No. 14-24-00521-CR

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

DANIEL WAYNE WILSON
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1694826
From the 179th District Court of Harris County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Ana Martinez 179th District Court Harris County, Texas 1201 Franklin Street, 18th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On January 15, 2021, a Harris County grand jury returned an indictment charging Appellant with the felony offense of murder alleged to have occurred on or about September 30, 2020. (C.R. at 34). On February 8, 2024, Appellant entered a plea of guilty, without an agreed recommendation on punishment, to the charge of murder. (C.R. at 324-351). On July 1, 2024, following the preparation of a pre-sentence investigation report ("PSI") and a sentencing hearing, the trial court sentenced Appellant to life imprisonment in the Texas Department of Criminal Justice. (3 R.R. at 107). The trial court certified Appellant's right of appeal on July 16, 2024, and he timely filed his notice of appeal on that same date. (C.R. at 380, 384-385).[1]

[1] On September 9, 2024, Appellant filed a motion to abate, as there were two different certifications of defendant's right of appeal within the Clerk's Record. (C.R. at 352, 380). On October 15, 2024, this Court denied Appellant's motion and noted "[t]he Court will presently proceed with the appeal on the basis that the applicable certification of defendant's right of appeal the one signed by the trial court on July 16, 2024, and included in the clerk's record." That particular certification certifies that this "is not a plea-bargain case, and the defendant has the right of appeal." (C.R. at 380).

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel does not request oral argument. However, should the State of Texas or the Court request oral argument, Appellant requests the opportunity to participate in oral argument.

ISSUE PRESENTED

Whether trial counsel rendered ineffective assistance of counsel when he failed to object to and elicited improper statements from the State's witnesses regarding their opinion that Appellant should receive a life sentence?

STATEMENT OF FACTS

A. Pre-Sentence Investigation Report

According to the PSI Report, on September 30, 2020, several witnesses called in an assault in progress. (4 R.R. State's Ex. 2 at p. 2).[2] Witnesses reported a tall black male, later identified as the Appellant, assaulting the Complainant with a knife. (4 R.R. State's Ex. 2 at p. 2). Witnesses further reported they observed Appellant pursue the Complainant in his vehicle and then follow him behind a residence on foot. (4 R.R. State's Ex. 2 at p. 2). A nearby church parking lot contained blood drops beginning on the sidewalk near the church which formed a trail leading to where the incident was first witnessed. (4 R.R. State's Ex. 2 at p. 2). A

[2] Appellant reference the specific page numbers from the PSI Report.

mangled black t-shirt was located on the curb adjacent to the sidewalk/blood trail. (4 R.R. State's Ex. 2 at p. 2). Blood smears were located throughout. (4 R.R. State's Ex. 2 at p. 2). Complainant suffered severe blunt force trauma to his head as well as multiple stab wounds and multiple lacerations to his torso and arms. (4 R.R. State's Ex. 2 at p. 2). In addition, the Complainant had multiple blunt force trauma wounds to the head, which caused skull fractures in two separate areas. (4 R.R. State's Ex. 2 at p. 3).

A witness in a pickup truck observed Appellant stabbing the Complainant in a church parking lot. (4 R.R. State's Ex. 2 at p. 2). When the Complainant attempted to run away, Appellant chased him down and stabbed him again in the street with the incident culminating with the Appellant beating the Complainant to death with a baseball bat behind a residence. (4 R.R. State's Ex. 2 at p. 2). Videos of the incident were reviewed by officers and the PSI report described these videos as follows:

> The first video was captioned "So this just happened in front of my car. This man is stabbing this guy. Omg." The video showed the Toyota Camry parked in the street had paper/temporary tags. The suspect was shown standing over the complainant, who was on the ground, and dragging him by one of his legs toward the rear left passenger side of the vehicle. While dragging the complainant, the suspect was shown to open the car door with his right hand. At this point, the video showed the

> complainant get to his feet and move toward the front of the vehicle, at which point the suspect pursued the complainant and is shown to strike the complainant with a closed fist with his right hand.
>
> The second video appeared to be a continuation of the first and showed the suspect and complainant struggling with each other in front of the Toyota Camry. The complainant was shown trying to pull away from the suspect while the suspect grasps his right arm. As they moved to the right side of the vehicle, the suspect was shown retrieving an object from his right pants pocket which appeared to be a pocketknife. The suspect then proceeded to thrust the object into the complainant's back as they continue to move toward the rear of the vehicle. Once at the rear of the vehicle, the suspect was again shown to retrieve the knife from his pocket and stabbed the complainant twice more in the back. At this point in the video, the complainant's injuries could be seen more clearly due to his proximity to the camera. He was observed to have blood covering his face, right arm, and back.

(4 R.R. State's Ex. 2 at p. 3, 6)[3]

A search warrant executed on Appellant's vehicle yielded an aluminum baseball bat with apparent blood on it. (4 R.R. State's Ex. 2 at p. 8). In addition, blood droplets and smears were observed on the hood and trunk of the vehicle consistent with those shown in the video of the incident. (4 R.R. State's Ex. 2 at p. 7). After Appellant was taken into custody, he provided a statement. (4 R.R. State's Ex. 2 at pp. 10-11). Appellant told law

[3] These videos were admitted into evidence during the PSI Hearing. (4 R.R. State's Ex. 11).

enforcement that he did not recall anything from September 30, 2020, did not know the Complainant, and that he did not own a baseball bat. (4 R.R. State's Ex. 2 at p. 11). The detective observed a large cut on Appellant's right hand which was located between his thumb and index finger and was still healing. (4 R.R. State's Ex. 2 at p. 11).

Initially, Appellant declined to discuss the details of the offense during the TRAS interview as part of the PSI, but later advised that he used an unknown amount of alcohol and unknown amount of marijuana on the date of the offense. (4 R.R. State's Ex. 2 at p. 13). He advised that he felt a 5-year prison sentence was appropriate. (4 R.R. State's Ex. 2 at p. 13). During a subsequent interview, Appellant stated that he did not have a clear recollection of the events from the date of the offense, but acknowledged marijuana use and consuming beer. (4 R.R. State's Ex. at 13). In addition, Appellant stated:

> he met the complainant two to three months prior to the offense when he was smoking Marijuana in a park and the complainant joined him. He stated he vaguely recalled the complainant saying something to him on the date of the offense but advised he could not recall what was said, when it was said, or what setting they were in at the time. He stated, "Towards him (the complainant) I didn't have no ill feelings toward him. I didn't hate the guy. I didn't have plans to plot to hurt him in any type of way."

> He described his feelings about the offense by stating, "I really feel sad. It's really, I have mixed feelings because I feel bad that the crime was committed." He further stated, "That's not my nature. I'm a kind person. I don't go around plotting criminal activity. Me supposedly committing a crime is very very bad. I don't condone violence any kind of way." He also described feeling "sad and angry at myself" because of the offense.
>
> He advised he thinks often about how the complainant's family feels. He stated he believes they feel sad, angry, devastated, and emotionally "destroyed." He related this to how he felt after losing his mother and his cousin and stated, "I would ask them for forgiveness, but I don't expect any type of forgiveness."
>
> He reported he wishes to apologize to people whose time he "wasted" with the case and identified these people as the PSI writer, his attorney, and the Judge. He stated, "I apologize for any wrongdoing I've done."

(4 R.R. State's Ex. 2 at pp. 13-14)

B. PSI Hearing

Rosa Joseph, the Complainant's older sister, testified that the Complainant called her Momma, Jr., as he always looked for her to help him out with things and she was always there for him. (3 R.R. at 8-10). He was not a violent person and Ms. Joseph described him as a person who liked to make people laugh and make people smile. (3 R.R. at 12). She thought a life sentence was just in this case and knowing that Appellant was remorseful would not change her opinion of him. (3 R.R. at 12-13).

Timothy Criswell is the pastor of the Fifth Ward Missionary Baptist Church and he also owns a mortuary transport service, Criswell Mortuary Transport. (3 R.R. at 41). He knew the Complainant all of his life. (3 R.R. at 41). Seven years prior, the Complainant returned to the church where he was working in the ministry and helping him build the kingdom. (3 R.R. at 41-42). Mr. Criswell testified that the Complainant was a light to their congregation, their seniors, and tried to make sure everybody was good. (3 R.R. at 42). He described as loving and compassionate, and never knew him to be disrespectful. (3 R.R. at 42). After transporting the Complainant's body to a funeral home, Mr. Criswell had to step away from his business as the effect was something that he had never witnessed. (3 R.R. at 43-44). When he was told the range of punishment for the offense of murder, his quick reaction was life. (3 R.R. at 45). On cross-examination, he again emphasized 99 years and that he made up his mind that it should be life. (3 R.R. at 47).

Dr. Paulyann Maclayton is an assistant medical examiner at the Harris County Institute of Forensic Sciences who performed the autopsy of the Complainant. (3 R.R. at 49, 52; 4 R.R. State's Ex. 14). The cause of the Complainant's death was multiple sharp force and blunt force injuries. (3

R.R. at 52). There were multiple fractures to the Complainant's nose. (3 R.R. at 54). From the backside of the Complainant's body there were sharp force injuries, a stab wound, and the blunt force injuries could be seen. (3 R.R. at 55). On the Complainant's head there was a laceration with skull and brain tissue coming out of the wound. (3 R.R. at 55). This type of injury would have taken significant force. (3 R.R. at 55). Complainant's lung and liver was punctured. (3 R.R. at 58-59). His skull was fractured and hit a minimum of four times. (3 R.R. at 62-63). In total, there were 22 sharp force injuries. (3 R.R. at 52). In Dr. Maclaytion's opinion, the blunt force injuries were more significant. (3 R.R. at 63-64).

Complainant's mother described him as a light to this word, loving and caring of humanity. (3 R.R. at 65). Complainant met the Appellant at a homeless camp where he would walk. (3 R.R. at 67). During initial meeting of the Appellant, her spirit rejected him, as she felt the evil in him. (3 R.R. at 68). She missed the Complainant's presence the most. (3 R.R. at 69). She told the PSI interviewer that Appellant should never get out of jail. (4 R.R. State's Ex. 2 at p. 15). In addition, she told the interviewer: "I think that his was crime was so, somebody lends you a helping hand you kill them. It's insane." (4 R.R. State's Ex. 2 at p. 15). Ultimately, she told the interviewer

“If he gets fifty (years), I’d rather it be life (in prison).” (4 R.R. State’s Ex. 2 at p. 15).

Appellant described himself as a very caring guy. (3 R.R. at 78). At 19, he went to college, but had to stop because he did not have enough money to pay for an apartment. (3 R.R. at 78-79). Afterwards, he worked and stopped the partying and drugs. (3 R.R. at 79). He went to Houston Community College at 22-years old. (3 R.R. at 79). In addition, Appellant worked with kids for five years and joined an organization that he grew up in called Positive Black Men Association. (3 R.R. at 79). He mentored kids from age 22 until he was incarcerated. (3 R.R. at 79). Furthermore Appellant testified:

> It's very unfortunate that y'all have to come down here for this case. I'm very sorry to the family that your son was murdered. That was never my intentions at all. I apologize. I feel very sorry for all the events that happened but I'm a decent young man before that. I never committed any crimes. I never did anything violent. All I did every day was help take care of kids in the community. You know, I'm sorry how people testified to that, but that's all I really did every single day was go to work and take care of the kids in the community. If you go -- well, I don't know if it's too late now but I have pictures of me helping kids and everything like that, not to, you know, post on social media for the likes or for the media but I did it because I actually cared and wanted to make a change because that's where I'm from.

(3 R.R. at 79-80)

Appellant met the Complainant at a park by his grandfather's house, not at a homeless camp. (3 R.R. at 91-92). The night he killed the Appellant, he first committed an aggravated assault on the Appellant. (3 R.R. at 81). Afterwards, he followed the Complainant and beat him to death with a baseball from his knowledgement. (3 R.R. at 82). He wished he had never been out on the streets, stayed in school, and had gone to the proper treatment that he needed. (3 R.R. at 81-82). Earlier in the morning, he had drunk a couple of beers and had some brown liquor. (3 R.R. at 82). He also smoked marijuana throughout the day. (3 R.R. at 90). Complainant had told him that he had smoked marijuana earlier that day. (3 R.R. at 82). When asked by his counsel to tell the Complainant's family how he felt about ending the Complainant's life, Appellant testified:

> I know that it may not seem like I'm remorseful because I'm not related to your family but I really am. Like I say, I teach kids for a living. I – every single day, that's all I do. So it's not like I personally at in any point of my life ever decide to kill anyone. I don't have that in my heart. I don't have it in my mind. I don't even have it in my spirit. That's not how I was taught and raised. I'm so apologetic towards that.
>
> It's times -- it's times when I'm in my cell, I feel sad, I cry, I break down. They have a mental health counseling called cognitive behavior therapy inside the jail. I went through that program just so I can clear my mind so I can feel better because I'm very remorseful. I never talked about the case to the counselors because my lawyer told me not to talk to anyone about it but I

> talked to them about my trauma, my issues with my mother and my father, my aunts. I talked to them about that so I can move forward because it's no reason to kill anyone. Like I told the guy who was interviewing me that, you know, I fight crime and activity in gangs every single day. I may not be a police officer but I fight crime and gang activity in my own way by helping kids not go down that path. So there's no reason for me to want to kill somebody. I'm very sorry. There's nothing I can do to take that back.

(3 R.R. at 83-84)

Appellant asked the trial court to be merciful and grant him 20 years so that he could finish college, and he did not feel that the maximum was appropriate. (3 R.R. at 85). When asked by the State what a person should get if they chased him down with a baseball bat and stabbed him 22 times, Appellant answered that it would depend on the circumstances of what's going on and what was happening. (3 R.R. at 86). He remembered stabbing the Complainant, but he could not tell if it was him on the video of the stabbing. (3 R.R. at 87). Appellant did not recall telling law enforcement that he did not know who the Complainant was and that he did not do any drugs. (3 R.R. at 87-88). He did not remember anything that happened in the moment he was stabling the Complainant. (3 R.R. at 88-89). He felt that in that moment, his life was in danger based on previous events and he blacked out. (3 R.R. at 89).

SUMMARY OF THE ARGUMENT

Trial Counsel rendered ineffective assistance of counsel when he failed to object to inadmissible evidence from multiple witnesses who recommended that Appellant receive a life sentence. This error was further compounded when trial counsel elicited the same evidence on cross-examination while attempting to address this testimony recommending a life sentence. In general, a witness may not recommend to the trier of fact a particular punishment and trial counsel repeatedly allowed this evidence to be admitted. Trial counsel's failure to object to these statements was so outrageous that no competent attorney would have engaged in it, rendering his performance deficient. Because of this deficient performance, there is a reasonable probability that the result of the proceedings would have been different, as the State's requested and received a life sentence from the trial court despite Appellant's extensive testimony both live and from his statements in the PSI report expressing his remorse concerning the offense.

ARGUMENT

Whether trial counsel rendered ineffective assistance of counsel when he failed to object to and elicited improper statements from the State's witnesses regarding their opinion that Appellant should receive a life sentence?

A. Applicable Law and Standard of Review

Under *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffective assistance of counsel claim is subjected to a two-step analysis whereby the appellant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687. An Appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). When the record is silent, a reviewing court may not speculate to find trial counsel ineffective. *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994), citing *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Thompson*, 9 S.W.3d at 813. "An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluation the effectiveness of counsel." *Id.*, citing *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

"In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test – that trial counsel's representation fell below an objective standard of reasonableness-because the record on direct appeal is undeveloped." *Lopez v. State*, 565 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd), citing *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). "When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id.*, quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). "That is, the record must show that counsel's performance fell below an objective standard of

reasonableness as a matter of law and that no reasonable trial strategy could justify his deficient performance." *Dryer v. State*, 674 S.W.3d 635, 647 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd), citing *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Courts "generally will assume that counsel had a reasonable strategic motive if any reasonable trial strategy can be imagined." *Id*., citing *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). "[I]t is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance." *Thompson*, 9 S.W.3d at 813, citing *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985). "A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole." *Dryer*, 674 S.W.3d at 647, citing *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

"In a non-capital felony trial, evidence is admissible during the punishment phase if 'the court deems [it] relevant to sentencing." *Hayden v. State*, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009), citing TEX. CODE OF CRIM. PROC. ART. 37.07, § 3(a). "Evidence is relevant if it helps the factfinder decide what sentence is appropriate for a particular defendant given the facts of the case." *Id*. "A punishment recommendation from a non-victim –

especially an expert – entails a situation significantly different from a recommendation from the victim, who, at least arguably, was in a position to give an opinion based rationally upon his observations of the crime itself." *Taylor v. State*, 109 S.W.3d 443, 454 (Tex. Crim. App. 2003). See also *Johnson v. State*, 987 S.W.2d 79, 87 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) ("Appellant is correct in stating that, in general, a witness may not recommend to the trier of fact a particular punishment.") and *Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex. Crim. App. 1989) ("The argument that a witness may recommend a particular punishment to the trier of fact has been soundly rejected" and concluded that "such testimony would escalate into a 'battle of experts.'").

B. Analysis

1. Trial Counsel's performance was deficient

"Counsel's performance is deficient when his representation falls below an objective standard of reasonableness." *Cueva v. State*, 339 S.W.3d 839, 857-858 (Tex. App.—Corpus Christi 2011, pet. ref'd), citing *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005) and *Strickland*, 466 U.S. at 687-688. "In determining whether there is a deficiency, we afford great deference to trial counsel's ability, indulging 'a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance,' and that counsel's actions were the result of sound and reasonable trial strategy." *Id.* at 858, citing *Strickland,* 466 U.S. at 689 and *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi-Edinburg 2006, no pet.). "[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008).

Complainant's mother told the PSI interviewer that Appellant should never get out of jail. (4 R.R. State's Ex. 2 at p. 15). In addition, she told the interviewer: "I think that his was crime was so, somebody lends you a helping hand you kill them. It's insane." (4 R.R. State's Ex. 2 at p. 15). Ultimately, she told the interviewer "If he gets fifty (years), I'd rather it be life (in prison)." (4 R.R. State's Ex. 2 at p. 15). Trial counsel offered no objection to the PSI Report. (3 R.R. at 7). On two separate occasions during the State's case-in-chief, the State directly asked their respective witness their specific recommendation as to punishment. Ms. Joseph, the

Complainant's sister, testified that she thought a life sentence was just in this case after she acknowledged she had a conversation about the range of punishment and being asked what she thought a just outcome was. (3 R.R. at 12). In addition, when Mr. Criswell was told the range of punishment for the offense of murder by the State, his quick reaction was life. (3 R.R. at 45). Appellant's trial counsel offered no objection to these statements. On cross-examination by defense counsel, while attempting to address Mr. Criswell's statements on direct examination that trial counsel failed to object to, Mr. Criswell again emphasized 99 years and that he made up his mind that it should be life in response to trial counsel's questions. (3 R.R. at 46-47). His attempt to mitigate Ms. Joseph's unobjected to testimony that she believed Appellant deserved a life sentence similarly failed on cross-examination. (3 R.R. at 13).

"To argue successfully that trial counsel's failure to object amounted to ineffective assistance, appellant must show, at a minimum, that the trial court would have erred in overruling the particular objection." *Torres v. State*, 609 S.W.3d 595, 597 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd), citing *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) and *Jagaroo v. State*, 180 S.W.2d 793, 800 (Tex. App.—Houston [14th

Dist.] 2005, pet. ref'd). Although the Court of Criminal Appeals has suggested in dicta that testimony regarding what punishment should be assessed from a victim may be admissible, none of the witnesses were the victim in this case given the nature of the alleged offense. See *Fryer v. State*, 68 S.W.3d 628, 631 n. 22 (Tex. Crim. App. 2002) (looking at statements in a PSI report and noting "[the victim] was arguably qualified to give lay opinion testimony under Rule 701 concerning appellant's suitability for probation because she was acquainted with appellant and had first-hand knowledge of the commission of the offense."). Here, the PSI report contained inadmissible evidence related to the Complainant's mother's punishment recommendation. (4 R.R. State's Ex. 2 at p. 15). In addition, the State solicited testimony on direct examination from two witnesses regarding their recommendation of 99 years or life imprisonment. (3 R.R. at 12, 45). Defense counsel further exacerbated that testimony when he attempted to clean up Mr. Criswell's testimony regarding recommending a sentence of 99 years on cross-examination without success. (3 R.R. at 47). This testimony was inadmissible. See *Taylor*, 109 S.W.3d at 454. If trial counsel had objected to the testimony of Ms. Joseph and Mr. Criswell regarding their punishment recommendations, and the punishment

recommendation contained in the PSI report, the trial court would have erred in overruling those objections. As the evidence was clearly inadmissible, there was no reasonable trial strategy for trial counsel to allow the trial court to hear testimony related to three recommendations from the State's witnesses that Appellant receive a 99-year or life sentence, particularly when his punishment argument requesting a 30-year sentence focused on Appellant acceptance of responsibility for the commission of the offense. (3 R.R. at 99-100). As a result, trial counsel's failure to object and his improper follow-up questioning regarding the witnesses punishment recommendation constituted deficient performance.

2. Appellant was prejudiced by trial counsel's deficient performance

"[T]o show prejudice, the appellant 'must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different.'" *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009), citing *Strickland*, 466 U.S. at 694. "Reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

Appellant acknowledges the underlying details of the murder were grim and the injuries inflicted on the Complainant were extensive prior to his death. However, Appellant, in the PSI interview and during his testimony expressed true remorse for his actions:

> He described his feelings about the offense by stating, "I really feel sad. It's really, I have mixed feelings because I feel bad that the crime was committed." He further stated, "That's not my nature. I'm a kind person. I don't go around plotting criminal activity. Me supposedly committing a crime is very very bad. I don't condone violence any kind of way." He also described feeling "sad and angry at myself" because of the offense.
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> He advised he thinks often about how the complainant's family feels. He stated he believes they feel sad, angry, devastated, and emotionally "destroyed." He related this to how he felt after losing his mother and his cousin and stated, "I would ask them for forgiveness, but I don't expect any type of forgiveness."
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> He reported he wishes to apologize to people whose time he "wasted" with the case and identified these people as the PSI writer, his attorney, and the Judge. He stated, "I apologize for any wrongdoing I've done."

(4 R.R. State's Ex. 2 at pp. 13-14)

When asked by his counsel to tell the Complainant's family how he felt about ending the Complainant's life, Appellant testified:

> I know that it may not seem like I'm remorseful because I'm not related to your family but I really am. Like I say, I teach kids for a living. I – every single day, that's all I do. So it's not like I personally at in any point of my life ever decide to kill anyone. I don't have that in my heart. I don't have it in my mind. I don't

> even have it in my spirit. That's not how I was taught and raised. I'm so apologetic towards that.
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> It's times -- it's times when I'm in my cell, I feel sad, I cry, I break down. They have a mental health counseling called cognitive behavior therapy inside the jail. I went through that program just so I can clear my mind so I can feel better because I'm very remorseful. I never talked about the case to the counselors because my lawyer told me not to talk to anyone about it but I talked to them about my trauma, my issues with my mother and my father, my aunts. I talked to them about that so I can move forward because it's no reason to kill anyone. Like I told the guy who was interviewing me that, you know, I fight crime and activity in gangs every single day. I may not be a police officer but I fight crime and gang activity in my own way by helping kids not go down that path. So there's no reason for me to want to kill somebody. I'm very sorry. There's nothing I can do to take that back.

(3 R.R. at 83-84)

Appellant asked the trial court to be merciful and grant him 20 years so that he could finish college, and he did not feel that the maximum was appropriate. (3 R.R. at 85).

Although the complained of testimony was brief within the context of the entire punishment hearing, the damaging effect of three of the State's witnesses recommending essentially life sentences affected the result of the proceedings. As stated earlier, Appellant's trial counsel noted in his closing argument that Appellant himself had accepted responsibility for committing the offense and as a result, trial counsel requested that the trial court

sentence Appellant to 30-years in TDCJ. (3 R.R. at 99-100). In response, the State requested a life sentence and noted that "this family wants you to sentence him to life." (3 R.R. at 105-106). See *Reyes v. State*, No. 03-10-00082-CR, 2011 Tex. App. LEXIS 4811 at *18 (Tex. App.—Austin June 24, 2011, no pet.) (mem. op., not designated for publication) (in holding punishment recommendation testimony harmless, appellate court noted "[t]he State, during its closing argument, did not emphasize the challenged testimony."). The trial court obliged the State's request and sentenced Appellant to a life sentence, the maximum punishment available. (3 R.R. at 107). See TEX. PEN. CODE §§ 12.32, 19.01(c). See *Hines v. State*, 396 S.W.3d 706, 711 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (considering that jury sentenced defendant to low range of punishment in determining that potential error in allowing victim to testify regarding their recommendation for punishment was harmless.).

Based upon the totality of the circumstances in this case, trial counsel's failure to object inadmissible evidence from numerous witnesses that all recommended Appellant receive a life sentence prejudiced the outcome of the case. As a result, Appellant received ineffective assistance

and this Court should reverse and remand the Appellant's case for a new trial.

PRAYER

Appellant, Daniel Wilson, prays that this Court reverse the trial court's judgment and remand this case back to the trial court for a new trial. Appellant 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 on Jessica Caird of the Harris County District Attorney's Office on October 23, 2024 to the email address on file with the Texas E-filing system.

/s/ Nicholas Mensch
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