No. 01-24-00241-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

ROBERT CHENIER
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1715091
From the 185th District Court of Harris County, Texas
Hon. Andrea Beall, Judge Presiding

BRIEF FOR THE APPELLANT

Oral Argument Requested

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STATEMENT OF THE CASE

On September 7, 2021, Robert Chenier (Appellant) was charged by indictment with murder, a first degree felony. (C.R. 32).[1] Appellant pled not guilty and proceeded with a trial by jury. A jury found Appellant guilty and sentenced him to forty years in the Texas Department of Criminal Justice – Correctional Institutions Division. (C.R. 404-06). The trial court certified Appellant's right of appeal and he timely filed notice of appeal. (C.R. 403, 412).

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

ISSUES PRESENTED

Issue I: The trial court violated Texas Code of Criminal Procedure Article 38.05 by telling the venire panel that if someone is shot in the chest or thigh, the shooter clearly intended to cause death or serious bodily injury and committed an act clearly dangerous to human life. The comments were improper and material, and harmed Appellant.

Issue II: The trial court's limitation of defense counsel's cross-examination of the complainant's father violated Appellant's right to confront witnesses and was not harmless beyond a reasonable doubt.

[1] The Clerk's Record will be cited as "C.R." and the Reporter's Record will be cited as "R.R." preceded by the volume number.

STATEMENT OF FACTS

The complainant's body was found in a field. (3R.R. 23-25, 57-58). He had been shot in the head and neck. (4R.R. 103; 7R.R. St. Ex. 52). The night prior, Elbert Thomas, who lived nearby, was sleeping when bullets came flying through his house. (3R.R. 43-44, 50-51). He grabbed his gun, went downstairs, went outside and crept into a nearby yard. (3R.R. 52-53). He claimed he heard two men walking by and arguing—one of the voices belonged to Robert Chenier, the Appellant. (3R.R. 53-54). He heard one or two more shots and claimed to have seen the complainant staggering back. (3R.R. 55). He did not call the police. Appellant's mother, Toni Chenier, and cousin, Shantel Chenier, testified Appellant came to them after the shooting and told them he did it. (4R.R. 58-62, 132-147).

Pretty cut and dried, right? But plot twist: Shantel Chenier felt she was testifying against Appellant under duress. (4R.R. 75-76). She was threatened by someone to force her to come testify about Appellant's alleged "confession." "They said that if I don't testify, they going to come shoot my house up." (4R.R. 70-71). It was an anonymous call. (4R.R. 71). She received these threats after she spoke to police, and the threats influenced "whether or not" she was "telling the truth" in her testimony. (4R.R. 72). She was aware of other possible suspects. (4R.R. 74). She stated, "Well, the neighborhood we live in, you hear all different kinds of stories so you don't know which one is true and what's not true." (4R.R. 75). When asked if people in her neighborhood "take credit for stuff that they didn't do," she responded, "Of course, because they want

to prove something." (4R.R. 75). When an officer came to speak with Toni Chenier after the shooting, she was terrified and looking over her shoulder. (4R.R. 97).

SUMMARY OF THE ARGUMENT

Judge Andrea Beall, who presided over Appellant's trial, made improper comments during voir dire in violation of Article 38.05 of the Texas Code of Criminal Procedure. In attempting to explain the mens rea and "clearly dangerous to human life" elements of the two theories of murder charged in the indictment through an overly specific hypothetical, she told the jury venire that if someone is shot in the chest then it is obviously intentional. She also stated that if someone is shot in an important part of the body like the thigh that the shooter clearly intended to cause serious bodily injury and only an act clearly dangerous to human life would be associated with that type of gunshot injury. These comments were a massive overstep and lowered the State's burden to prove the crime charged by committing the jury to a particular finding depending on the location of a gunshot wound. This was also a comment on the weight of the evidence. Judge Beall made these statements despite being aware that this was a shooting case. This harmed Appellant because the complainant was shot in the head and neck, making the facts of the case materially similar to the fact pattern provided by the court in her hypothetical.

The trial court also abused its discretion by limiting defense counsel's cross-examination of the father of the complainant, violating Appellant's right to confront

the witnesses against him. The complainant's father testified his son was "mannerable" and respectful, which opened the door to an inquiry into specific instances of conduct to correct any false impression this statement created. Defense counsel requested to be allowed to ask the father if he was aware his son had been arrested for assault involving family violence, but the court disallowed this, reasoning that the witness did not have enough personal knowledge of the facts underlying the arrest and the knowledge he did have was through hearsay. However, this decision was made on an incorrect standard and counsel was entitled to make the inquiry; therefore, the court's decision not to allow the inquiry was an abuse of discretion. It violated Appellant's confrontation right by preventing all meaningful cross-examination of this witness. This error cannot be found to have been harmless beyond a reasonable doubt.

ARGUMENT

Issue I: The trial court violated Texas Code of Criminal Procedure Article 38.05 by telling the venire panel that if someone is shot in the chest or thigh, the shooter clearly intended to cause death or serious bodily injury and committed an act clearly dangerous to human life. The comments were improper and material, and harmed Appellant.

The indictment charged Appellant with murder, alleging alternate theories. It alleged that Appellant, Robert Chenier,

> on or about November 23, 2020, did then and there unlawfully, intentionally and knowingly cause the death of [the complainant] by shooting Complainant with a deadly weapon, namely a firearm.
>
> It is further presented that . . . [Appellant] . . . did then and there unlawfully intend to cause serious bodily injury to . . . Complainant, and did cause

> the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely shooting Complainant with a deadly weapon, namely a firearm.

(C.R. 32); *see* TEX. PEN. CODE § 19.02(b)(1) & (2).

During the trial court's voir dire, Judge Beall made the following comments in an attempt to explain some components of the theories of murder charged in the indictment:

> I know you would never do this, Juror No. 6, but you take out the gun and you shoot it – **you shoot me square in the chest and that's pretty clear, like you meant for me to die, right**? **No one shoots somebody in the chest and goes, oopsie**, right? Like I shot you on purpose and it happened to go in your chest but I didn't mean for you to die with that chest shot, okay? That would be a first paragraph murder, okay? I intended for you to die, I pulled the trigger, I aimed it squarely at your chest, now you're dead: First paragraph murder.
>
> Second-paragraph murder is I unlawfully intended to cause serious bodily injury to someone, so I committed an act clearly dangerous to human life, and then that person died. So if Juror No. 6 is like, Well, I don't like her, and I'm going to shoot her in the thigh, **would everybody consider that an act clearly dangerous to human life, shooting someone in the thigh? Right? Okay. We all can agree that that would cause somebody, potentially, death, right, and they might bleed out, especially if they're not getting medical intervention, okay?**

(2R.R. 14-15) (emphases added).

The evidence in this case showed the complainant was shot in the neck/face and in the head. (4R.R. 103; 7R.R. St. Ex. 52).

A. Applicable Law and Standard of Review

"[T]he trial court shall maintain an attitude of impartiality throughout the trial." *Ex parte Scott*, 541 S.W.3d 104, 125 (Tex. Crim. App. 2017), quoting *Lagrone v. State*, 209 S.W. 411, 415 (Tex. Crim. App. 1919). "[I]t has been often held his views or impressions of the weight of the evidence or upon the issues in the case may be conveyed to the jury as effectively by other means as by charge of the court." *Anderson v. State*, 202 S.W. 944, 946 (Tex. Crim. App. 1918). As the Court of Criminal Appeals explained in *Lagrone*:

> To the jury the language and conduct of the trial court have a special and peculiar weight. The law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. Jurors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved. The delicacy of the situation in which he is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret.

Lagrone, 209 S.W. at 415 (internal citations omitted).

"Article 38.05 of the Texas Code of Criminal Procedure prohibits the trial judge from commenting on the weight of the evidence in criminal proceedings or otherwise divulging to the jury [their] opinion of the case[.]" TEX. CODE CRIM. PROC. art. 38.05; *Proenza v. State*, 541 S.W.3d 786, 791 (Tex. Crim. App. 2017). Article 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Even if a trial judge's intention is not to advocate for the State or to undermine a defendant's rights, their comments can still be improper under 38.05. *Simon v. State*, 203 S.W.3d 581, 592 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("Without judging the trial court's intention in making these comments, we conclude they were improper.").

"In evaluating a claimed violation of article 38.05, we first determine whether the trial court's comments were, in fact, improper under the article." *Moore v. State*, 624 S.W.3d 676, 681 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd), citing *Simon*, 203 S.W.3d at 590. "If so, we must determine whether the comments were material." *Id.* "A comment is material if the jury was considering the same issue." *Id.* at 682, citing *Simon*, 203 S.W.3d at 592. If a court finds they were improper and material, it reviews for non-constitutional harm under TEX. R. APP. P. 44.2(b). *Id.*, citing *Proenza*, 541 S.W.3d at 801.

B. Analysis

i. This issue is not forfeitable and was not waived.

Trial counsel did not object to the trial court's comments. However, in *Proenza*, the Court of Criminal Appeals determined that "claims of improper judicial comments raised under Article 38.05 are not within *Marin's* third class for forfeitable rights. Rather, . . . the right to be tried in a proceeding devoid of improper judiciary commentary is at least a category-two, waiver-only right." *Proenza*, 541 S.W.3d at 801, referencing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (en banc) (explaining category-two rights as those "which must be implemented by the system unless expressly waived").

The record does not show this right was waived. As a result, this issue is properly before this Court.

ii. The trial court's comments were improper and material.

Again, Judge Beall informed the jury venire that if someone is shot squarely in the chest, that this objectively indicates the shooter intended to do so and intended for that person to die. (2R.R. 14-15). She also commented that if someone is shot in a location like the thigh that it is clear the shooter intended to cause serious bodily injury. *Id.* Though this was in the context of attempting to explain a legal concept, the statement very literally commented on the weight of the evidence and communicated the judge's opinion of the merits of a murder case with a like set of facts. This lowered the State's burden to prove murder.

"[T]he U.S. Supreme Court has explained, and [the Court of Criminal Appeals] has reiterated that '[the] principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Rogers v. State*, 664 S.W.3d 843, 489 (Tex. Crim. App. 2022), quoting *Kimble v. State*, 537 S.W.2d 254, 254-255 (Tex. Crim. App. 1976). "The presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

"Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right to the 'presumption of innocence,' *i.e.* the right to be free from criminal conviction unless the State can prove his guilt beyond a reasonable doubt by

probative evidence adduced at trial." *Miles v. State*, 204 S.W.3d 822, 825 (Tex. Crim. App. 2006), citing *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

The presumption of innocence is also guaranteed by Texas state law, as "the statute itself arises from a constitutional guarantee, that of a right of a fair and impartial trial." *Miles v. State*, 154 S.W.3d 679, 681 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 204 S.W.3d 822 (Tex. Crim. App. 2006), citing U.S. CONST. amend. XIV; TEX. CODE CRIM. PROC. art. 38.03; *Estelle*, 425 U.S. at 503; and *Oliver v. State*, 999 S.W.2d 596, 599 n. 3 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). "The presumption of innocence is a fundamental right, and 'its enforcement lies at the foundation of the administration of our criminal law.'" *Walker v. State*, 469 S.W.3d 204, 208 (Tex. App.—Tyler 2015, pet. ref'd), citing *Taylor*, 436 U.S. at 483 and *Ex parte Clark*, 545 S.W.2d 175, 177 (Tex. Crim. App. 1977).

While Judge Beall's comments were not directly concerned with the admission of evidence, her comments conveyed to the jury her opinion of the case: that Appellant's guilt depended on the location of a gunshot—specifically, that if somebody was shot by a gun in either a kill spot or any important part of the body—that the shooter certainly intended to cause death or serious bodily injury. (2R.R. 14-15). This violated Appellant's presumption of innocence. TEX. CODE CRIM. PROC. art. 38.05 (trial judge should not "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to the jury his opinion of the case."). It is possible for someone to recklessly or negligently (rather than intentionally or knowingly) shoot a

gun and hit someone in the chest or other important body part,[2] but Judge Beall's comments precluded a finding of not guilty on this basis. At best, her statements were an improper comment on the weight of the evidence because they included facts materially identical to the facts of this case and communicated her opinion of a certain type of case (which just so happened to be similar to this one). At worst, it was a misstatement of the law. If the location of a penetrating injury which resulted in a death necessarily showed intent or knowingness, then no shooting or stabbing cases where death resulted would ever qualify as manslaughter or negligent homicide. This is nonsensical.

Judge Beall opined very clearly that if someone is shot, for example, in the chest, it is definitely intentional: "No one shoots somebody in the chest and goes, oopsie, right? Like I shot you on purpose and it happened to go in your chest but I didn't mean for you to die with that chest shot, okay? That would be a first paragraph murder, okay?" (2R.R. 14-15). She then continued, after giving a hypothetical of shooting someone in the thigh, "would everybody consider that an act clearly dangerous to human life, shooting someone in the thigh? Right? Okay. We all can agree that that would cause somebody, potentially, death, right, and they might bleed out, especially if they're not getting medical intervention, ok?" *Id.* These comments acted as a command to the jury

[2] TEX. PEN. CODE §§ 6.03(c, d), 19.04(a), 19.05(a). The State may argue, then, that this comment was harmless because it was not a defense theory that this was a recklessness-oriented shooting, but this does not matter because the State still has the burden to prove all essential elements of murder regardless of the defensive theory.

venire that under a materially similar set of facts, it should convict Appellant. And though a comment can be improper even if unintentional, Judge Beall was aware that this case involved a shooting death because the State alleged the complainant was killed with a firearm in the indictment. (C.R. 32). A hypothetical involving, for example, poison, could have just as effectively assisted the jury in understanding the meanings of "intentionally or knowingly", "serious bodily injury", and "clearly dangerous to human life" without the risk of improperly commenting her opinion on cases involving penetrating injuries—more specifically, gunshot wounds.

When read without knowledge of the speaker, these comments look like they were made by a prosecutor. *See Tejeda v. State*, 905 S.W.2d 313, 317 (Tex. App.—San Antonio 1995, pet. ref'd) (recognizing it is improper for a trial judge to act as an advocate rather than referee). An entire body of caselaw is dedicated to issues in which the State presented a jury panel with overly specific hypotheticals to inculcate them on a particular set of facts. *E.g.*, *Atkins v. State*, 951 S.W.2d 787, 789-90 (Tex. Crim. App. 1997) (holding prosecutor improperly committed the jurors when it stated, "If the evidence, in a hypothetical case, showed that a person was arrested and they had a crack pipe in their pocket, and they had a residue amount in it, and it could be measured, and it could be seen, is there anyone who could not convict a person, based on that—[?]"). It is improper to use hypothetical scenarios with facts similar to the actual case in order to commit the jury. *Id.*

"[T]he rationale for the rule which prohibits counsel from asking a question based on a hypothetical case or from bringing out the juror's views on the particular case to be tried is to avoid allowing counsel to commit the juror to a particular finding in advance of hearing the testimony or because the answer would not tend to show the juror's bias or prejudice." *Shipley v. State*, 790 S.W.2d 604, 608 (Tex. Crim. App. 1990) (en banc), citing 23 TEX. JUR.3d "Criminal Law" Sec. 2668 (1982) & TEX. JUR.3d Sec. 74 (1986). This logic should inform an analysis on an improper judicial comment where a trial judge gives a directive on a certain set of facts at voir dire. Judge Beall's comments here were styled as commitment comments—for example: "[W]ould everybody consider that an act clearly dangerous to human life, shooting someone in the thigh? Right? Okay. We all can agree that that would cause somebody, potentially, death, right, and they might bleed out, especially if they're not getting medical intervention, okay?" (2R.R. 14-15). *See Moore*, 624 S.W.3d at 681 (finding judicial comments improper, "particularly the comments in which the trial judge argues hypothetical scenarios on the complainant's behalf").

Judge Beall's statements were material because they pertained to the essential elements of the crime charged. They directly undermined the presumption of innocence, which is foundational to any criminal trial. *Simon*, 203 S.W.3d at 592 ("A matter is material if the jury had the same issue before it."). Her statements were exactly the type of improper comment within the purview of 38.05. *Moore*, 624 S.W.3d at 682

(holding trial court's comments improper because they showed the court "abdicat[ed] its assigned role as an impartial arbiter"), citing *Proenza*, 541 S.W.3d at 802.

C. Harm

"To constitute harm under article 38.05, the trial court's improper comments must be reasonably calculated to benefit the State or prejudice the defendant's rights." *Moore*, 624 S.W.3d at 682. This error is reviewed under TEX. R. APP. P. 44.2(b). *Proenza*, 541 S.W.3d at 801. "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (citation omitted). "The focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict." *Hankston v. State*, 656 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd), citing *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011).

"A conviction must be reversed if this court has 'grave doubt' that the result of the trial was free from the substantial effect of the error." *Id.* "'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced he feels himself in virtual equipoise as to the harmlessness of the error." *Id.*, quoting *Barshaw*, 342 S.W.3d at 94. When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001).

Judge Beall's erroneous comments were made toward the beginning of voir dire. (4R.R. 9-10). Though the comments were purported to explain a legal concept, Judge Beall did not make these comments with the "manifest intent to benefit the defendant and to protect [Appellant's] rights[.]" *Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013). Her opinion prejudged the Appellant as guilty under a certain set of facts immediately prior to the State presenting evidence that showed a story materially like Judge Beall's hypothetical. These comments "impart[ed] information to the venire panel that…tainted appellant's presumption of innocence[.]" *Soto v. State*, No. 05-01-00589-CR, 2003 Tex. App. LEXIS 2476 at *12 (Tex. App.—Dallas March 25, 2003, no pet.) (mem. op., not designated for publication). They did not helpfully explain a legal concept; rather, they qualified it.

The State may argue there was no harm because two witnesses testified that Appellant confessed to them that he killed the complainant. (4R.R. 58-62, 132-147). However, one of the two purported "confession" witnesses—Shantell Chenier, Appellant's cousin—testified that she was threatened to come to court to testify against Appellant and that she felt she was testifying under duress. (4R.R. 70-71, 75-76). Toni Chenier, Appellant's mother, testified she heard about a threat. (4R.R. 151). This threw major doubt on the veracity of the two purported "confession" testimonies, and the jury was unconvinced by them alone; the record shows the jury struggled to put together the puzzle pieces of this case when they sent two jury notes requesting readbacks of testimony unrelated to the "confession" witnesses. (C.R. 382-83, 385). One piece of

evidence that interested the jury was witness Elbert Thomas's testimony that supposedly placed Appellant outdoors near the scene around the time of the shooting. *Id.*; (3R.R. 54). The other piece was a jail phone call (whose participants did not testify as witnesses) heard by an investigating officer that was ostensibly consistent with other information inculpating Appellant. (4R.R. 96-97).

The State might also argue that the context of the comments renders them harmless because Judge Beall several times insisted that defendants are presumed innocent and the default verdict is "not guilty." *E.g.*, (C.R. 16-17, 20-21). However, no matter how many times or how vehemently it was communicated that Appellant was entitled this presumption, the presumption was improperly qualified. Judge Beall's statements communicated Appellant was presumed not guilty *unless* the complainant was shot in the chest or another important part of the body, despite that there are many conceivable scenarios in which this may happen and the accused is still not guilty of murder. Judge Beall precluded the jury from finding this.

Even if the jury believed Appellant shot the gun that killed the complainant, the essential elements of "intentionally or knowingly", serious bodily injury, and "clearly dangerous to human life" were, of course, central issues at his trial. Judge Beall's comments left the jury with the impression that if Appellant shot the complainant in a kill-spot (like the chest or, in Appellant's case, the head) that he is guilty of murder. However, it is entirely possible that someone can shoot a gun recklessly or negligently, hit someone in the chest or head, and not be guilty of murder. The jury was all but

instructed that it should convict Appellant if the facts regarding the weapon used and where the bullet landed were similar enough to the hypothetical Judge Beall gave, which in this case, they were.

The trial court's comments during voir dire caused a substantial and injurious effect on the verdict in the guilt phase of trial. This case should therefore be reversed and remanded for a new trial.

Issue II: The trial court's limitation of defense counsel's cross-examination of the complainant's father violated Appellant's right to confront witnesses and was not harmless beyond a reasonable doubt.

During the State's case in chief, the complainant's father, Johnny Lewis, testified that "quite a few people" told him about "how mannerable [the complainant] was, how respectful he was." (4R.R. 185-87). Other than this portion of the testimony, he was only questioned by the State regarding whether he could identify the body. *Id.* at 188-90.

The complainant, Shaun Lewis, was arrested at least three times for assault on a family member. (C.R. 155). One of these charges resulted in a conviction. *Id.* One charge was an aggravated assault. *Id.* The most recent assault charge was dismissed on February 4, 2021. *Id.* The date of that dismissal was after the complainant's death. (4R.R. 191).

After Mr. Lewis testified about his son being described as "respectful" and "mannerable", defense counsel approached and requested the opportunity to cross-

examine him on a specific instance of prior conduct because Mr. Lewis's statements opened the door. (4R.R. 190-91). The trial court understood the defense's position to be that the statements left a "false impression . . . with the jury about [the complainant's] character." *Id.* at 192. The court allowed a hearing outside the presence of the jury; defense counsel asked him about the complainant's assault case from 2019 against his daughter, and Mr. Lewis testified he was unaware of it. *Id.* at 193. However, he "recall[ed] a disagreement that they had." *Id.* at 194. On redirect examination by the State, Mr. Lewis stated he did not know what his son had been charged with but he "might have spent a day or two in jail." *Id.* at 195.

The State argued in opposition to allowing defense counsel to question Mr. Lewis on this subject before the jury, stating the following:

> So, Judge, I'm going to object to relevance; it's improper character evidence. This witness has absolutely no personal knowledge of this incident, he's shown that he was not a witness, he did not observe the incident. Everything that he has learned about the incident is hearsay. Also his testimony today talks nothing about it being a violent offense and, therefore, I don't believe it would be proper character evidence to allow this witness to testify . . . regarding this incident.

(4R.R. 197-98). Defense counsel responded, "I feel like they did open the door in asking about Mr. Lewis'[s] character to a degree, at least he answered the question that kind of spoke of his character about how mannerable he was. This is not too prejudicial. This is just—". *Id.* at 198. The court cut him off and asked if counsel could respond to the "speculation or hearsay" arguments. *Id.* The court sustained the State's objection,

apparently on the logic that any information Mr. Lewis had on this incident was hearsay. *Id.* at 198-99.

A. Applicable Law and Standard of Review

A criminal defendant has the right to confront the witnesses against him. U.S. CONST. amend. VI; TEX. CONST. art. 1, § 10. This right is given life by the process of cross-examination at trial: "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Johnson v. State*, 433 S.W.3d 546, 551 (Tex. Crim. App. 2014). A defendant has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule. *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001). The Court of Criminal Appeals "has often stated and discussed the fact that one of the greatest Constitutional rights that an accused person might have is the right to confront and cross-examine the State's witnesses…" *Virts v. State*, 739 S.W.2d 25, 29 (Tex. Crim. App. 1987). "Cross-examination is the cornerstone of the criminal trial process and, as such, a defendant must be given wide latitude to explore a witness' story, to test the witness' perception and memory and to impeach his or her credibility." *Guttierrez v. State*, 764 S.W.2d 796, 799 (Tex. Crim. App. 1989).

When a witness testifies as to character, "inquiry may be made into relevant specific instances of the person's conduct" on cross-examination. TEX. R. EVID. 405(a). This is so that the witness's familiarity with the person about whom they are testifying

may be tested. *Wilson v. State*, 71 S.W.3d 346, 350-51 (Tex. Crim. App. 2002) (holding that when a witness testified as to character of defendant, "the State was entitled to test his knowledge about specific instances of conduct . . . by asking a series of 'did you know' questions") (emphasis added). 405 does not require proof "to the jury that the act[] actually occurred[.]" *Id.* Under Rule 405, "[t]his right of cross-examination has two limitations: (1) the prior instances must be relevant to a character trait at issue; and (2) the prior instances must have a basis in fact." *Moore v. State*, 143 S.W.3d 305, 314 (Tex. App.—Waco 2004, pet. ref'd), citing *Wilson*, 71 S.W.3d at 350.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. "Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case." *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990) (en banc). "Accordingly, courts must examine the purpose for which the evidence is offered and whether there is a direct or logical connection between the evidence and the proposition sought to be proven." *Garza v. State*, 18 S.W.3d 813, 822 (Tex. App.—Fort Worth 2000, pet. ref'd).

A trial court may impose "reasonable limits" on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Johnson*, 433 S.W.3d at 555, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). This

discretion is overstepped "when the trial court exercises" it in a way that leaves counsel "unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Johnson*, 433 S.W.3d at 555, quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (internal quotation marks omitted, alteration in original).

This Court reviews a trial court's decision to limit cross-examination for abuse of discretion. *Sansom v. State*, 292 S.W.3d 112, 118 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). A trial court does not abuse its discretion unless the ruling falls outside the "zone of reasonable disagreement." *Montgomery*, 810 S.W.2d. A trial court abuses its discretion when it acts "without reference to any guiding rules and principles" or acts arbitrarily or unreasonably. *Id.* at 380.

B. Analysis

i. The testimony sought was relevant.

Here, inquiry into a specific instance of the complainant's bad act was relevant to dispel the false impression that the complainant was "respectful." The State asked the complainant's father what the complainant was like, and Mr. Lewis replied that his son had the reputation of being respectful and "mannerable." (4R.R. 187). This is at odds with the complainant's arrest history to which defense counsel was attempting to refer (and which was provided by the State prior to trial). (C.R. 155). Assaulting one's daughter is not "respectful" or well-mannered behavior. Mr. Lewis claimed on voir dire he was unaware his son had been arrested for assault and that he had the

misunderstanding that it pertained just to a disagreement between the complainant and his daughter. (4R.R. 193-94). He then changed course and said his son "might have spent a day or two in jail." (4R.R. 195). Being cross-examined in front of the jury would have given a fuller picture of Mr. Lewis's testimony regarding the behavior of his son.

Relevance is not a high hurdle. *Aguayo v. State*, No. 13-14-00650-CR, 2016 WL 6804455 at *4 (Tex. App.—Corpus Christi-Edinburg, Nov. 17, 2016, pet. ref'd) (mem. op., not designated for publication), citing TEX. R. EVID. 401 & *Hodge v. State*, 506 S.W.2d 870, 873 (Tex. Crim. App. 1973). If the State elicits good character evidence, then rebutting it is necessary to clear up any misconception the jury may have developed. *See Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002) (en banc) (explaining the door is opened to an prior bad act if it would "tend to correct the false impression left by the witness' direct examination testimony"). The assault arrest was relevant to rebutting Mr. Lewis's testimony that his son was known as a respectful and "mannerable" person because it is obviously not respectful to physically harm anyone, especially one's own child.

ii. The inquiry had basis in fact.

To inquire about the prior instance under 405, the question need only have basis in fact. Here, the State provided notice that the complainant had been arrested for assault – family violence, (C.R. 155); Mr. Lewis admitted he heard of a disagreement between the complainant and his daughter and that he spent a day or two in jail. (4R.R. 194-95). Together, this shows a factual basis for this line of questioning.

iii. The limitation rendered counsel wholly unable to meaningfully cross-examine the complainant's father.

Mr. Lewis's testimony was almost entirely about his relationship and situation with his son, the complainant, and his granddaughter (the complainant's daughter); this included his statement about his son being seen as "respectful" and "mannerable." (4R.R. 186-190). His testimony about the actual facts of the case was scant—he only stated he went to the scene and was prevented from attempting to identify his son's body. (4R.R. 190).

The thrust of defense counsel's cross-examination was to rebut the character statement elicited by the State. (4R.R. 190-91). He immediately requested to address only one criminal charge of the complainant to rebut this false impression. *Id.* The court allowed a hearing outside the jury's presence. (4R.R. 192-98). After the court sustained the State's objection, defense counsel was only able to ask the witness some questions regarding his knowledge of and relationship with the witness Elbert Thomas, but his attempted point was also thwarted by the court. (4R.R. 199-205). Because defense counsel's attempted cross-examination regarding the complainant's charge would have given the jury a "significantly different impression of [the witness's] credibility" and potential bias, the court's ruling that defense counsel be disallowed from making the inquiry regarding the assault violated Appellant's right under the confrontation clause. *Johnson*, 433 S.W.3d at 555, quoting *Van Arsdall*, 475 U.S. at 680 (internal quotation marks omitted, alteration in original); *see also Carroll v. State*, 916 S.W.2d 494, 500 (Tex.

Crim. App. 1996) (recognizing a jury is "entitled to the 'whole picture' in order to evaluate and judge the witness' credibility"), summarizing *Harris v. State*, 642 S.W.2d 471, 479 (Tex. Crim. App. 1982) (en banc).

In sum, given that the prior instance of conduct referred to by defense counsel was relevant to address the false impression given by Mr. Lewis's testimony and that it had a basis in fact, defense counsel was entitled to question the witness on it before the jury. *Wilson*, 71 S.W.3d at 350-51. The trial court sustained the State's objection not because the State did not open the door, but because the witness's limited knowledge of the incident was obtained through hearsay statements and was speculative. (4R.R. 198-99). This is not the law, and therefore the ruling was outside the trial court's discretion. Further, because the attempted inquiry into the witness's knowledge of his son's violent past was the thrust of the cross-examination, this limitation violated Appellant's confrontation right.

In *Sansom*, the Court of Appeals held it was an abuse of discretion for the trial court to have prevented defense counsel from asking the mother of the complainant about her citizenship status because it was relevant to the "thrust" of the defense theory. *See Sansom*, 292 S.W.3d at 119-121. Here, the defense contested the State's ability to prove Appellant as the person who killed the complainant; dispelling the false notion that the complainant was well-mannered and respectful was important to leaving open the possibility that the complainant may have made other enemies.

The court abused its discretion in limiting defense counsel's cross-examination of Mr. Lewis on his knowledge of the complainant's prior assault arrest. This was an unconstitutional limitation on Appellant's right to confront the witnesses against him. U.S. CONST. amend. VI; TEX. CONST. art. 1, § 10.

C. Harm

"Constitutional error is harmful unless a reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing TEX. R. APP. P. 44.2(a). "While the rule does not expressly place a burden on any party, the 'default' is to reverse unless harmlessness is shown." *Merritt v. State*, 982 S.W.2d 634, 636 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). "The State has the burden, as the beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard*, 612 S.W.3d at 328, citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall v. State*, 184 S.W.3d 730, 746 n.53 (Tex. Crim. App. 2006).

This Court cannot determine beyond a reasonable doubt that this limitation on cross-examination was harmless. The purported confession witnesses' testimonies were placed in doubt by Shantel Chenier's admission she was coerced into testifying against Appellant, (4R.R. 70-76), and the only other evidence connecting Appellant to the actual shooting was evidence that simply placed him at the scene and the hearsay contents of a jail phone call between two people who did not even testify. (3R.R. 54; 4R.R. 96-97). The complainant's father's claim that his son is well-mannered and

respectful could have weighed heavily against the defense's theory that someone else shot the complainant.

PRAYER

Appellant, Robert Chenier, prays that this Court reverse the lower court's judgment and remand this case for a new trial. Mr. Chenier also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served to the Harris County District Attorney's Office on September 16, 2024.

/s/ Sophie Bossart
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CERTIFICATE OF COMPLIANCE

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