NO. 14-24-00906-CR

IN THE COURT OF APPEALS FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

NO. 1772457

IN THE 248TH DISTRICT COURT OF

HARRIS COUNTY, TEXAS

ROGER A. VALLADARES, *Appellant*

VS.

THE STATE OF TEXAS, *Appellee*

BRIEF FOR APPELLANT

JOSEPH W. VARELA
TEXAS BAR NO. 20496400
PO BOX 924136
HOUSTON, TEXAS 77292
(713) 294-9965
jwvarela@gmail.com

ATTORNEY FOR APPELLANT

NAMES OF PARTIES

Appellant

Roger A. Valladares

Appellant's attorney at trial

Antonio Balderas Jr.

Appellant's attorney on appeal

Joseph W. Varela

Appellee

State of Texas

State's attorney at trial

Hon. Kim Ogg, District Attorney
Rene Serrato, ADA; Truitt Rosane, ADA

Trial Court

Hon. Hilary Unger[1]

Complainant

K.J.M.

[1] Associate Judge I. Okorafor presided over voir dire.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

TO THE HONORABLE COURT OF APPEALS:

ROGER A. VALLADARES, defendant in the court below, hereinafter referred to as "Appellant," submits this Brief pursuant to Rule 38.1, Texas Rules of Appellate Procedure.

STATEMENT OF THE CASE

Appellant was indicted for the felony of continuous sexual abuse of a child, Tex. Penal Code § 21.02. (CR 51). Appellant entered a plea of not guilty in the 174th District Court of Harris County, Texas, Hon. Hilary Unger, J., presiding. Trial was before a jury with the Court assessing punishment. The jury found Appellant guilty as charged in the indictment (CR 283). Punishment was assessed by the court at 40 years confinement in TDCJ. (CR 285). The Appellant filed a timely written notice of appeal (CR 290). The trial court certified that Appellant had the right to appeal (CR 289).

STATEMENT REGARDING ORAL ARGUMENT

Appellant hereby requests oral argument, only in the event the State requests oral argument and the Court grants the State's request.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT A HEARING ON HIS MOTION FOR NEW TRIAL

POINT OF ERROR NUMBER TWO

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

STATEMENT OF FACTS

The State first called Marta Luz Diaz Gonzalez, mother of the Complainant. She testified that she had a good relationship with the

Complainant, until Complainant's behavior began to change for the worse. These changes included drug use, unauthorized absences from home (RR IV 36-44). At the time of the events described, they lived in an apartment on Antoine Drive in Harris County. (RR IV 44-49). Ms. Diaz Gonzalez met the Appellant in 2013 and allowed him to move in with her and her family at the beginning of 2014. They moved several times in 2014; all locations were in Harris County. (RR IV 49-53). In 2015 they moved to the Oak Glen Apartments (RR IV 54). Ms. Diaz Gonzalez testified that Appellant treated the Complainant "fine" and that she never saw him acting inappropriately towards her. She trusted Appellant to the extent of leaving her children at home with him while she was at work. Eventually, in 2020, she moved out (RR IV 55-56).

The Complainant outcried while Ms. Diaz Gonzalez was driving her to a hospital. Complainant had taken pills in an attempt to commit suicide. The Complainant disclosed that Appellant had been "touching her for a long time." At the hospital, Complainant disclosed more details, including that she had been penetrated by Appellant's penis once and that he had touched her vagina with his fingers. Complainant indicated to Ms. Diaz Gonzalez that this had been occurring ever since Appellant moved in, which was 2014, and that it had

stopped a year ago. Ms. Diaz Gonzalez called police from the hospital. (RR IV 59-63). The Complainant was 12 years of age when she disclosed the sexual abuse (RR IV 64).

Detective Marissa Weber of the Houston Police Department testified that she scheduled an interview with Appellant via a phone call. She explained the allegations and asked him if he would come in for an interview. Appellant came in to the Children's Assessment Center for an interview with Detective Weber. She told Appellant he was free to leave at any time. (RR IV 123-126). At the interview Appellant denied the allegations. (RR IV 136).

Clara Rivers was a forensic interviewer at the Children's Assessment Center. She described the procedures the CAC follows when it interviews an alleged victim. (RR IV 146-153). She interviewed the Complainant (RR IV 153-157).

Jennifer Paz was a therapist in private practice who had previously worked at the CAC. She provided therapy services for Complainant and Complainant's mother. She testified that Complainant made outcry to the sexual abuse, and that the perpetrator made her think it was normal. She also testified that Complainant told her the first occurrence was when Complainant was four years old, and the most recent was when she was 11. Further, that it

happened almost every night. (RR V 11-12). Jennifer Paz also testified that Complainant struck her as depressed and emotionally distraught (RR V 14-15). She was also allowed to testify that Complainant had self-inflicted injuries (RR V 20).

Complainant testified that Appellant used his hands and penis to touch her vagina. The first incident happened after they moved into the Glen Oak Apartments and while she was in elementary school. (RR V 54-56). Complainant testified that he would rub his penis with her vagina and touch her vagina with his fingers; there was one act of penile penetration of the vagina. This occurred every day and went on for years (RR V 60-66).

Dr. Whitney Crowson, a clinical psychologist at the CAC, testified concerning the "dynamics and processes involved with child sexual abuse." (RR VI 12). She testified generally about some signs of child sexual abuse, grooming, the process of disclosure, and other such topics. (RR VI 13-33). She testified concerning Complainant based on her review of the therapy records. (RR VI 33-38).

Appellant, represented by the undersigned on appeal, timely filed and timely presented a Motion for New Trial (CR 303). The Motion for New Trial incorporated affidavits of Appellant and a potential witness in

mitigation of punishment, and contained a request for a hearing. The trial court denied the Motion for New Trial without holding a hearing. (CR 319).

SUMMARY OF THE ARGUMENT

Appellant argues that the trial court abused its discretion in denying the motion for new trial without holding an evidentiary hearing. Appellant also argues that he was denied effective assistance of counsel in several instances.

POINT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT A HEARING ON HIS MOTION FOR NEW TRIAL

ARGUMENT AND AUTHORITIES

I. Standards for Review

The purpose of a hearing on a motion for new trial is to: (1) decide whether the cause shall be retried and (2) prepare a record for presenting issues

on appeal in the event the motion is denied. **Smith v. State**, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009). Such a hearing is not an absolute right. Id. A hearing is not required when the matters raised in the motion for new trial are subject to being determined from the record. Id. Conversely, a trial judge abuses his discretion in failing to hold a hearing on a motion for new trial when that motion raises matters which are not determinable from the record. Id. To hold otherwise would deny the accused meaningful appellate review. Id.

As a prerequisite to a hearing when the grounds in a motion for new trial are based on matters not already in the record, the motion must be supported by an affidavit, either of the defendant or someone else, specifically setting out the factual basis for the claim. Id. The affidavit need not establish a *prima facie* case, or even reflect every component legally required to establish relief. Id. It is sufficient if a fair reading of it gives rise to reasonable grounds in support of the claim. Id. Affidavits that are conclusory in nature and unsupported by facts do not provide the requisite notice of the basis for the relief claimed; thus, no hearing is required. Id.

The appellate standard for examining a trial court's denial of a hearing on a motion for new trial is abuse of discretion, Id. Such a denial will be reversed only when the trial judge's decision was so clearly wrong as to lie

outside that zone within which reasonable persons might disagree. Id. Appellate review is limited to the trial judge's determination of whether the motion for new trial has raised grounds that are both undeterminable from the record and reasonable, meaning they could entitle the defendant to relief. Id. This is because the trial judge's discretion extends only to deciding whether these two requirements are satisfied. Id. If the trial judge finds that the defendant has met the criteria, he has no discretion to withhold a hearing. Id. Under such circumstances the trial judge abuses his discretion in failing to hold a hearing.

II. The Motion for New Trial

Appellant's Motion for New Trial alleged ineffective assistance at the punishment stage.

The body of the Motion set these grounds out explicitly, and recited specific facts which, if found credible, would have entitled Appellant to relief on the grounds pleaded in the Motion.[2] The Motion alleged that at the sentencing hearing, defense counsel Balderas failed to secure the presence of the only available witness who could have testified in mitigation of

punishment. The affidavit of Appellant (Exhibit A to the Motion) recites that Appellant timely gave Balderas names and contact information of potential mitigation witnesses, including his sister, Maria Valladares. Yet Balderas failed to contact or interview such witnesses, and failed to secure the presence of any mitigation witness at the trial. The affidavit of Maria Valladares (Exhibit B to the Motion) recited that she was never contacted by Balderas, but if she had, she would have testified to her familiarity with Appellant and to aspects of his good character.

Balderas called no witnesses at the punishment stage of the trial (RR VI 90).

III. The Trial Court's failure to hold a hearing denied Appellant the opportunity to present evidence.

At a hearing on a motion for new trial, the court "may receive evidence by affidavit or otherwise." Tex.R.App.P. 21.7; **Lee v. State**, 186 S.W.3d 649, 658 (Tex. App.-Dallas 2006, pet. ref'd). An affidavit attached to a motion for new trial is "not evidence in itself;" it must be introduced at the hearing on the motion to constitute evidence. **Stephenson v. State**, 494 S.W.2d 900, 909-10

[2] To avoid prolixity, the facts alleged in the Motion and the accompanying affidavits will

(Tex. Crim. App. 1973); **Jackson v. State**, 139 S.W.3d 7, 20 (Tex. App.-Fort Worth 2004, pet. ref'd); **Godoy v. State**, 122 S.W.3d 315, 319 (Tex. App.-Houston [1st Dist.] 2003, pet. ref'd).

Appellant swore to pertinent portions of the Motion for New Trial and his affidavit was incorporated therein. Also submitted along with the Motion for New Trial was an affidavit from Appellant's sister, a prospective mitigation witness. But the trial court, in denying an evidentiary hearing on the Motion for New Trial, precluded Appellant from either introducing affidavits into evidence, or from calling live witnesses. The Motion and its accompanying affidavits raised issues which were not determinable from the face of the record, and Appellant was denied the opportunity to make a record for appellate purposes. To be entitled to a hearing, Appellant was required only to allege facts that show he "could potentially be entitled to relief," **Guillory v. State**, 652 S.W.3d 499, 505-06 (Tex. App.-Houston [14th Dist.] 2022, no pet.) and Appellant has met his burden.

IV. The Trial Court abused its discretion.

Although an evidentiary hearing on a motion for new trial is not an

---

not be reproduced in detail, but only by reference as necessary.

absolute right, **Smith**, 286 S.W.3d at 338, on the facts of Appellant's case, Appellant was denied "meaningful appellate review," Id. There is simply nothing in the record that would allow Appellant to argue on appeal any of his grounds for a new trial. The reason there is nothing in the record is that the trial court denied Appellant an evidentiary hearing.

V. The Remedy sought by Appellant

The proper remedy is for the appellate court to abate the appeal, and order the trial court to conduct an evidentiary hearing on the Motion for New Trial. A record of that hearing must be made and included as a supplemental clerk's and reporter's record. **Guillory**, 652 S.W.3d at 507.

POINT OF ERROR NUMBER TWO

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

ARGUMENT AND AUTHORITIES

I. Standards for Review

The United States Supreme Court has established a standard for constitutional review of performance of criminal defense counsel. In **Strickland v. Washington**, 104 S.Ct. 2052 (1984) the Court held that a defendant must make an initial showing of professional error:

> When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . . A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . The court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. 104 S.Ct. at 2064-2066.

The Court also held that once a defendant makes this initial showing of counsel's error, he must also show prejudice resulting from the error complained of:

> . . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

> probability is a probability sufficient to undermine confidence in the outcome. 104 S.Ct. at 2068.

The Texas Court of Criminal Appeals adopted the **Strickland v. Washington** standard to determine if counsel was effective in **Hernandez v. State**, 726 S.W.2d 53 (Tex. Crim. App. 1986)(en banc), for purposes of Tex. Const. Ann. art. I § 10 and Tex.Code Crim.Pro. Ann. art. 1.05. **Hernandez** held that Texas law did not set a higher standard than did the Supreme Court for Sixth Amendment purposes in **Strickland**, and that the federal standards were to be followed fully in analyzing ineffective assistance claims in Texas proceedings. The **Strickland** test is applicable to ineffective assistance claims at the guilt-innocence stage of both capital and non-capital trials. **Craig v. State**, 825 S.W.2d 128, 129 (Tex.Crim.App. 1992). **Strickland** also applies to the punishment phase of a noncapital case, **Hernandez v. State**, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. **Cannon v. State**, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984).

In essence, there is a two-step analysis. First, the court must determine whether counsel's performance fell below the objective standard of reasonableness under prevailing professional norms; if so, the court must

determine if there is prejudice, i.e., whether the conviction "resulted from a breakdown in the adversarial process that renders the result unreliable," **Strickland**, 104 S.Ct. at 1064; **Boyd v. State**, 811 S.W.2d 105 (Tex. Crim. App. 1991).

II. Counsel's Performance was Deficient

In the case at bar, concerning the first prong of **Strickland**, defense counsel committed numerous professional errors.

1. ***Counsel failed to properly investigate or call mitigating witnesses***.

Reference is made to Point of Error Number One above. When an appellant asserts counsel was ineffective because he failed to call witnesses, appellant must demonstrate that such witnesses were available to testify and that he would have benefitted from their testimony. **Wade v. State**, 164 S.W.3d 788, 796 (Tex. App.-Houston [14th Dist.] 2005, no pet.) (citing **Wilkerson v. State**, 726 S.W.2d 542, 551 (Tex. Crim. App. 1986). The Affidavits of Appellant and Maria Valladares establish that Counsel was timely informed of the existence of putative mitigation witnesses, that at least one witness, Maria Valladares, was available to testify and would have been beneficial to

Appellant. Yet Counsel failed to contact them or cause them to come to court to testify at the punishment stage of Appellant's trial. "[C]ounsel can only make a reasonable decision to forego presentation of mitigating evidence after evaluating available testimony and determining that it would not be helpful." **Humphrey v. State**, 501 S.W.3d 656, 663 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). In Appellant's case, Counsel could not have made a reasonable decision, as he failed to contact potential witnesses and evaluate their testimony.

2. ***Counsel failed to object to the Complainant's therapy records at the guilt stage, which records contained victim-impact evidence***.

At the guilt stage of the trial, the State offered as State Exhibit 8, the therapy records of KJM, the Complainant. Counsel had "no objections" to this exhibit. (RR V 9-10). Exhibit 8 was admitted and appears in the appellate record at VII 146. These records consist of 116 pages of therapy records from the Children's Assessment Center. The therapy described therein occurred after outcry was made in Appellant's case. Most of the entries in the records

detail victim-impact effects.

At RR VII 175, Complainant describes the details of a suicide attempt. She also describes how in response to anger she bangs her head on the wall, thinks of cutting herself, has sleep difficulties, and manifests other emotional disturbances.

At VII 184, Complainant describes details of sexual abuse by "mom's ex boyfriend"; this is a prior consistent statement prohibited by Tex. R. Ev. Rules 613(c); it was not offered in compliance with Tex. R. Ev. Rule 801(e)(1)(B). This page of the records also included victim-impact evidence.

At VII 185, there is a progress note concerning a group session. This progress note contained prior consistent statements concerning the alleged sex abuse and explained why she did not promptly disclose. It had the effect of bolstering her in-court testimony.

VII 186 is a detailed summary of statements of Complainant and her mother concerning a suicide attempt. Complainant describes the previous sexual abuse.

VII 187 contains results of an interview with Complainant, in which she describes her emotional state; this is victim-impact evidence.

At VII 196, Complainant describes "triggers" consisting of odors which

apparently raise unpleasant memories.

At VII 198, Complainant indicates fear of the perpetrator [Appellant] hurting her or her family, and blaming herself.

At VII 203, there is a discussion of Complainant's recent self-inflicted injuries.

VII 204 describes an incident of bulimia.

At VII 212, there is a progress note in which Complainant's mother describes Complainant's aggressive behavior and non-compliance with medication. Complainant is cited for her description of her difficult family relationships, which started when Appellant left the house. Complainant also describes an incident in which she sent a photo of her breasts to a male classmate.

VII 214 contains a description by Complainant of how the "Perpetrator" took her to a closet and touched her, and sexually assaulted her. She said she felt "scared."

At VII 217, Complainant describes her worst memory as the sexual abuse from [Appellant]. This has caused nightmares.

VII 218 describes the "significant PTSD" suffered by Complainant, and the signs and symptoms thereof.

There are other such instances of victim-impact evidence and testimony-bolstering in the therapy records.

Victim-impact evidence is evidence concerning the effect of the crime on the victim and the victim's family after the crime occurs. **Reynolds v. State**, 371 S.W.3d 511, 525 (Tex. App.--Houston [1st Dist.] 2012, pet. ref'd); see **Haley v. State**, 173 S.W.3d 510, 517 (Tex .Crim. App. 2005). The crime's after-effects on the victim is not relevant at the guilt-innocence phase. **Garrett v. State**, 815 S.W.2d 333, 337-38 (Tex.App.-Houston [1st Dist.] 1991, pet. ref'd). But Counsel made no objection to the admission of many victim-impact statements by the Complainant.

Counsel also allowed the State, without objection, to emphasize this evidence by having the therapist, Ms. Paz, testify concerning the records. This served to emphasize their importance to the jury, including the outcry evidence (V 10-12), victim-impact evidence (V 13-18). The therapist was also allowed to emphasize further effects on the Complainant such as self-harm via cutting and bulimia (RR V 20-21) and the extraneous sexual assault in the closet (RR V 22). The therapist was allowed to testify to all this, and more, without objection.

In its closing argument on guilt, the State took advantage of this error,

asking the jury to look at the therapy records, (RR VI 58-59, 70-71, 78-79).

3. ***Counsel failed to object to the Complainant's Mother's therapy records at the guilt stage, which records contained victim-impact evidence.***

At the guilt stage of the trial, the State offered as State Exhibit 9, the therapy records of Marta Diaz, mother of the Complainant. Counsel had "no objections" to this exhibit. (RR V 9-10). Exhibit 9 was admitted and appears in the appellate record at VII 264. These records consist of 111 pages of therapy records from the Children's Assessment Center. The therapy described therein occurred after outcry was made in Appellant's case. Most of these records detail victim-impact effects and other inadmissible evidence.

At VII 291, Ms. Valladares describes physical and emotional abuse perpetrated by Appellant against herself. This abuse included allegations of a sexual assault perpetrated against Ms. Valladares. There was also a general allegation of physical abuse against the children, and a suicide threat by Appellant. These allegations were extraneous offenses which Counsel allowed the jury to consider the guilt stage.

At VII 302, Ms. Valladares describes an incident where she had a

"flashback" to Complainant's sexual abuse.

At VII 306, Ms. Valladares describes prior domestic abuse at the hands of Appellant, and the negative effects of it.

At VII 313, Ms. Valladares describes her negative emotions ("sadness, crying, stress, and impotence") as a result of trauma inflicted on her and on Complainant by Appellant.

As with the therapy records of the Complainant, there are other instances of victim-impact evidence admitted without objection. If Complainant's victim-impact evidence was not relevant at the guilt stage, **Reynolds**, supra, then neither was that of Complainant's mother. Nevertheless, Counsel allowed the jury to consider it before passing on the issue of Appellant's guilt.

4. Counsel failed to object to records of the ano-genital exam performed on the Complainant.

At the guilt stage, the State offered records from the Children's Assessment Center as State Exhibit 5. (RR VII 12). These were records of the SANE exam of the Complainant. The sponsoring witness was Dr. Donaruma, who performed the examination and completed her portion of the

report (RR VII 14-28). This portion of the exam was conducted on October 18, 2021. There was no ano-genital exam done that day, but on October 21, 2021, Complainant returned for that ano-genital exam. This portion of the exam was conducted by Dr. Bachim, who did not testify. This examination was admitted into evidence at RR VII 29-43. Counsel failed to object to Dr. Bachim's portion of the records under the Confrontation Clause, see **Melendez-Diaz v. Massachusetts**, 557 U.S. 305, 129 S.Ct. 2527, 2530-31, 174 L.Ed.2d 314 (2009); or as hearsay. Although the results of the exam were all negative, the jury (and later the trial judge at the punishment stage) was allowed to hear that Complainant had to undergo that unpleasant procedure when such should have been excluded. There was no reason of strategy that would justify Counsel's failing to object to Dr. Bachim's portion of the report.

5. ***Counsel failed to properly object to numerous statements contained in hospital records***.

At the guilt stage, during Complainant's testimony, the State offered Exhibit 6, consisting of 93 pages of records from Memorial Hermann Hospital (RR VII 44). Defense counsel made a general objection to the entire record,

"I'm going to object to relevance, your Honor." This general objection was overruled and the records were admitted (RR V 80-81). These records contained numerous inadmissible statements.

At RR VII 55, there is an outcry statement that is hearsay-within-hearsay and was not subjected to cross-examination. This is seen again at VII 108 and 111.

At VII 60-61, there is a statement by the Complainant that she took "20 hydroxyzine" in a suicide attempt. This is reiterated at VII 68.

At VII 85, there is a detailed description of Complainant's suicide attempt by overdose. Another detailed description occurs at VII 111.

At VII 112 there is a description of Complainant's mental state in detail.

There are other iterations of these statements in the Memorial Hermann records.

Counsel's objection to "relevance" over the entire set of records was nothing but a general objection. To preserve error for appellate review, a defendant must make a timely objection or request and state the grounds on which he thinks he is entitled to a favorable ruling. **Gonzalez v. State**, 616 S.W.3d 585, 591 (Tex. Crim. App. 2020). An objection or request is sufficiently specific if the trial court is aware of the complaint or if the grounds

are apparent from the context. Tex.R.App.P. 33.1(a); **Gonzalez**, 616 S.W.3d at 591. Magic words are not required, but the litigant must "let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him." **Gonzalez**, 616 S.W.3d at 591 (quoting **Vasquez v. State**, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016)). A general objection will not preserve error unless the legal basis is obvious to the trial court and opposing counsel. Id.

Counsel's general objection was a professional error; he should have leveled specific objections to the portions of the records set out above. Specific objections might have been to hearsay, to improper outcry, to specific lack of relevance. None of these objections were made, and there is no strategic reason for failing to object and allowing the jury to see the entire set of records.

6. ***Counsel failed to object to an inadmissible extraneous offense***.

Without objection, Complainant was permitted to testify at the guilt stage about an extraneous offense allegedly perpetrated by the Appellant. She testified that one time she noticed Appellant acting peculiarly in the bathroom.

When Complainant inspected the bathroom, she found in the air conditioning vent a phone that was recording. The phone contained videos of Complainant. (RR V 51-52).

This testimony amounted to an allegation of invasive visual recording, Tex. Penal Code § 21.15. Although such is arguably admissible under Tex. Code Crim. Pro. Art. 38.37, no notice of that extraneous offense was given in the State's notice of extraneous offenses (CR 141). The extraneous offense was objectionable at least on the grounds of lack of notice but no objection was made.

7. ***Counsel failed to object to improper expert testimony***.

The State called Dr. Crowson to testify about the signs and symptoms of child sex abuse. She first testified generally that in cases of suspected sexual abuse of children, she looks for four factors: intrusive thoughts, avoidance of memories, negative alterations in mood, and emotional dysregulation (RR VI – 12-13). Then the questioning turned to Complainant in particular. Dr. Crowson testified about Complainant based on therapy records:

Q. And, Dr. Crowson, now I would like to talk a

little bit about this case in particular, okay. And in preparation for your testimony today, did you -- did we review any documents?

A. Yes.

Q. And what were those?

A. The therapy records.

Q. And in your review of the therapy records, do you remember seeing any -- **do you remember seeing any behaviors that would have been consistent with trauma**?

A. Yes.

Q. And which were those, if you remember?

(Emphasis supplied) (VI 34).

Dr. Crowson was then permitted to testify, without objection, that based on her reading of the Complainant's therapy records, she observed that Complainant had intrusive thoughts and nightmares; emotional dysregulation consisting of irritability, hypervigilance, depressed affect, substance abuse and a suicide attempt. Regarding the suicide attempt, the prosecutor asked:

Q. And one of the things that we also -- we also reviewed in the therapy records was the suicide attempt, right. And why -- other than the obvious, right, of the death of the child, but **why might that be significant in**

the context of trauma related to sexual abuse?

(Emphasis supplied). In answer, Dr. Crowson described the suicide attempt as a response to how "alone" such victims feel. (RR VI 36).

All of this "consistent with" testimony was objectionable and should not have been admitted. Relevance requires, at least, some causal connection. Such connection may be established by empirical data of causation, but is not established by mere occurrence. See **Vasquez v. State**, 975 S.W.2d 415 (Tex.App.-Austin 1998, pet. ref'd.) (referencing expert testimony that a child exhibits certain characteristics that have been empirically shown to be common among children who have been sexually molested). Because "consistent with" testimony is associated with causation, a jury can be misled by such evidence. See **United States v. DeNoyer**, 811 F.2d 436, 438 n.3 (8th Cir. 1987). Unless the state can demonstrate relevance, "consistent with" testimony should be excluded under Tex. R. Ev. Rules 401, 402, 403, and 702.

What Counsel permitted the State and Dr. Crowson to do, was testify to a list of common traits believed to be exhibited by child sex victims, and show that Complainant had exhibited those characteristics; therefore, Complainant was a victim of child sex abuse. (RR VI 34, 36). Counsel should have

objected but failed to do so.

Counsel allowed the State to emphasize this evidence at the closing argument on guilt.

[Prosecutor]: Dr. Crowson also told you about how she and I reviewed the therapy and how **some of the things that she observed were consistent with someone who has experienced a trauma**. So she talked to you about that.

(Emphasis supplied) (RR VI 82). There was no objection to this argument.

As a general rule, ineffective assistance claims should not be heard on direct appeal, because the trial counsel has no opportunity to reveal his trial strategy and the courts will not speculate, **Jackson v. State**, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); **Delrio v. State**, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992). There is a strong presumption that defense counsel's conduct was reasonable and constituted sound trial strategy, **Strickland**, 466 U.S. at 689, 104 S.Ct. at 2065. But it is apparent from the record in the case at bar that there could be no conceivable trial strategy for Appellant's counsel's omissions. There is no scenario imaginable where allowing the evidence

complained of herein could benefit Appellant.[3]

III. Appellant suffered prejudice

The "prejudice" prong of **Strickland** requires this Court to determine if trial counsel's deficient conduct was sufficient to undermine its confidence in the outcome, that is, whether there is a reasonable probability that, but for this deficient conduct, the result of the trial would have been different. **Strickland v. Washington**, 466 U.S. at 694; **Kyles v. Whitley**, 514 U.S. 419, 430 (1995).

In Appellant's case, a great volume of inadmissible evidence was allowed before the jury at the guilt stage of the trial. Complainant's therapy

[3] There were other instances where Counsel appeared inept or lacking in knowledge of the law. For instance, Counsel filed a pretrial motion to suppress Appellant's statement when Appellant voluntarily came to the police and gave a recorded statement. (CR 229). Counsel appeared to believe that when Appellant became the "focus" of an investigation, **Miranda** warnings were required. (RR IV 114). This is neither federal nor Texas law; see **California v. Beheler**, 463 U.S. 1121, 1122-25, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); **Herrera v. State**, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007); Tex. Code Crim. Pro. art. 38.22.

records and even more inexplicably, Complainant's *mother's* therapy records, all of which contained much victim-impact evidence, was allowed to be admitted *in toto*. Evidence that Complainant underwent an intrusive genital examination was allowed. Hospital records which contained harmful statements were admitted. An un-noticed extraneous (the bathroom recording incident) was allowed.

Admission of the therapy records was impermissible victim-impact evidence, none of which was admissible at the guilt stage, **Garrett**, supra.

The Complainant was the only witness who knew whether or not Appellant committed the alleged acts. Admission of all this evidence, particularly the Complainant and her mother's therapy records, served only to bolster her testimony. Bolstering occurs when a party is allowed to introduce prior consistent statements of an unimpeached witness to enhance

---

Counsel's voir dire covered pertinent topics, true enough; he discussed the presumption of innocence, the burden of proof, indictment was not evidence, whether the jury would require Appellant to testify, and identification of crime victims on the panel. (RR III 126 et seq.). But these topics were discussed previously by the Court or the prosecutor, or both. Counsel's voir dire was pro-forma and not "customized" to the case at hand. He could have asked more pertinent questions, such as credibility of state experts, credibility of child victims and their parents, whether allegations of multiple offenses by itself constituted evidence of guilt, whether a juror would "err on the safe side" in a child sex case by finding a defendant guilty when not convinced beyond a reasonable doubt, and the like.

the witness' credibility. **Lopez v. State**, 643 S.W.2d 431 (Tex.App.--Corpus Christi 1982, no pet.).

At the punishment stage, Counsel failed to offer any evidence in mitigation, despite Appellant informing him of at least one witness who was available and could have testified favorably. Having heard nothing in mitigation, the trial court handed Appellant a 40 year sentence without parole.

Confidence in the outcome of Appellant's trial has been undermined by Counsel's errors and omissions. This Court should reverse and remand for a new trial.

CONCLUSION AND PRAYER

For the reasons stated above, this Court should first abate this appeal, remand to the trial court with instructions to conduct an evidentiary hearing on the Appellant's Motion for New Trial, and order the trial court to supplement the record with this hearing.

Respectfully submitted,

/s/ *Joseph W. Varela*
JOSEPH W. VARELA
Texas Bar No. 20496400
PO Box 924136
Houston, Texas 77292
(713) 294-9965
jwvarela@gmail.com

ATTORNEY FOR APPELLANT,
ROGER A. VALLADARES

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief contains 5,225 words.

/s/ Joseph W. Varela
Joseph W. Varela

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Appellate Division, District Attorney's Office, by efile service, on the date of filing.

/s/Joseph W. Varela
Joseph W. Varela

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 100494556
Filing Code Description: Brief Not Requesting Oral Argument
Filing Description: BRIEF FOR APPELLANT
Status as of 5/6/2025 1:13 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
JESSICA CAIRD		caird_jessica@dao.hctx.net	5/6/2025 1:05:01 PM	SENT