NO. 14-24-00559-CR

IN THE COURT OF APPEALS

FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

CHASITY TIMS

APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

ON APPEAL CAUSE NO 92871-CR

FROM THE 239TH JUDICIAL DISTRICT COURT

BRAZORIA COUNTY, TEXAS

HONORABLE GREG HILL, JUDGE PRESIDING

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

POINT OF ERROR ONE

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT'S REQUEST FOR A MISTRIAL WHEN WITNESSES PROVIDED EVIDENCE OF 404(b).

The evidence of Appellant's incarceration elicited through the witness's testimony was highly inflammatory. The testimony was not only irrelevant but was also prejudicial and prevented Appellant from receiving a fair trial. The trial court erred when it failed to grant a mistrial in this case.

STATEMENT OF THE CASE

This is a direct appeal from a conviction for two counts of Aggravated Sexual Assault. Appellant was charged by an indictment in count one for Aggravated Sexual Assault TEX. PEN. CODE Sec. 22.021 (a)(1)(B)(i) and Aggravated Sexual Assault in count two under the TEX. PEN. CODE Sec. 22.021 (a)(1)(B)(iii). on June 2, 2021. The State alleged the two offenses constituted a criminal episode. (C.R. at 9). The State provided notice on June 14, 2024, of an intent to enhance punishment with two prior felonies committed by Appellant with the second offense being committed subsequent to the first becoming final. Appellant entered a plea of not guilty on July 1, 2024. (II R.R. at 5). The jury returned a verdict of guilty on July 3, 2024. (IV R.R. at 56).

Aggravated Sexual Assault, under TEX. PEN. CODE Sec. 22.021 (a)(1)(B)(i) & (iii) is a 1st degree felony offense with a range of punishment of not more than 99 years or life or less than 5 years within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00. TEX. PEN. CODE Sec. 22.021 (e). The State further alleged Appellant was convicted of two prior felonies with the second offense being committed subsequent to the first becoming final. The range of punishment increasing to that of a 1st degree felony offense with a range of punishment of not more than 99 years or life and not less than 25 years

within the Texas Department of Criminal Justice – Institutional Division. TEX. PEN. CODE Sec. 12.42 (d).

Following evidence and arguments on the issue of punishment, the jury, having found Appellant had previously been found guilty of the felonies as alleged in the indictment, accessed punishment at 60 years for each count in the Texas Department of Criminal Justice-Institutional Division. (C.R. at 136 & 137).

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BRIEF FOR APPELLANT

TO THE COURT OF APPEALS:

COMES NOW, Chasity Tims, appellant herein, and files this, her brief in this cause. This is an appeal from the 239th Judicial District Court, Brazoria County, Texas.

STATEMENT OF THE FACTS

The State indicted Appellant on June 2, 2021. (C.R. at 9). The State Alleged in counts one Appellant committed an offense under the TEX. PEN. CODE Sec. 22.021 (1)(B)(ii), Aggravated Sexual Assault and in count two Appellant committed an offense under the TEX. PEN. CODE Sec. 22.021 (1)(B)(iii). (C.R. at 9). Appellant counsel will refer to the child by initials only per TEX. R. APP. PROC. 9.10(a)(3). Count one alleged Appellant did then and there intentionally or knowingly cause the sexual organ of J.T., a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the sexual organ of the defendant. Count two alleged Appellant did then and there intentionally or knowingly cause the sexual organ of J. T., a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the mouth of the defendant. The indictment alleged the two offenses constituted a "criminal episode" as that term is defined in Section 3.01 of the Texas Penal Code. The indictment further alleged an enhancement of the allegations with two prior felonies, each being committed before the commission of the primary offense and second enhancement being committed after the conviction of the first noted enhancement. (C.R. at 9). To the indictment, Appellant pleaded not guilty on July 1, 2024. (II R.R. at 5).

The State presented testimony from General Mcgarity, Maggie McDougal, J. T., Christopher Tolmachoff, and Jarrad Norris.

Prior to the trial before the jury the trial court conducted a hearing outside the presence of the jury with regard to the testimony of the outcry made by J.T. (III R.R. at 6). The State presented General Mcgarity, J.T., and Maggie McDougal.

General Mcgarity testified Outside the presence of the jury to the "outcry" of the complaining witness J.T. (III R.R. at 7). Mr. Mcgarity testified he fathered a child, J.T., with Appellant. (III R.R. at 7). Mr. Mcgarity testified in 2020 when J.T. was 13 he learned from J.T. that he and his mother, Appellant, were having sexual contact. (III R.R. at 8). J.T. specifically stated Appellant and he were having sex. (III R.R. at 10). Mr. Mcgarity testified he had been living with his girlfriend for the past five years, (III R.R. at 14), in Bellville, Texas. (III R.R. at 9). His son, J.T., began living with the two of them two weeks into his 8th grade school year. (III R.R. at 8). Mr. Mcgarity learned J.T. was caught stealing a football at school and was accused of an inappropriate touching of a female student. (III R.R. at 11). Upon returning home from work, Mr. Mcgarity, after questioning his son about the incident, punished him. (III R.R. at 11). Prior to returning home to confront J.T. about the allegations made at school, he spoke with Appellant telling her of J.T. being caught touching girls and a teacher inappropriately. He then confronted her with what was going on with J.T.

and why she was letting him have sex with little girls. (III R.R. at 9). Her response made Mr. Mcgarity suspicious of something that was occurring when he lived with his mother. (III R.R. at 9). With these suspicions he questioned J.T. about his mother, falsely claiming he already knew the answer but wanted J.T. to tell him the truth. (III R.R. at 14). This is when J.T. told his father Appellant made him have sex with her. (III R.R. at 14). Mr. Mcgarity admitted J.T. never told him what sexual acts were committed and that he did not want to know. (III R.R. at 15).

J. T. testifying outside the presence of the jury in the "outcry hearing" stated the first person he informed of the sexual allegations against Appellant was to Mr. Mcgarity, his father. (III R.R. at 18). J.T. testified he did not give any details to his father. He simply responded to Mr. Mcgarity's question, "I know what happened" and J.T. responded "it's true." (III R.R. at 19). The first adult he gave details about the two incidents was Maggie McDougal. (III R.R. at 20). J.T. continued his testimony testifying he was responding to his father's question "Did your mom have sex with you?" He simply responded with a "yes." (III R.R. at 23). This questioning was in the morning while he was getting ready for school and after the whipping with a belt. (III R.R. at 24). J.T. testified the punishment was for touching the girls. (III R.R. at 26). J.T. denied touching a teacher and stealing a football but admitted to

touching other girls. (III R.R. at 24). J.T. never claimed he was sexually assaulted by his mother to his father. (III R.R. at 27).

Maggie McDougal, a forensic interviewer with Fort Bend County testified outside the presence of the jury in the "outcry hearing". (III R.R. at 29). Ms. McDougal interviewed J.T. on November 16, 2020, J.T. was 13 years of age at the time of the interview. (III R.R. at 29-30). During the interview J.T. described two incidents in two different residences in sufficient detail. The first incident involved both oral sex performed by Appellant on J.T. and sexual intercourse. (III R.R. at 31). The second involved oral sex performed by Appellant on J.T. (III R.R. at 32). Ms. McDougal could only testify that J.T. believed the incidents happened in 2020 with the first incident happening in the summer of 2020, but no further detail was provided. (III R.R. at 39).

Following the hearing the trial court determined the outcry statements would be allowed to be presented to the jury based on time, content, circumstances of the statements. (III R.R. at 41).

General Mcgarity testified before the jury that he does have a primary residence in Angleton, Texas, however, he lives with his girlfriend of fourteen years in Bellville, Texas. (III R.R. at 61). J.T. has been living with the two of them for the past four years. (III R.R. at 62). Mr. Mcgarity testified after J.T. was born he lived

with his grandmother until her death and then lived with various family members until moving in with his mother, Appellant. (III R.R. at 64). Mr. Mcgarity believes J.T. began living with his mother when he was eleven but is unsure. (III R.R. at 65). Without providing a time reference, Mr. Mcgarity testified he was contacted by J.T. Following this Mr. Mcgarity went to Danciger, Texas and picked up J.T. and his little brother. (III R.R. at 66). J.T. was thirteen at the time. (III R.R. at 75). Returning to Bellville, Texas he enrolled the children into school with J.T. attending Bellville Junior High School. (III R.R. at 67). While enrolled J.T. J.T. was in constant trouble being accused of touching the girls and a teacher inappropriately. (III R.R. at 68). While working Mr. Mcgarity received a phone call from Appellant, checking on the children. (III R.R. at 68). Mr. Mcgarity told her of the trouble J.T. was getting into and she explained he was sexually active with the girls while living with her. Mr. Mcgarity responded blaming her for the actions of J.T. and to this she stated something to the effect of "I shouldn't have put it on him like that". (III R.R. at 68). To this Mr. Mcgarity took Appellant's response to mean it was her that was having sexual relations with J.T. (III R.R. at 69). When Mr. Mcgarity returned home he confronted J.T. about the recent allegations at school and J.T. admitted to it. Mr. Mcgarity then spanked the child with a belt 5-6 times. (III R.R. at 70). After leaving the room Mr. Mcgarity returned and confronted J.T. asking if he and his mother had

any relations. To this J.T. responded “no”. Then Mr. Mcgarity said “Jabari, don't lie to me. I'm no fool. And I know what's going on." J.T. putting his head down responded “well, yeah." When asked what happened Mcgarity testified J.T. stated "She had sex with me." (III R.R. at 70). The following week Mr. Mcgarity contacted Brazoria County Sheriff’s Department. (III R.R. at 71). Mr. Mcgarity responded “Yes” to the question posed by the State, “The two residences where Jabari lived with the defendant, are those both in Brazoria County, Texas?” (III R.R. at 76).

On cross-examination Mr. Mcgarity, a truck driver testified while on the road to Dallas and after receiving the call about J.T. getting caught stealing he stopped by the house, arriving between 11:00 and 12:00 pm. (III R.R. at 79). Spending no longer than the time to confront J.T. and give the whipping, approximately 20 minutes. (IIIR.R. at 80). Mr. Mcgarity testified he had to “pry” the information about the alleged assault out of J.T. (III R.R. at 83). Mr. Mcgarity never attempted to clarify the incident with Appellant. (III R.R. at 86).

Maggie McDougal begins her testimony before the jury. (III R.R. at 91). She meets with J.T. on November 16, 2020. (III R.R. at 93). During the interview J.T. stated he understood he was there to talk about his mother having sex with him. He stated the first time was when he was living in Old Ocean. He stated his mom's boyfriend took his little brother fishing. After they were gone his mother, Appellant,

called her into the bathroom where she was bathing and asked him to give her a back rub. (III R.R. at 96). Asking J.T. to join her in the bath she then began performing oral sex on him. J.T. told Ms. McDougal Appellant then had him sit on the counter where she inserted his penis into her Virgina and then again after she had him sit on the toilet where she would go up and down. (III R.R. at 97). J.T. then described a second incident which occurred after the family moved to a trailer. The appellant called J.T. into the home and they went into the bedroom. After Appellant removed his cloths J.T. told her Appellant performed oral sex on him. (III R.R. at 98). J.T. advised the first incident occurred in the summer of 2020 when he was out of school and the second incident happened a couple of months after the first. (III R.R. at 99). Ms. McDougal testified delayed disclosure, minimization, and recanting is not uncommon in these types of cases. (III R.R. at 100).

The jury heard the testimony of J.T., the complaining witness and currently 17 years of age, (III R.R. at 116). J.T. identified Appellant as his mother. (III R.R. at 122). J.T. testified he remembered reviewing the video with the prosecutor and after requesting the video be stopped, told the prosecutor his statement in the video is a lie. (III R.R. at 118-119). J.T. testified he had not received counseling since making his outcry allocation when he was 13 years of age. (III R.R. at 119-120). After the video was resumed and J.T. finished reviewing he told the prosecutor it was

embarrassing, sad, but his statement of the event was true. (III R.R. at 121). J.T. testified he lived with his great grandmother until her death in 2017. From there he lived with his uncle for two years. He began living with Appellant in 2018. (III R.R. at 124). Living with his younger brother, mother, and her boyfriend in Old Ocean, J.T. described the environment as "Fighting, cussing, yelling, weapons." (III R.R. at 126). After living in Old Ocean for approximately one and half years, the group moved to a trailer park located in Old Ocean with J.T. and his brother living with a woman in her home and Appellant with her boyfriend living in a camping trailer. (III R.R. at 127). J.T. testified he lived at this location for about one year, moving because of the way he was treated by the women. (III R.R. at 128). Following this is when J.T. requested his father to come and get him. (III R.R. at 128). J.T. testified after being enrolled in school by his father he was getting in trouble at school. J.T. admitted this was due to inappropriate touching of some girls at school. J.T. denied he was caught stealing. (III R.R. at 129). The result of the inappropriate touching led to J.T. being disciplined with a spanking from his father. (III R.R. at 129). J.T. testified he was asleep when his father came in with a belt and gave him the spanking. Following this his father left his room, returning after a short time and questioning J.T. about him and his mother. Specifically stating "You act like I don't know what happened between you and your Mama." and then asking, "Did she have sex with

you?" To which J.T. responded they had. This was the first time J.T. told anyone. (III R.R. at 130). He then was interviewed by a CAC interviewer in which he described two incidents of sexual contact. J.T. continued his testimony by describing how each incident occurred relating to the jury the sexual contact by Appellant. J.T. testified the first incident involved Appellant's mouth contacting his sexual organ followed by Appellant's sexual organ contacting his sexual organ. (III R.R. at 132). J.T. then testified about the second incident which involved Appellant's sexual organ contacting his sexual organ. (III R.R. at 134).

On cross-examination J.T. was questioned about the allegation he was getting into trouble for touching girls. J.T. went from testifying it occurred once at the direction of the girl to three times, each being the request of the girl involved. (III R.R. at 135-137). As to the allegation he touched a teacher on the thigh, J.T. testified it was an accident. (III R.R. at 137). J.T. additionally denied stealing anything, although his dad is not lying by making the allegation, J.T. continued to proclaim he did not steal. (III R.R. at 138-139). J.T. then was questioned about his request to stop the video, claiming it was all a lie while being interviewed by the prosecutor. J.T. explained after stopping the video a representative of the District Attorney's office took him to another room and the two talked. She said it was ok to want to protect his mother, but he needed to tell the truth. With this the two returned

where again he pronounces the allegation was a lie. (III R.R. at 149). While being questioned by members of the District Attorney's office, J.T. requested the video continue. (III R.R. at 150). J.T. then reverts his allegation again and explains he was trying to protect his mother, but she did in fact commit the acts alleged. (III R.R. at 152). J.T. then is asked to explain the first incident of Appellant performing oral sex on him in the bathtub, which occurred in the house. J.T. testifies Appellant did not force him to undress or get into the tub. The appellant performed the sexual act for 10 minutes and he didn't resist. (III R.R. at 159). After this he got out of the tub, dried off, and Appellant told him to get on the sink. (III R.R. at 160). J.T. testified Appellant facing away from him started "riding me." At no time did Appellant threaten J.T. (III R.R. at 161). After 1-2 minutes Appellant told him to get on the toilet, he complied without force, and Appellant again was on top of him, facing away from him. This continued for about three minutes. (III R.R. at 162). The appellant then told him to get out. (III R.R. at 163). J.T. went to the lake where his brother and Appellant's boyfriend were fishing. He did not tell anyone. (III R.R. at 163). Describing the second incident, J.T. testified he was living in a trailer with Ms. Linda. He went to his mother who lived in an RV. When he got there she told him to lie on the bed. Appellant then pulled his pants down and performed oral sex on

him. (III R.R. at 167-168). This testimony contradicts the testimony previously by J.T. that Appellant's sexual organ contacted his sexual organ.. (III R.R. at 134).

Christopher David Tolmachoff is a deputy with the Brazoria County Sheriff's Department. (III R.R. at 174). Deputy Tolmachoff was dispatched to meet with General Mcgarity. (III R.R. at 175). Mr. Mcgarity provided a written statement which Tolmachoff provided to intake and notified Child Protective Services. (III R.R. at 176). This was the extent of Tolmachoff's involvement. (III R.R. at 176).

Jarrad Norris employed with the Brazoria County Sheriff's Department was the lead investigator assigned to this case. (III R.R. at 183). After the assignment Norris reviewed the file, attempted to contact Mr. Mcgarity, the reporting party, obtained the CAC interview for review, conducted interviews, and reviewed CPS records. (III R.R. at 183 - 184). After his review and investigation, he submitted the information for review by the grand jury. (III R.R. at 184). This was the extent of the investigator's involvement. The investigator did not review the location of the offense or obtain any additional information. (III R.R. at 187). The investigator did not speak with Mr. Mcgarity until five months after the incident was reported. (III R.R. at 188).

On July 5, 2024, Appellant, Chasity Tims, plead true to the enhancements alleged in the notice given by the State on June 14, 2024. (V R.R. at 10-11). The

State did not call witnesses during punishment and rested after offering the evidence entered in the guilt stage of trial. The defense called two witnesses, Brian Patterson and Danielle Todaro.

Brian Patterson testified as a mitigation specialist with a background in community supervision and corrections. (V R.R. at 16). Mr. Patterson testified to Appellant's family history and childhood within a splintered family. (V R.R. at 21-22). He testified Appellant did not finish school due to the need to care for her Great Grandmother. Appellant was able to obtain a GED in 2012. (V R.R. at 22). Mr. Patterson provided the jury with Appellant's employment and substance abuse history. (V R.R. at 23).

Danielle Todaro, a licensed clinical psychologist specializing in forensic psychology, (V R.R. at 29), testified to her evaluation of Appellant. (V R.R. at 32). Ms. Todaro testified she reviewed the Brazoria County Sheriff's incident report for the charges in question, reviewed public information of Appellant's criminal history, consulted with her attorneys, and conducted a clinical interview of Appellant. (V R.R. at 35). Todaro determined with regards to Appellant's verbal skills she performed in the lower extreme range as compared to people her same age. (V R.R. at 32). Testing determined Appellant's IQ in the range of 72 to 82. (V R.R. at 39). Thus, determining Appellant's IQ fell below where it is expected an individual to be

functioning intellectually. (V R.R. at 40). The analysis of the results of the testing performed on Appellant revealed she has difficulty sometimes controlling her impulsive behavior. (V R.R. at 46). Dr. Todaro determined although Appellant's intellectual function was below average, (V R.R. at 46), this was due to her leaving school before completing the 9th grade and it was not that Appellant had an intellectual disability. (V R.R. at 47).

POINT OF ERROR ONE

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT'S REQUEST FOR A MISTRIAL WHEN WITNESSES PROVIDED EVIDENCE OF 404(b)

FACTUAL SUMMARY

First motion for mistrial:

Appellant's first motion for a mistrial was based on a combination of witnesses revealing Appellant had been incarcerated. The first instance was during the State's examination of Mr. Mcgarity, J.T.'s father. Information was offered during the testimony concerning who was responsible for raising the complaining witness, J.T. J.T.'s father, General Mcgarity, responding to questions presented by the State with regard to the locations J.T. has lived in the past, first being with his grandmother, then with various other family members following the grandmother's

death, Mr. Mcgarity testified before the jury revealing Appellant did not have custody of J.T. until she was released from incarceration. In response to the prosecutor's question "Do you recall when Jabari started living with the defendant?" Mr. Mcgarity testified "It was right after she had got out she got him back." (III R.R. at 64). Defense counsel requested to approach the bench. During the bench conference counsel requested the State be advised to instruct the witness not to speak of the incarceration. (III R.R. at 65). Following the admonition, the State continued with the examination of the witness.

The second instance happened when the prosecutor asked J.T. "When did you start living with the defendant?" To which J.T. responded "After my uncle took us back -- well, she got out of jail." (III R.R. at 123). Defense counsel reminded the trial court this was the second witness the State has obtained a response indicating the incarceration of Appellant. Defense counsel complained of the prejudicial nature of the question and response and requested a mistrial. (III R.R. at 123). The State responded with "Judge, I think it's clear we are not trying to. This is kind of a built-in factor of the situation." Defense counsel expressed his frustration over the frequency of the State's provocation and interference with Appellant's ability to have a fair trial. (III R.R. at 123). The trial court denied the mistrial and instructed the jury to disregard. (III R.R. at 124).

For the prosecutor to defend his actions after being put on notice this question will bring a response indicating incarceration is inexcusable. This cannot be denied. It is the same question as previously asked invoking a response of identifying Appellant as being previously incarcerated.

Second motion for mistrial:

Appellant's second motion for a mistrial was based on a response provided by J.T. to a question presented by Defense counsel. Defense counsel questioning J.T. about his rebuttal and denial of the allegations made that he was sexually assault and then his reconfirmation of the allegations asked, "So why should they (jury) believe you…. now you're telling them it's true?" J.T. responded with "Maybe because I was looking out for my mom." To which Defense counsel responded "No. I'm asking you. I don't want "maybe". I want you to tell them and look them in the eye." J.T. then responded by again telling the jury of Appellant prior incarcerations. (III R.R. at 146). To this testimony Defense counsel objected and requested for a second time, a mistrial. The State responded by arguing defense asked an open-ended question. The Defense argued the witness had been previously admonished not to provide information about Appellant's previous incarceration. The trial court agreed with the State and denied this second motion for a mistrial. (III R.R. at 147). Defense counsel did not ask an open-ended question. Defense counsel instructed

the witness to be more direct in the response without wavering with a "maybe." J.T.'s response was nonresponsive to the question proposed. Testifying why he did what he did in denying the offense occurred and then reaffirming is not a response as to why the jury should believe him. The defense counsel did not ask why he was protecting his mother. Defense counsel asked why the jury should trust J.T. to tell the truth.

Point of error number one creates harm that cannot be cured with an instruction. The trial court erred when it failed to grant a mistrial after witnesses for the State testified Appellant had been in incarcerated. (III R.R. at 124 and 147). The testimony regarding the fact that Appellant was incarcerated was prejudicial and tantamount to requiring a defendant appear in court in jail clothing. The testimony's prejudicial effect is enhanced by the emotional effect provided to the jury allowing the jury to see Appellant as an individual, parent, and mother who from the testimony presented has spent the majority of J.T.'s life incarcerated, thus portraying Appellant as a career criminal with no regard for her children. It was prejudicial and violated the Appellant's right to a fair trial. The error was not harmless because it violated very basic and valuable constitutional rights. The Court should reverse the judgment.

ARGUMENT

In preparation for trial, the State interviewed the witnesses, reviewing the evidence, preparing them for testimony and working on their case in chief. The prosecutor for the State knew Appellant's incarceration history. The prosecutors elicited testimony in front of the jury that would be prejudicial, not with just one witness but after being made aware of the structure of the question proposed would elicit a prejudicial response, asked the question again with a second witness. The trial court erred when it failed to grant the mistrial because the State knew the elicited testimony would draw a prejudicial response. This error cannot be undone by an instruction to the jury. The appellant did not receive a fair trial. The defense was not responsible for eliciting testimony which required the witness to ignore the instruction to not reference his mother's incarceration. J.T.'s blatant refusal to follow the instruction denies Appellant a fair trial.

Texas Courts have held that mistrials are the appropriate remedy when objectionable events are "so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. *Young v. State*, 137 S.W.3d 65, 71 (Tex. Crim. App. 2004). Additionally, the courts have held that extraneous offenses are admissible in the guilt innocence phase of a trial if they are relevant to the charged offense. See, *Christopher v. State*, 833 S.W.2d

526 (Tex. Crim. App. 1992), aff'd on remand, 851 SW.2d 318 (Tex. App.–Dallas 1993) (finding that the erroneous admission of evidence of a prisoner's conduct affected his substantial rights and mandated reversal); *Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991) (holding that evidence that defendant stole a car prior to the murder was inadmissible); *Fitzgerald v. State*, 782 S.W.2d 874 (Tex. Crim. App. 1990) (evidence of an extraneous offense committed twelve hours after the escape was inadmissible and not relevant to the escape); *Stanley v. State*, 606 S.W.2d 918 (Tex. Crim. App. 1980) (during his trial for aggravated robbery, the trial court allowed the admission of several weapons found in defendant's possession at the time of his arrest thirteen days later, the Court found that these were not relevant and reversed). Admission of extraneous offenses in the trial on the merits are troublesome at best and a violation of the defendant's constitutional right to a fair trial. Texas courts have held that evidence which is not relevant to the charge upon which a citizen is being tried is inadmissible and therefore, an error.

The Enriquez Court held that the admission of three prior convictions in the case during the guilt/innocence phase of the trial was prejudicial. *Enriquez v. State*, 56 S.W.3d 596, 601 (Tex. App.–Corpus Christi-Edinburg, 2001, pet ref'd). The Court wrote,

> "[t]he prior convictions were inherently prejudicial because they revealed appellant's criminal history to the jury which allowed them to consider this evidence during deliberations at the guilt/innocence phase. Accordingly, the prejudicial effect of this evidence to appellant greatly outweighed its probative value. We hold that the trial court abused its discretion in allowing the State to introduce evidence of the convictions."

Id. at 601.

The Court in reviewing for harm, found they must determine if the error affected a substantial right. Id. (citing, Tex. R. App. P. 44.2 (b); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1998). In that query, the court found that a substantial right is "affected when the error had a substantial and injurious effect or influence in determining the jury's verdict". *Id*. (Citing, *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); King, 953 S.W.2d at 271). Further, the *Enriquez* Court found that if the "reviewing court is unsure whether the error affected the outcome the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict." *Id*. at 602 (Citing, *O'Neal v. McAnninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). The *Enriquez* Court held that it could not say from the record that the prior convictions did not influence the jury. *Id*.

There is no doubt the testimony of Appellant's incarceration and failure to be in her child's life would have been discussed in the deliberations. TEX R. EVID. 404(b)

embodies the established principle that a defendant is not to be tried for collateral crimes, wrongs, or acts, or for being a criminal generally. *Russell v. State*, 113 S.W.2d 530, 535 (Tex. App. - Fort Worth, 2003) (Citing, Tex. R. Evid. 404(b); *Nobles v. State*, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992); *Booker v. State*, 103 S.W.3d 521, 530 (Tex. App. - Fort Worth, 2003, pet ref'd); *Castillo v. State*, 910 S.W.2d 124, 127 (Tex. App. - El Paso, 1995). Holding that extraneous offenses are not admissible at the guilt-innocence phase of the trial to show defendant acted in conformity with his character.

In reviewing a court's determination regarding the relevance of evidence, the reviewing court is required to do more than determine whether the trial court did a balancing test. *Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996). The *Rachal* Court found that the trial court's determination must also be reasonable in view of all the relevant facts. Id. (Citing *Montgomery v. State*, 198 S.W.3d 67, 77-78 (Tex. App.—Fort Worth 2006, writ refused); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006). Further the Court found that "[if] the record reveals criteria reasonably conducing to a risk that the probative value of the tendered evidence is substantially outweighed by unfair prejudice, then the trial court acted irrationally in admitting it and abused its discretion". *Id*.

Looking at TEX. R. EVID. 403, the *Rogers* Court addressed the issue of unfair prejudice and found that unfair prejudice does not mean that evidence injures the opponent's case, the central point of offering the evidence. Rather it refers to an undue tendency to suggest a decision on an improper basis incarceration and the emotional loss of this incarceration upon J.T. *Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999) (citing *Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993). There was certainly an undue tendency to suggest a decision on an improper basis when the jury was told of Appellant's apparently lengthy Incarceration resulting in her failure to raise him. Further, Appellant had a constitutional guarantee to a fair and impartial trial under the Sixth Amendment. U. S. Constitution, VI Amendment. The Sixth Amendment guarantees a criminal defendant the right to be tried before an "impartial jury," representative of a cross-section of the community, which will consider the evidence against the defendant and decide whether to find him or her guilty of the crime charged. Without the evidence of Appellant's incarceration resulting in her absents during J.T.'s childhood, the jury has a complaining witness with conflicting testimony of what occurred, a lack of memory of when it occurred, J.T.'s failure to tell anyone about the event until an overbearing father that demands the allegation of sexual assault or face the consequences. The Court cannot deny the emotional opinion in recognizing

Appellant's failure in being involved in her child's life and the strength such an opinion will have in judging another. By allowing the trial to go forward after the State tainted the jury panel by eliciting the information regarding Appellant's incarceration, the trial court denied Appellant her constitutional rights.

In the case at issue herein, the testimony by the witness was elicited by the State's direct examination. The testimony elicited by the State was not relevant, it was not needed to advance the State's case, and it cannot be said that it did not contribute to the jury's verdict. The emotional impact of the evidence combined with the jury's knowledge now of J.T. being raised by relatives is due to Appellant's incarceration. Presumably due to her criminal nature. Appellant ask the Court to recognize the State's frequent argument regarding sending a message to the community. Appellant ask the Court to send a message to the State that it cannot purposely elicit testimony that is clearly prejudicial and creates an unfair trial for the citizen accused. The issue of guilt is not the question. The issue of the Constitution's guarantee of a fair trial is the question.

The evidence elicited through the witness's testimony was highly inflammatory, was not only irrelevant but was also prejudicial and prevented Appellant from receiving a fair trial. The trial court erred when it failed to grant a

mistrial in this case. The error harmed Appellant and the judgment should be reversed.

PRAYER

WHEREFORE, PREMISE CONSIDERED, Appellant respectfully prays this Honorable Court sustain Appellant's point of error one, reverse the trial court judgement and remand for a new trial.

Respectfully Submitted,
By: /S/ Perry Stevens
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to Tom Selleck, 111 East Locust, Suite 408A, Angleton, Texas 77515, on March 31, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify, per Texas Rules of Appellate Procedure 9.4i (1), 9.4i (2) (B), and 9.4i (3), this brief is a computer-generated document, and the computer program used to prepare the document calculates the word count to be 5537 words.

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