advised him of his right to testify at trial.[35] The evidence showed that the appellee's attorney advised him of the consequences and risks of testifying at trial.[36] The appellee's attorney warned him that if he testified at trial, his testimony would likely open the door to extraneous sexual acts committed by him against the victim in this case.[37] And the testimony at the new trial showed that before trial, the appellee told his defense attorney he did not want to testify at trial.[38]

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[32] CR—230 (paragraph 18).

[33] CR—228-31.

[34] CR—228, 234.

[35] RR VII—12, 27-28, 37.

[36] RR VII—12.

[37] RR VII—16.

[38] RR VII—11-12, 59.

VII. During closing arguments for the new-trial hearing, the appellee argued that he was denied the right to testify based on his trial counsel's ineffective assistance.

During the new-trial hearing, the appellee's entire argument centered on him being denied the right to testify by his attorney's ineffective assistance of counsel.[39] The appellee's attorney for the new trial hearing even stated, "We're here under an ineffective assistance of counsel claim…"[40]

VIII. At the conclusion of the new-trial hearing, the trial court found that there was "absolutely no ineffective assistance of counsel."

After hearing the testimony and arguments at the new-trial hearing, the trial court found that the appellee agreed not to testify at trial and the appellee later changed his mind after the defense rested.[41] The trial court explained that the appellee's right to testify was not overridden by his attorney.[42] The trial court found that the appellee's trial counsel's performance did not fall below the *Strickland v. Washington* standard.[43]

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[39] RR VII—50-52.

[40] RR VII—50.

[41] RR VII—59.

[42] RR VII—59-60.

[43] RR VII—58.

Moreover, the trial court even concluded that no prejudice was caused by the appellee's actions or the appellee's failure to testify.[44] The judge found that if the appellee had testified at trial it would not have changed the jury's verdict or "give[n] the jury a different understanding of what happened."[45] Notably, the trial court even found that a new trial might be harmful to the appellee.[46] Finally, the trial court stated, "I find absolutely no ineffective assistance of counsel."[47]

IX. Nevertheless, the trial court still granted the appellee a new trial.

Even though the trial court found that there was no deficient performance or prejudice that occurred under *Strickland*, the trial court granted a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[48] "[F]or that… reason alone," the trial court granted the appellee a new trial.[49]

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[44] RR VII—9.

[45] RR VII—59.

[46] RR VII—59.

[47] RR VII—59.

[48] RR VII—59-60.

[49] RR VII—59-60.

Subsequently, the appellee's defense attorney asked the trial court to clarify its ruling:

> **DEFENSE:** And it's specifically, the finding -- just so we are clear, the finding of fact is that Mr. Ribbeck was denied his right to testify and that's it. There's no IAC findings?[50]
>
> **JUDGE:** Oh, no, no. I haven't -- I haven't given Findings of Facts and Conclusions of Law yet. I did make findings just now on the record that I did not find [defense counsel] to be ineffective.[51]

This clearly showed that the trial court did not find that the appellee was deprived of his right to testify by ineffective assistance of counsel, as alleged in the appellee's motion for new trial and argued by his attorney at the hearing. Rather, the judge granted a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[52] "[F]or that… reason alone," the trial court granted a new trial.[53]

Once the trial court granted a new trial and made oral findings of facts, the State requested written findings.[54] The trial court stated that she intended to file

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[50] RR VII—62.

[51] RR VII—63.

[52] RR VII—59-60.

[53] RR VII—59-60.

[54] RR VII—62.

written findings.[55] However, the appellate record does not contain written findings from the trial court.[56]

X. The trial court denied the State's request for the trial court to rescind its new-trial ruling.

The trial court granted the appellee a new trial on September 19, 2024.[57] On September 30, 2024, the State filed a motion to reconsider with the trial court requesting that the judge rescind her new-trial ruling because she granted the new trial on a ground that was not pled in the appellee's new-trial motion.[58] The State's motion to reconsider explained the trial court lacked the authority to grant a new trial on a ground that was unpled in the appellee's motion for new trial.[59] The State's motion to reconsider outlined how the appellee's original motion for new trial only

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[55] RR VII—62-63; RR VIII—9-12.

[56] The State requested for the trial court clerk to include the trial court's findings of fact and conclusions of law in the appellate record. See CR—288-89. However, the State noticed that no written findings were included in the clerk's record, so the State sought for this Court to abate this appeal to obtain written findings of fact and conclusions of law from the trial court. At the time of filing this brief, this Court has not ruled on the State's motion to abate. Notably, a trial court is permitted to make only oral findings in a motion for new trial. See Tex. R. App. P. 21.8 (b) (stating, "In ruling on a motion for new trial, the court may make oral or written findings of fact.").

[57] RR VII—1; CR—234.

[58] CR—265.

[59] CR—265.

alleged an ineffective assistance of claim because the appellee claimed he was denied the right to testify by his trial attorney's actions.[60] However, as explained in the State's motion to reconsider, the trial court granted a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[61] "[F]or that…reason alone," the trial court granted the appellee a new trial.[62] Demonstrating that the trial court mistakenly believed the appellee must on the record waive his right to testify or error occurs.

On October 7, 2024, the trial court held a hearing on the State's motion to reconsider.[63] During the hearing, the trial court stated the appellee's trial counsel erred, but that this error did not change the outcome.[64] And the judge repeated that she did not find defense counsel to be ineffective, or deficient.[65]

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[60] CR—265.

[61] RR VII—59-60; RR VIII—9 (the trial judge stated, "I think that I called it right the first time.").

[62] RR VII—59-60.

[63] RR VIII—1.

[64] RR VIII—9. And the State would point out that an attorney can commit an error without it rising to the level of deficient performance or causing prejudice, which is what the trial court's findings reflect.

[65] RR VII—8-9.

During the reconsideration hearing, the appellee reiterated the alleged grounds in his motion for new trial, none of which were the ground that the trial court granted a new trial upon. The appellee's trial counsel also argued the trial court could grant a new trial on the ground that his trial counsel's actions deprived him of the right to testify but did not amount to ineffective assistance of counsel—namely that he had a Sixth Amendment right to a new trial because he had not testified—but without his attorney being the reason for his failure to testify.[66]

At the conclusion of the hearing, the trial court chose to stay with her original ruling to grant a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[67] The judge stated, "I think that I called it right the first time."[68] Thus, she denied the appellee's attempts to amend the basis for her new-trial ruling and she denied the State's request to rescind..[69]

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[66] RR VIII—8.

[67] RR VII—59-60.

[68] RR VIII—9.

[69] CR—278.

SUMMARY OF THE ARGUMENT

First, the trial court's order granting a new trial is void because a trial court cannot grant a new trial on its own motion. The trial court granted a new trial on its own motion because it rejected the appellee's listed reasons for a new trial, and granted a new trial on a ground that was neither (1) pled in the appellee's motion for new trial, nor (2) argued by the appellee during the new-trial hearing.

Second, the trial court abused its discretion by granting the appellee a new trial on an invalid legal claim. The claim that the appellee was deprived of the right to testify due to his trial counsel's actions is an invalid legal basis for granting a new trial, unless it is based on ineffective assistance of counsel. Because the trial court expressly disavowed that ineffective assistance of counsel occurred, the trial court granted a legally insupportable basis.

THE STATE'S FIRST POINT OF ERROR

The trial court's new-trial grant is void because the judge granted a new trial on its own motion. The trial court granted a new trial on its own motion because it rejected the appellee's listed reasons for a new trial, and granted a new trial on a ground that was neither (1) pled in the appellee's motion for new trial, nor (2) argued by the appellee during the new-trial hearing.

I. When a trial court grants a new trial on its own motion, the new-trial ruling is void.

A. Standard of review and applicable law.

The State is entitled to appeal a trial court's order granting a new trial.[70] This Court reviews a trial court's new-trial ruling for an abuse of discretion.[71] Although "[a] trial court's decision to grant a new trial is reviewed only for abuse of discretion…that discretion is not unbounded or unfettered."[72]

[70] *See* Tex. Code Crim. Pro. art. 44.01(a)(3); *see also State v. Garcia*, 638 S.W.3d 679, 680 (Tex. Crim. App. 2022) (stating, "Under Article 44.01, the State may appeal a trial court's order granting a new trial.").

[71] *See State v. Thomas*, 428 S.W.3d 99, 103 (Tex. Crim. App. 2014).

[72] *See State v. Arizmendi*, 519 S.W.3d 143, 148 (Tex. Crim. App. 2017).

The Court of Criminal Appeals has explained that a trial court does not abuse its discretion by granting a new trial if the defendant:

(1) "articulated a valid legal claim in his motion for new trial;"[73]

(2) "produced evidence or pointed to evidence in the trial record that substantiated his legal claim; and"[74]

(3) "showed prejudice to his substantial rights under the harmless error standards of the Texas Rules of Appellate Procedure."[75]

But "[a] judge may not grant a new trial on mere sympathy, an inarticulate hunch, or simply because he believes the defendant received a raw deal or is innocent."[76] And "[t]o grant a new trial for a non-legal or legally invalid reason is an abuse of discretion."[77] Furthermore, a trial court may not grant a new trial on a ground that was not pleaded in the defendant's motion for new trial.[78]

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[73][73] *See State v. Zalman*, 400 S.W.3d 590, 593 (Tex. Crim. App. 2013).

[74] *See id.*

[75] *See id.*

[76] S*ee id.*

[77] *See State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007).

[78] *See Zalman*, 400 S.W.3d at 594 (motion for new trial may not be granted on a ground not properly pleaded in the motion).

A trial court also lacks authority to order a new trial "on its own motion."[79] The granting of a new trial on the trial court's own motion is a "void act."[80] Rule 21.1 of the Rules of Appellate Procedure states, "*New trial* means the rehearing of a criminal action after the trial court has, ***on the defendant's motion***, set aside a finding or verdict of guilt."[81] (emphasis added).

When discussing a defendant's motion for new trial, the Court of Criminal Appeals has explained:

> [a]n essential element of [a motion for new trial] is that the matter of error relied upon for a new trial must be specifically set forth therein. The wisdom of that rule lies in the fact that reasonable notice should be given not only to the trial court but the State, as well, as to the misconduct relied upon and to prevent a purely fishing expedition on the part of the accused.[82]

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[79] *See Zaragosa v. State*, 588 S.W.2d 322, 326–27 (Tex. Crim. App. 1979).

[80] *See Johnson v. State*, 894 S.W.2d 529, 534 (Tex. App.—Austin 1995, no pet.) (stating, "A trial court has no power to grant a new trial on its own motion, and if it does so, such act is void."); *see also Wright v. State*, 158 S.W.3d 590, 595 (Tex. App.—San Antonio 2005, pet. ref d) (stating, "the granting of a new trial on the court's own motion…is a void act."); *see also Perkins v. Court of Appeals*, 738 S.W.2d 276, 280 (Tex. Crim. App. 1987) (stating, "a trial judge has no power to grant a new trial on his own motion, and, if he does grant a motion for new trial on his own motion, such is a void act.").

[81] *See* Tex. R. App. P. 21.1.

[82] *See Zalman*, 400 S.W.3d at 593.

The purpose of this specificity requirement is to allow the judge enough notice to prepare for the hearing and make informed rulings, and to allow the State enough information to prepare a rebuttal.[83]

When reviewing a judge's new-trial ruling, this Court views the evidence in the light most favorable to the trial court's ruling and upholds the ruling if it was within the zone of reasonable disagreement.[84] "The trial court, as factfinder, is the sole judge of witness credibility at a hearing on a motion for new trial with respect to both live testimony and affidavits."[85]

The Rules of Appellate Procedure allow trial courts to make oral findings when ruling on motions for new trial.[86] The reason for this is so "that appellate courts will not need to speculate as to the possible factual findings supporting a trial judge's ruling if the trial judge will articulate them."[87] Notably, under this rule, "***[i]n the absence of express findings***…[appellate courts] presume that the trial court

[83] *See Zalman*, 400 S.W.3d at 593.

[84] *See Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007).

[85] *See Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013).

[86] *See* Tex. R. App. P. 21.8 (b) (stating, "In ruling on a motion for new trial, the court may make oral or written findings of fact.").

[87] *See Landers v. State*, 256 S.W.3d 295, 301 n. 4 (Tex. Crim. App. 2008).

made all findings, express and implied, in favor of the prevailing party."[88] (emphasis added). However, when findings have been made by the trial court, this Court defers to them.[89]

B. Error is preserved for this issue because a void judgment may be challenged at any time.

The State was not required to raise an objection to the trial court's void grant of a new trial because a void judgement may be attacked at any time.[90] Thus, error is preserved for appellate review, even if the State did not object before the trial court. Notably, the State did argue, in a motion to reconsider and at a subsequent hearing that the trial court lacked authority to grant a new trial on a ground the appellee's motion for new trial failed to plead.[91]

[88] *See Okonkwo*, 398 S.W.3d at 694.

[89] *See id*.

[90] *See Cooper v. State*, No. 12-20-00075-CR, 2021 WL 306204, at *3 (Tex. App.—Tyler Jan. 29, 2021, no pet.) (mem. op., not designated for publication) (explaining that a party does not need to object to a void new-trial grant because a void judgment can be attacked at any time) (citing *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001); *see also Reeves v. State*, 68 S.W.3d 828, 829 (Tex. App.—Eastland 2002, pet. ref'd) (same).

[91] CR—272; RR VIII—4-5.

C. The trial court's new-trial grant is void because it rejected the appellee's listed grounds for new trial, but still granted a new trial on a ground that was neither alleged in the motion for new trial, nor argued by the appellee at the motion for new trial hearing.

In *Stoker v. State*, the defendant filed a motion for new trial alleging: (1) the evidence was legally insufficient to sustain the conviction; (2) he was "actually innocent of the charge"; (3) he was denied effective assistance of trial counsel; (4) the district court did not have jurisdiction; and (5) his conviction violated several constitutional guarantees.[92] In *Stroker*, a hearing was held on the defendant's motion, at which the defendant abandoned his actual innocence claim.[93] In *Stroker*, the trial judge overruled the defendant's new-trial motion, but still granted a new trial on the ground that the defendant had previously abandoned.[94]

In *Stroker*, two weeks after granting the new trial, the trial court reconsidered its ruling and determined that the order granting a new trial was void because granting a new trial in such a circumstance was a new-trial grant on the trial court's own motion.[95] In *Stroker*, the Austin Court of Appeals agreed that the trial court had

[92] *See Stoker v. State*, No. 03-02-00137-CR, 2003 WL 549128, at *1 (Tex. App.—Austin Feb. 21, 2003, no pet.) (mem. op., not designated for publication).

[93] *See id.*

[94] *See id.*

[95] *See id.*

granted a new trial on its own motion, even though the defendant had filed his own motion for new trial.[96] The Court of Appeals stated the new-trial grant was "unauthorized and void."[97]

Here, the appellee filed a motion for new trial alleging that his trial counsel's actions, which denied him the right to testify, amounted to ineffective assistance of counsel.[98] The appellee's motion states that he did not "knowingly waive his right to testify at trial."[99] When read in context, it is clear that the appellee is complaining that his trial counsel ineffectiveness resulted in an unknowing waiver of the right to testify.[100] Each of the assertions in the appellee's motion for new trial was based on ineffective assistance of counsel.[101]

Moreover, during the new-trial hearing, the appellee's entire argument centered on him being denied the right to testify by his attorney's ineffectiveness.[102]

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[96] *See Stoker*, No. 03-02-00137-CR, 2003 WL 549128, at *1.

[97] *See id.*

[98] CR—228-31; *Supra*—6-8.

[99] CR—230 (paragraph 13).

[100] CR—230 (paragraph 13).

[101] CR—230.

[102] RR VII—50-52.

In fact, during the new-trial hearing, the appellee's attorney even stated, "***We're here under an ineffective assistance of counsel claim***…"[103] (emphasis added). The Court of Criminal Appeals has explained that a claim that a defendant was prevented from testifying by actions or failures of his attorney is subject to the usual ineffective-assistance-of-counsel analysis outlined in *Strickland*.[104] Therefore, it is clear, that the appellee's motion sought a new trial on the ground that he was deprived of his right to testify and present evidence due to his trial counsel's ineffectiveness.[105]

Yet, at the conclusion of the hearing on the motion for new trial, the trial court expressly and repeatedly found that the appellee's trial attorney was not ineffective.[106] The trial court even stated, "I find absolutely no ineffective assistance of counsel."[107] And the trial court explained that the appellee's right to testify was not overridden by his attorney.[108]

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[103] RR VII—50.

[104] *See Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005).

[105] CR—228-31; *see also Johnson*, 169 S.W.3d at 235.

[106] RR VII—59, 63.

[107] RR VII—59.

[108] RR VII—59-60.

By finding there was no ineffective assistance of counsel and that counsel did not override the appellee's right to testify, the judge ruled adversely to the appellee's grounds for new trial.[109] Therefore here, as in *Stroker*, the trial court overruled the appellee's listed grounds for a new trial by finding there was no ineffective assistance of counsel.[110]

Nevertheless, after rejecting the appellee's ineffective assistance of counsel claim, the trial court still chose to grant the appellee a new trial based on a ground that was not alleged in the appellee's new-trial motion or argued by him at the hearing. Specifically, the trial court granted a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[111] "[F]or that…reason alone," the trial court granted the appellee a new trial.[112] The trial court then repeated that there was not a finding of ineffective assistance of counsel.[113]

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[109] RR VII—59, 63.

[110] RR VII—59, 63.

[111] RR VII—59-60.

[112] RR VII—59-60.

[113] RR VII—63.

Notably, the appellee did not file an amended motion for new trial to include this unpled ground. And he did not argue for this ground at the new-trial hearing.[114] Therefore, the trial court granted a new trial on its own motion—not the appellee's.

In sum, when a trial court expressly rejects a defendant's pleaded grounds for a new trial, but proceeds to grant a new trial on a ground that was neither alleged nor argued by the defendant, the trial court has actually granted a new trial on its own motion.[115] And when a trial court grants its own motion for new trial, the action is void.[116] This Court should vacate the trial court's void grant of a new trial.

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[114] RR VII—50-52.

[115] *See Stoker*, No. 03-02-00137-CR, 2003 WL 549128, at *1.

[116] *See Johnson*, 894 S.W.2d at 534 (stating, "A trial court has no power to grant a new trial on its own motion, and if it does so, such act is void."); *see also Wright*, 158 S.W.3d at 595 (stating, "the granting of a new trial on the court's own motion…is a void act."); *see also Perkins*, 738 S.W.2d at 280 (stating, "a trial judge has no power to grant a new trial on his own motion, and, if he does grant a motion for new trial on his own motion, such is a void act.").

D. At a subsequent hearing, the appellee explained what the grounds were alleged in his original motion for new trial and none of them matched the ground upon which the trial court's granted a new trial.

Here, the trial court imposed a sentence on July 25, 2024.[117] The appellee timely filed a motion for new trial on August 23, 2024.[118] The judge granted the appellee a new trial on September 19, 2024.[119] On September 30, 2024, the State filed a motion to reconsider with the trial court requesting that the judge rescind its ruling because it did not have the authority to grant a new trial absent a finding of ineffective assistance of counsel.[120] The motion to reconsider explained that the ground the trial court granted a new-trial upon was not pled by the appellee and thus could not be the basis of a new trial.[121]

On October 7, 2024, the trial court held a hearing on the State's motion to reconsider.[122] At the beginning of the hearing, the trial court reiterated that it found

[117] CR—217; RR V—1, 57.

[118] CR—229-33.

[119] RR VII—1; CR—234.

[120] CR—265.

[121] CR—265.

[122] RR VIII—1.

the appellee's trial counsel "effective."[123] The trial court then invited argument on only one part of the State's motion to reconsider—whether the trial court could grant a new trial based upon the denial of the right to testify apart from a finding of ineffective assistance of counsel.[124]

The State's motion to reconsider explained that the trial court could not grant a new trial on the basis that defense counsel denied the appellee right to testify unless there is a finding of ineffective assistance of counsel.[125] The State's motion further explained that the appellee's motion for new trial only alleged ineffective assistance of counsel.[126] But, as is stated in the State's motion and reflected in the reporter's record for new-trial hearing, the trial court granted a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[127] And "[F]or that… reason alone," the trial court granted the appellee a new trial.[128] Therefore, although the trial court wanted to discuss whether she could

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[123] RR VIII—5.

[124] RR VIII—4-5.

[125] CR—266-67.

[126] CR—266-67.

[127] RR VII—59-60.

[128] RR VII—59-60.

grant a new trial based upon the denial of the right to testify apart from a finding of ineffective assistance of counsel, the judge did not grant a new trial on the basis that the appellee was denied the right to testify.

1. The appellee explained what his original motion for new trial alleged.

Later, during the hearing on the State's motion to reconsider, the appellee's attorney explained what the appellee's original motion for new trial alleged.[129] The appellee's attorney claimed it alleged the following:

1. The appellee was denied the ability to testify at trial.[130]
2. The appellee was denied the ability to present evidence in his defense.[131]
3. The appellee's trial lawyer failed to re-open or consult with the appellee before resting.[132]

Notably, for the first time, it was the appellee's position that the trial court could grant a new trial on these grounds apart from any finding of ineffective assistance of counsel.[133]

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[129] RR VIII—5-6.

[130] RR VIII—5-8.

[131] RR VIII—5-8.

[132] RR VIII—5-8.

[133] RR VIII—7.

The appellee's argument at the reconsideration hearing only supports the State's position that the trial court granted a new trial based on its own motion instead of the appellee's motion because the trial court did not grant a new trial on any of these alleged grounds. The trial court did not grant a new trial on the ground that the appellee was deprived of the right to testify. The trial court did not grant a new trial on the ground that the appellee was denied the right to present evidence in his defense. And the trial court did not grant a new trial on the ground that the appellee's attorney failed to re-open or consult with the appellee. Rather, the trial court believed there should have be a "clear waiver" of the right to testify on the record "after the State rests" and "for that …reason alone" a new trial was granted.

2. *The appellee offered to "supplement" his motion for new trial to allow the trial court to grant a new trial on his desired grounds.*

Here, during the reconsideration hearing, the appellee's attorney said about supplementing his motion for new trial:

> Yes, Your Honor. Page 1 of ***the Defendant's Motion for New Trial makes it pretty clear in No. 3 and 4 that it's also attacking his ability to testify at his own trial***; that the testifying, it's a fundamental constitutional right and explains the constitutional basis for that. So the Motion for New Trial, I think, probably raises that as a separate ground. If it didn't, we can always supplement, which I think we did in our reply to theirs. It's not an amendment of the original, although I believe it was clear in the original that was a separate ground. And so that's why we filed the supplement. And we have, at least in our proposed findings, we'd also have ***a separate ground on***

> ***his being deprived of his ability to testify***.[134] (emphasis added).

It appears the appellee offered to "supplement" his motion for new trial to allow the trial court to grant a new trial on his desired grounds for new trial—namely that the appellee was denied the right to testify.[135] Notably, the appellee did not seek to "supplement" his motion for new trial with the trial court's ground, which was that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[136] This further demonstrates that the trial court granted a new trial on its own motion and not the appellee's. The trial court's ruling was so contrary to what the appellee pleaded or argued that he attempted to change her ruling to his desired basis. But the trial court stuck with its ruling and said, "…I think that I called it right the ***first time***."[137] (emphasis added).

3. *The State objected to the appellee's proposed findings of fact and conclusions of law because they proposed that the judge find trial counsel ineffective.*

During the reconsideration hearing, the State objected to the appellee's proposed findings of fact and conclusions of law because they proposed that the trial

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[134] RR VIII—5-6.

[135] RR VIII—5-8.

[136] RR VII—59-60.

[137] RR VIII—9.

court make a finding of ineffective assistance of counsel.[138] The trial court agreed with the State's objection and reiterated that trial counsel had not found trial counsel ineffective.[139] Later in the hearing, the trial court explained that was not going to find trial counsel ineffective, even though the appellee's right to testify was "affected" by his counsel's "error".[140] Notably, the trial court did not say she was adopting this as the reason for granting a new trial. Rather, she stated, "So I think that I called it right the ***first time***."[141] (emphasis added).

Therefore, as previously explained, the ground the trial court granted upon was not alleged in the original new-trial motion or argued by the appellee during the new-trial hearing.[142] The State's motion for reconsideration laid out how the trial court's reason for relief did not provide a basis for new trial and was not alleged by the appellee. Then the State obtained a hearing on this motion and received an adverse ruling to its motion.

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[138] RR VIII—8.

[139] RR VIII—8.

[140] RR VIII—9.

[141] RR VIII—9.

[142] *Supra*—6-8, 22-25.

Accordingly, the new-trial grant in this case is void, and this Court should vacate the trial court's improper grant of a new trial on a basis not alleged, argued, or supported in law as a ground for relief.[143]

[143] *See Stoker*, No. 03-02-00137-CR, 2003 WL 549128, at *1; *see also Johnson*, 894 S.W.2d at 534 (stating, "A trial court has no power to grant a new trial on its own motion, and if it does so, such act is void."); *see also Wright*, 158 S.W.3d at 595 (stating, "the granting of a new trial on the court's own motion…is a void act."); *see also Perkins*, 738 S.W.2d at 280 (stating, "a trial judge has no power to grant a new trial on his own motion, and, if he does grant a motion for new trial on his own motion, such is a void act.").

THE STATE'S SECOND POINT OF ERROR

If this Court finds that the trial court's new trial grant was not void, the State requests this Court to reverse the trial court due to an abuse of discretion. The trial court abused its discretion by granting the appellee a new trial because: (1) the deprivation of the right to testify due to a defense attorney's actions is an invalid legal claim unless the claim is based on ineffective assistance of counsel, (2) failing to call witnesses in the appellee's defense is not a valid legal claim, unless the claim is based on ineffective assistance of counsel, and (3) failing to have a defendant clearly waive their right to testify on the record is not a valid legal basis for new trial.

I. The trial court erred if it granted the appellee a new trial on a ground involving the appellee's trial counsel's alleged errors unless it was based upon ineffective assistance of counsel.

A. Standard of review

This point of error applies the same standard of review as the State's first point of error.[144]

[144] *Supra*—16-20.

B. The deprivation of the right to testify due to trial counsel's actions is an invalid legal claim unless it is based upon ineffective assistance of counsel.

The trial court stated it granted a new trial on the ground that "there [is] no evidence as to his clear waiver [of his right to testify] after the State rested."[145] "[F]or that… reason alone," the trial court granted the appellee a new trial.[146] If this Court interprets the trial court's stated ground for new trial as her granting a new trial on the ground that the appellee's trial counsel deprived him of the right to testify, the trial court's ruling is still reversible error unless there was also a finding of ineffective assistance of counsel.

In *State v. Thomas*, the defendant filed a motion for new trial, which alleged he was entitled to a new trial on the ground that his trial counsel failed to call an exculpatory witness to testify at punishment.[147] However, the defendant in *Thomas* chose not to allege ineffective assistance of counsel in their motion for new trial.[148] In *Thomas*, at the new-trial hearing, the State sought to call the defendant's trial attorney to the witness stand to question the attorney about his strategy for failing to

[145] RR VII—59-60.

[146] RR VII—59-60.

[147] *See State v. Thomas*, 428 S.W.3d 99, 105-07 (Tex. Crim. App. 2014).

[148] *See id.*

call the exculpatory witness.[149] However, in *Thomas*, the attorney refused to answer the State's questions asserting "attorney-client privilege."[150] In *Thomas*, the trial court granted a new trial "in the interest of justice" on the ground that the defendant's trial counsel failed to call an exculpatory witness to testify, even though the ground was not based upon ineffective assistance of counsel.[151]

However, in *Thomas*, the Court of Criminal Appeals reversed the trial court's decision because the defendant failed to allege a valid legal claim.[152] The Court of Criminal Appeals explained that a new trial could not be granted upon a claim that defense counsel failed to call an exculpatory witness to testify who was known to counsel and available at trial if the claim was not based on ineffective assistance of counsel.[153] The *Thomas* Court further explained that such claims would prohibit the State from inquiring about the trial strategy of defense counsel because attorney-

[149] *See Thomas*, 428 S.W.3d at 106.

[150] *See id.*

[151] *See id.* at 105

[152] *See id.*

[153] *See id.* at 106.

client privilege can only be waived when counsel faces an ineffective-assistance claim.[154]

Similarly, here, the appellee's entire claim centered on his trial counsel's actions denying him his right to testify evidence at trial. Nevertheless, at the reconsideration hearing, the appellee advocated for the trial court to grant him a new trial without finding trial counsel ineffective.[155] Therefore, this case presents the same concerns raised in *Thomas* because the trial court expressly stated there was no ineffective assistance of counsel.[156]

If this Court were to uphold the trial court's grant of a new trial, this would permit future defense attorneys to seek a new trial on the basis of trial counsel's error, without having to allege ineffective assistance of counsel.[157] Trial attorneys would merely need to allege in their client's motion for new trial that they committed an error (i.e., denied their client the right to testify) during trial but refrain from alleging "ineffective assistance of counsel" in the new-trial motion. Then they could assert attorney-client privilege concerning the legal strategy for their errors.

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[154] *See Thomas*, 428 S.W.3d at 105

[155] RR VIII—7.

[156] RR VII—59.

[157] *See Thomas*, 428 S.W.3d at 106.

Notably, the Court of Criminal Appeals and the Federal Fifth Circuit Court of Appeals have both held that such a claim—the denial of the right to testify due to a defense attorney's actions—must be analyzed as an ineffective assistance of counsel claim.[158]

Moreover, it should be noted, that the deprivation of the right to testify can only be attributed to the actions of a defendant's trial counsel or the trial court.[159] But nothing in the appellee's motion for new trial or his argument remotely claimed that the trial court deprived him of the right to testify. Appellee only alleged a denial of the right to testify due to his attorney's actions. Thus, again, this claim was obviously based on trial court's "error."[160]

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[158] *See Johnson*, 169 S.W.3d at 232 (explaining that when a defendant claims his trial counsel deprived him of the right to testify, this claim must be analyzed as an ineffective assistance of counsel claim); *see also United States v. Mullins*, 315 F.3d 449, 452 (5th Cir. 2002) (stating, "where the defendant contends that his counsel interfered with his right to testify, the "appropriate vehicle for such claims is a claim of ineffective assistance of counsel.").

[159] *See generally Johnson*, 169 S.W.3d at 232 (when a defendant claimed he was entitled to a new trial due to the deprivation of the right to testify, the Court of Criminal Appeals stated, "…to avoid the requirements of *Strickland,* the defendant's complaint must reveal error attributable to the court and not simply to defense counsel.").

[160] RR VIII—9.

Furthermore, as in *Thomas*, "In the interest of justice" is not a separate ground to grant a new trial when the entire complaint relies upon defense counsel errors.[161] The defendant and the trial court in *Thomas* mistakenly believed that "In the interest of justice" was an alternative ground than "ineffective assistance of counsel" when seeking a new trial due to defense counsel's error.[162] In *Thomas*, the Court of Criminal Appeals rejected that argument.[163] Therefore, any claim that the trial court granted the new trial "In the interest of justice" also fails, unless it was founded upon a finding of ineffective assistance of counsel.

C. Counsel's failure to present witnesses on the appellee's behalf at trial is an invalid legal claim unless it is based upon ineffective assistance of counsel.

Thomas held that a defense counsel's failure to call witnesses on a defendant's behalf at trial is an invalid legal basis for new trial unless the claim is based upon ineffective assistance of counsel.[164] Therefore, even if the trial court had granted a new trial on the ground that the appellee's counsel erred by not calling witness, the trial court abused its discretion by granting a new trial because there was not a finding of ineffective assistance of counsel.

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[161] *See Thomas*, 428 S.W.3d at 105.

[162] *See id.*

[163] *See id.*

[164] *See id.*

D. Counsel's failure to have the appellee expressly or knowingly waive his right to testify after the State rested on the record is an invalid legal claim unless it is based on ineffective assistance of counsel.

1. A waiver of the right to testify on the record is not required.

The trial court's expressly stated reason for new trial, namely that the appellee's attorney did not have the appellee "clear[ly] waive" his right to testify on the record after the State rested, is not a basis for new trial.[165] The State has not found any legal authority, statutory or otherwise, that requires a "clear waiver" of a defendant's right to testify on the record after the State rests. Notably, appellate courts have stated that a trial court has no duty to verify that the defendant has waived their right to testify because it could influence a defendant to testify unwillingly.[166]

And if this Court were to affirm the trial court's stated basis for granting a new trial, this would undermine every criminal jury trial moving forward in this appellate jurisdiction. In each trial, all a defendant would need to do is fail to affirmatively waive their right to testify on the record after the State rests and they would be guaranteed a new trial. Defense attorneys would know that failing to have

[165] RR VII—59-60.

[166] *See United States v. Rodriguez-Aparicio*, 888 F.3d 189, 193–94 (5th Cir. 2018) (stating, '"[a]n overwhelming majority of the circuits have held that a district court generally has no duty to explain...to verify that the defendant…has waived the right [to testify] voluntarily.'") (quoting *United States v. Brown*, 217 F.3d 247, 258 (5th Cir. 2000)).

their client waive their right to testify on the record is enough of an error to warrant a new trial, but not the kind of error that results in ineffective assistance of counsel. With this in mind, some defense attorneys might be encouraged to commit this supposed "error" intentionally, to ensure a new trial in the event their client receives an unfavorable jury-verdict. Thus, the lack of a waiver of the right to testify on the record cannot be a valid basis for a new trial.

Moreover, the trial court's ruling invites this Court to go against the well-establish *Strickland* standard when analyzing a defense attorney's performance at trial.[167] Under *Strickland*, when the record is silent about an alleged error committed by defense counsel, the defendant must lose his claim because the burden is on the defendant in an ineffective assistance of counsel claim.[168] However here, the trial court's ruling found trial counsel erred *because* the record was silent. This is contrary to the standard for analyzing a defense attorney's error—the *Strickland* standard.

When analyzing defense counsel errors, there must be a claim of ineffective assistance of counsel as laid out in *Thomas*. Therefore, failing to have a defendant

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[167] *See Strickland*, 466 U.S. 668, 687-94.

[168] *See Johnson v. State*, 624 S.W.3d 579, 586 (Tex. Crim. App. 2021) (when analyzing an ineffective assistance of counsel claim under *Strickland*, the Court said "Counsel gets the benefit of the doubt from a silent record.").

waive his right to testify on the record also cannot be a valid legal claim for new trial, unless it is based upon a claim of ineffective assistance of counsel.[169]

2. A claim that a defendant did not knowingly waive their right to testify is invalid unless it is based on ineffective assistance of counsel.

The allegation that the appellee did not knowingly waive his right to testify is a claim that his trial counsel did not properly advise him of his right to testify, which is an ineffective assistance of counsel claim.[170]

> We find the majority view persuasive. This Court has held that a trial court has no duty to inform a testifying defendant, represented by counsel, of his right not to testify. If the trial court is not required to admonish a represented defendant about the right *not* to testify—arguably the "more fragile right"—then the trial court surely has no duty to do so with regard to the converse right *to* testify. We agree with the majority of jurisdictions that defense counsel shoulders the primary responsibility to inform the defendant of his right to testify, including the fact that the ultimate decision belongs to the defendant. ***Because imparting that information is defense counsel's responsibility, Strickland provides the appropriate framework for addressing an allegation that the defendant's right to testify was denied by defense counsel***.[66] (emphasis added).

[169] *See Johnson*, 169 S.W.3d at 232; *see also Thomas*, 428 S.W.3d at 105.

[170] *See Johnson*, 169 S.W.3d at 235.

Therefore, the claim that the appellee did not knowingly waive his right to testify is also an invalid legal claim unless it is based upon ineffective assistance of counsel.[171] Accordingly, the trial court granted a new trial on an invalid basis.

II. The trial court properly rejected all of the appellee's desired grounds for new trial.

If a trial court rules on a motion for new trial, and made findings concerning whether the trial counsel was ineffective under *Strickland* , this Court reviews the trial court's finding on prejudice *de novo*.[172] But this Court affords nearly total deference to "***any***" of the trial court's factual findings.[173] (emphasis added). The Rules of Appellate Procedure allow trial courts to make oral findings when ruling on motions for new trial.[174] The reason for this is so "that appellate courts will not need to speculate as to the possible factual findings supporting a trial judge's ruling if the trial judge will articulate them."[175] Notably, under the Rules of Appellate Procedure, "***[i]n the absence of express findings***…[appellate courts] presume that

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[171] *See Johnson,* 169 S.W.3d at 232; *see also Thomas,* 428 S.W.3d at 105.

[172] *See Johnson,* 169 S.W.3d at 239.

[173] *See id.*

[174] *See* Tex. R. App. P. 21.8 (b) (stating, "In ruling on a motion for new trial, the court may make oral or written findings of fact.").

[175] *See Landers,* 256 S.W.3d at 301 n. 4.

the trial court made all findings, express and implied, in favor of the prevailing party."[176] (emphasis added). However, when ***any*** findings have been made by the trial court, oral or written, this Court defers to those findings.[177]

A. The record supports the trial court's finding that trial counsel was effective.

The appellee originally alleged that his right to testify was deprived due to his attorney's ineffective assistance but he failed to prove this was a basis for new trial. To prevail on this claim, the appellee had to show that his attorney performed deficiently and that deficient performance caused him prejudice. The trial court properly found that the appellee failed to establish either of these *Strickland* prongs.

1. The appellee did not prove that his trial counsel performed deficiently.

The appellee's trial counsel testified that he informed the appellee of his right to testify during trial preparation and that it was agreed that it was best for him not to testify.[178] Trial counsel testified that the appellee waived the right to testify as part of trial strategy.[179]

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[176] *See Okonkwo*, 398 S.W.3d at 694.

[177] *See id.*; *see also Johnson*, 169 S.W.3d at 239.

[178] RR VII—11-12.

[179] RR VII—11-12, 15-16.

Additionally, the appellee's trial counsel heard the trial court inform the appellee of his right to testify during jury selection by stating the following with the appellee present:

> ...ultimately the constitution says that you have the right and everyone accused of an offense has the right to remain silent, that you don't have to take the stand. And there's a number of reasons why someone may elect not to testify. Mr. Ribbeck is represented here today by counsel. ***And they could get to the point where he has to make a decision as to whether or not he may testify.*** And they could say, listen, you have sat through this trial. We have tried hundreds of cases between the both of us and I'm telling you the State doesn't have sufficient evidence as to this part and that part and that part of the indictment. They have not met their burden and so ***our instruction and our advice to you is we don't think you should testify. It's your choice, but we don't think you should.***[180] (emphasis added).

This demonstrates that the appellee's attorney was aware that the appellee had been fully informed of his right to testify from the beginning of trial. The record affirmatively shows that the appellee was informed of his right to testify. Therefore, even though the appellee claimed he did not "knowingly" waive his right to testify due to his attorney not advising him properly, the trial court properly found that his

[180] RR II—38-39.

attorney's performance did not fall below the *Strickland* standard for reasonableness because the record demonstrates that the appellee was informed of his right.[181]

And although the appellee testified at the new-trial hearing that he wanted to testify at trial, he failed to voice his desire to testify to his defense counsel before the defense rested.[182] The appellee's attorney consulted with the appellee before trial began and the appellee represented that he would not testify at trial.[183]

During trial, after the State rested its case-in-chief, defense counsel rested without consulting with the appellee or calling him to testify because of the appellee's previous representation that he would not be testifying at trial.[184] The Court then recessed for lunch.[185] The appellee did not inform his attorney of his desire to testify until after the parties had rested and come back from lunch.[186]

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[181] RR VII—58.

[182] RR VII—10-11, 17-18, 59.

[183] RR VII—59 (the trial court explaining that the appellee "acquiesce[ed]" not to testify).

[184] RR VII—7-12, 16, 59.

[185] RR VII—9-10, 12, 59.

[186] RR VII—7- 8, 12, 59.

During the lunch break, the appellee discussed the idea of testifying with his parents.[187] After lunch, the appellee formulated the desire to testify.[188] Then, after the lunch break, the appellee told his attorney he wanted to run "the idea of testifying" by him.[189] Defense counsel had represented the appellee for over two years and this was the first time he informed his lawyer of his desire to testify.[190] Defense counsel informed the appellee it was too late because he had rested.[191]

Trial counsel did not perform deficiently when he advised the appellee it was too late to testify after both parties rested. The Code of Criminal Procedure states that once a party has rested, a trial court is only required to reopen the case and allow testimony to be introduced "if it appears that it is necessary to a due administration of justice."[192] The Court of Criminal Appeals has explained that "[A] 'due

[187] RR VII—17, 26-28.

[188] RR VII—9-10, 17-18, 26-28.

[189] RR VII—17-18.

[190] RR VII—10-11.

[191] RR VII—17-18.

[192] *See* Tex. Code Crim. Pro. art. 36.02.

administration of justice' means a judge should reopen the case if the evidence would materially change the case in the proponent's favor."[193]

Here, once both sides rested, the appellee was no longer entitled to testify because his testimony would not have materially changed the case in his favor.[194] The record demonstrates that the trial court specifically found that if the appellee had testified at trial it would not have changed the jury's verdict or "give[n] the jury a different understanding of what happened."[195] The trial court also said trial counsel did not cause "any harm" to the appellee.[196] In fact, the trial court stated that a new trial might be harmful to him due to the extraneous offenses that would be admitted for impeachment purposes.[197] Therefore, the appellee's trial counsel properly

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[193] *See Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003); *see also Thomas v. State*, No. 10-11-00250-CR, 2013 WL 2639168, at *9 (Tex. App.—Waco June 6, 2013, no pet.) (mem. op., not designated for publication) (trial court properly denied the defendant's motion to reopen because his testimony would not have materially changed the outcome in his favor).

[194] RR VII—59-60.

[195] RR VII—59.

[196] RR VIII—9.

[197] RR VII—59.

advised him that he could no longer testify once both parties rested because his testimony would not have materially changed the outcome of the trial in his favor.[198]

Notably, at the motion to reconsider hearing, the appellee's attorney claimed it was ineffective for trial counsel not have moved to reopen.[199] But the trial court rejected this argument and stated, "I don't want to make a finding that [trial counsel was] ineffective. In fact, under the *Stricklin* [sic] standard and *Mullins*, basically, they were above, you know -- above board with their effectiveness."[200] Therefore, even though the trial court characterized defense counsel's action as an "error", the judge explained this error did not rise to the level of deficient performance under *Strickland*.[201]

The trial court must have agreed that trial counsel was not able to re-open because it found that trial counsel's performance was effective, even after hearing

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[198] *See Peek*, 106 S.W.3d at 79; *see also Thomas*, No. 10-11-00250-CR, 2013 WL 2639168, at *9 (trial court properly denied the defendant's motion to reopen because his testimony would not have materially changed the outcome in his favor).

[199] RR VIII—8 (stating, "…the lawyer didn't move to re-open and that's where we have the problem.").

[200] RR VIII—8.

[201] RR VIII—8-9.

that trial counsel advised his client he could not re-open after resting.[202] Therefore, the appellee failed to prove that his trial counsel performed deficiently by advising the appellee it was too late to testify. And because trial counsel's conduct was not deficient, the trial court properly rejected this ground for new-trial.[203]

2. The appellee did not establish that his defense counsel's performance resulted in prejudice.

During the new-trial hearing, the appellee testified that if he had testified at trial, he would have testified about the following five subjects:

1. His professional and personal background.[204]
2. That he is forty-three years old.[205]
3. That he has no felony convictions.[206]
4. He would have denied the allegation and any extraneous bad acts.[207]

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[202] RR VIII—8.

[203] *See generally Strickland v. Washington*, 466 U.S. 668, 687-94 (1984) (requiring a defendant to show deficient performance to prevail on an ineffective assistance of counsel claim).

[204] RR VII—29-30

[205] RR VII—30.

[206] RR VII—30.

[207] RR VII—31, 33.

5. Background information about his relationship with the victim.[208]

But evidence of appellee's professional and personal background was already admitted at trial.[209] And evidence the appellee's age at the time of the offense was admitted at trial.[210] Notably, the State was required to prove the age of the appellee to establish he was more than three years older than the victim at the time of the offense.[211] Therefore, the appellee's testimony about his age at the time of trial, forty-three years of age, would have actually helped the State to prove its case.

Moreover, the jury repeatedly heard testimony about the relationship between the victim and the appellee.[212] The jury heard the appellee helped the victim with his grades and behavior.[213] The jury also heard the appellee felt bad for the victim during the victim's family troubles.[214]

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[208] RR VII—32.

[209] RR IV—120, 122, 126, 166-68, 189 (witnesses testifying to the jury in guilt-innocence that the appellee work at a law firm).

[210] RR IV—163.

[211] *See* Tex. Pen. Code § 22.011(e)(A) (an affirmative defense to the offense of sexual assault of a child is the defendant was not more than three years older than the victim at the time of the offense).

[212] RR IV—116-20, 190-91.

[213] RR IV—172-73.

[214] RR IV—157-58.

The rest of the appellee's proposed testimony would have opened the door to twenty-one extraneous offenses.[215] These extraneous acts included buying the victim a sex toy, touching the victim's penis while driving in a car, causing the victim to perform oral sex on the appellee, and many other extraneous acts.[216]

Notably, the jury already heard that the appellee denied any wrong doing.[217] The jury even heard that the appellee sought for the victim's father to write an affidavit swearing that he had not observed the appellee engage in any sexual conduct with the victim.[218] Finally, the jury also received two affidavits, one from the victim and the other from the victim's father, which swore that no sexual conduct had occurred.[219]

At the conclusion of the new-trial hearing, after hearing the appellee explain what he would have testified to at trial if given the chance, the trial court found that if the appellee had testified at trial it would not have changed the jury's verdict or

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[215] RR VII—59.

[216] CR—129-33.

[217] RR IV—85-86.

[218] RR IV—122-23.

[219] State's Exhibit 5, 12.

"give[n] the jury a different understanding of what happened."[220] And the trial court said trial counsel did not cause "any harm" to the appellee.[221] The trial court even stated that a new trial might be harmful to the appellee.[222] The trial court explained that the appellee's testimony would have opened the door to twenty-one extraneous bad acts, which included grooming.[223]

At both hearings, the trial court continued to repeat her finding that the appellee's trial counsel was not ineffective:

- "I don't want to make a finding that [trial counsel was] ineffective. In fact, under the *Stricklin* [sic] standard and *Mullins*, basically, they were above, you know -- above board with their effectiveness."[224]
- "I find absolutely no ineffective assistance of counsel."[225]
- "I did make findings just now on the record that I did not find [trial counsel] to be ineffective."[226]

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[220] RR VII—59.

[221] RR VIII—9.

[222] RR VII—59.

[223] RR VII—59.

[224] RR VIII—8.

[225] RR VII—59.

[226] RR VII—63.

It should also be noted that at the close of the guilt-phase of trial, the trial court charged the jury that it should not consider the appellee's failure to testify as evidence against him:

> Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a right accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against him.[227]

Therefore, the record clearly supports the trial court's finding of no prejudice, even under *de novo* review, because: (1) the appellee's testimony would not have changed the outcome of the trial, and (2) his failure to testify in no way harmed him.[228]

B. The record supports the trial court's finding that trial counsel was effective, even though he chose not to call witnesses to testify on the appellee's behalf in the guilt-innocence phase of trial.

The appellee claimed that his trial attorney was ineffective by failing to call witnesses in his defense but the trial court properly rejected this claim because he

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[227] CR—211.

[228] *See Johnson*, 169 S.W.3d at 240 (no prejudice because the defendant's testimony would not have changed the outcome).

failed to prove it.[229] "A claim of ineffective assistance based on trial counsel's failure to call a witness cannot succeed absent a showing that the witness was available to testify and that the witness's testimony would have benefitted the defense."[230]

1. The appellee did not prove that his trial counsel performed deficiently.

Here, during the new-trial hearing, the appellee testified that he spoke with his attorney about "witnesses" that he had available to present testimony in his defense.[231] But at the new-trial hearing, the appellee failed to name these witnesses.[232] Moreover, the appellee did not explain what their testimonies would have entailed or how they would have benefited his defense.[233] In fact, the appellee agreed that he was the only person who could present evidence of his innocence.[234]

The appellee stated:

DEFENSE: Did you have any witnesses testify on your behalf?

APPELLEE: Not during that phase, no.

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[229] CR—230.

[230] *See Stokes v. State*, 298 S.W.3d 428, 431 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd)

[231] RR VII—27.

[232] RR VII—25-50.

[233] RR VII—25-50.

[234] RR VII—29.

DEFENSE: Correct. So there was zero evidence in front of the jury to say that you were innocent?

APPELLEE: Correct.

DEFENSE: Okay. ***Who is the only person that could do that?*** (emphasis added).

APPELLEE: Me.[235]

During the new-trial hearing, the appellee's trial counsel also testified.[236] But neither party asked the appellee's trial counsel a single question about whether any witnesses were available to testify on the appellee's behalf.[237] The parties also never questioned the appellee's trial counsel about what the available witnesses would have testified to or how their testimonies would have aided the appellee.[238]

During the new-trial hearing, the appellee's mother also testified.[239] She testified that the appellee wanted to present "witnesses" at trial, but the only witness she named who was available to testify was Therrion.[240] She testified that Therrion

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[235] RR VII—29.

[236] RR VII—5.

[237] RR VII—5-18.

[238] RR VII—5-18.

[239] RR VII—19.

[240] RR VII—21-22.

was available to testify, but did not say whether the other witnesses were available.[241] Additionally, she never explained what the testimonies of the "witnesses" or Therrion would have entailed.[242] Notably, Therrion testified for the appellee during the punishment phase of trial.[243] But it remains unknown what testimony Therrion would have provided if Therrion had testified at the guilt-phase.

The appellee attached affidavits to his motion for new trial.[244] However, even though the trial court took "judicial notice" of the court's file during the new-trial hearing when discussing one of the affidavits, this Court cannot consider the affidavits attached to the appellee's motion for new trial because the appellee never admitted them into evidence at the new-trial hearing.[245]

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[241] RR VII—21-22.

[242] RR VII—19-25.

[243] RR VI—23.

[244] RR VII—11; The State requested for the clerk to include these affidavits in the appellate record immediately after filing its notice of appeal. See CR—228. However, at the time of filing this brief, the affidavits are not in the appellate record. Therefore, the State has submitted a supplemental request for the Clerk's Record be supplemented with the appellee's affidavits.

[245] *See Jackson v. State*, 139 S.W.3d 7, 20 (Tex. App.—Fort Worth 2004, pet. ref'd) (stating, "an affidavit attached to the appellant's motion for new trial concerning juror misconduct did not constitute evidence, even though the trial court had taken judicial notice of all papers on file, because the affidavit was not introduced as evidence at the hearing on the motion for new trial.").

Therefore, the appellee's claim of ineffective assistance on the basis of his trial counsel failing to call witnesses fails because he only showed that Therrion was available to testify, but did not demonstrate how this person's testimony would have benefited him. Thus, the trial court properly found that his trial counsel's performance did not fall below the standard for reasonableness under *Strickland*, even though counsel chose not to call witnesses on the appellee's behalf.[246]

Again, this Court has made it clear that "A claim of ineffective assistance based on trial counsel's failure to call a witness cannot succeed absent a showing that the witness was available to testify and that the witness's testimony would have benefitted the defense."[247] Since the record does not show what the witnesses would have testified to, there certainly has not been showing that their testimonies would have benefited the appellee.

2. The appellee did not prove that his trial counsel's performance caused him any prejudice.

By the appellee's own admission, he believed that he was the only person who could have presented evidence of his innocence.[248] So even though the trial court did not know what Therrion's testimony would have entailed if Therrion had

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[246] RR VII—58.

[247] *See Stokes*, 298 S.W.3d at 431.

[248] RR VII—29.

testified at the guilt-phase, the trial court knew that Therrion's testimony did not involve evidence of the appellee's innocence. There was no evidence presented by the appellee that Therrion's testimony could have changed the jury's verdict. Thus, the record supports the trial court's finding that there was "…absolutely no ineffective assistance of counsel."[249]

Accordingly, once the trial court saw that the appellee could not prove any of his desired grounds, the trial court, possibly motivated by sympathy, abused its discretion and granted a new trial on an invalid legal basis, namely that trial counsel erred but did not commit ineffective assistance of counsel.[250] This Court can reverse the trial court's new-trial grant on this point of error alone.[251]

[249] RR VII—59.

[250] *See Thomas*, 428 S.W.3d at 105.

[251] *See id.*

CONCLUSION AND PRAYER

The State respectfully submits that the trial court erred when it ordered a new trial. Accordingly, the State prays that this Court will vacate the trial court's ruling and reinstate appellant's conviction and sentence.

Respectfully submitted,

SEAN TEARE
District Attorney
Harris County, Texas

/s/ Victoriano Flores, III
VICTORIANO FLORES, III
Assistant District Attorney
Harris County, Texas
State Bar Number: 24108606
1201 Franklin Street, Suite 600
Houston, Texas 77002
Tel. (713) 274-5826
Fax: (832) 927-0180
flores_victoriano@dao.hctx.net

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned counsel certifies that there are 11,424 words in the foregoing computer-generated document, based upon the representation provided by Microsoft Word, the word processing program that was used to create the document.

/s/ Victoriano Flores, III
VICTORIANO FLORES, III
Assistant District Attorney
Harris County, Texas
State Bar Number: 24108606
1201 Franklin Street, Suite 600
Houston, Texas 77002
Tel. (713) 274-5826
Fax: (832) 927-0180
flores_victoriano@dao.hctx.net

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Emails:

dick@deguerin.com

m3degeurin@fddlaw.net

Neal@NealDavisLaw.com

/s/ Victoriano Flores, III
VICTORIANO FLORES, III
Assistant District Attorney
Harris County, Texas
State Bar Number: 24108606
1201 Franklin Street, Suite 600
Houston, Texas 77002
Tel. (713) 274-5826
Fax: (832) 927-0180
flores_victoriano@dao.hctx.net

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Dick DeGuerin		dick@deguerin.com	2/4/2025 9:24:26 PM	SENT
Neal Davis		Neal@NealDavisLaw.com	2/4/2025 9:24:26 PM	SENT
Victoriano Flores		flores_victoriano@dao.hctx.net	2/4/2025 9:24:26 PM	SENT
Michael DeGeurin		m3degeurin@fddlaw.net	2/4/2025 9:24:26 PM	ERROR