

**No. 14-24-00609-CR, 14-24-00610-CR, 14-24-00611-CR**

In the  
Court of Appeals  
for the  
Fourteenth District of Texas  
at Houston

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—◆—  
**No. 1741717, 1741718, 1741719**

In the 337th District Court  
Harris County, Texas

—◆—  
**ARDIS BROUSSARD**  
*Appellant*  
V.  
**THE STATE OF TEXAS**  
*Appellee*  
—◆—

**MANDY MILLER**  
Attorney for Ardis Broussard  
9722 Gaston Road, Ste. 150-257  
Katy, TX 77494  
SBN 24055561  
PHONE (832) 900-9884  
mandy@mandymillerlegal.com

**KATHLEEN NEILSON**  
708 Main Street, 10th Fl.  
Houston, TX 77002  
SBN 24119561  
PHONE (713) 281-3752  
kathleen@neilson.law

**APPELLANT WAIVES ORAL ARGUMENT**

**STATEMENT REGARDING ORAL ARGUMENT**

Appellant waives oral argument.

## **IDENTIFICATION OF THE PARTIES**

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Counsel for the State:

Harris County District Attorney's Office  
1201 Franklin Street, Ste. 600  
Houston, TX 77002

**Sean Teare**—District Attorney of Harris County

**Jessica Alane Caird**—Assistant District Attorney on appeal

**Nisha King-Hawkins and Xavier Stafford**—Assistant District Attorneys at trial

Appellant or criminal defendant:

**Ardis Broussard**

Counsel for Appellant at trial:

**Brennen Dunn**  
2646 S. Loop W., Ste. 520  
Houston, TX 77054

**Sirat Al-Nahi**  
Harris County Public Defender's Office  
1310 Prairie Street  
Houston, TX 77002

Counsel for Appellant on appeal:

**Mandy Miller**  
9722 Gaston Road, Ste. 150-257  
Katy, TX 77494

**Kathleen Neilson**  
708 Main Street, 10th Floor  
Houston, TX 77002

Trial Judge:

**Hon. Leslie Yates**

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## **TO THE HONORABLE COURT OF APPEALS:**

### **STATEMENT OF THE CASE**

On January 3, 2022, Appellant was charged by three indictments with aggravated robbery causing serious bodily injury. (CR I 70; CR II 37; CR III 37). On December 11, 2023, Appellant's first trial ended in a mistrial because the jury could not reach unanimity in its verdict. (CR I 326-28). In August 2024, Appellant was retried, and a jury convicted him of the three charged offenses. (CR I 401-09; RR VII 255-56). After a punishment proceeding, the jury found two enhancement paragraphs true and sentenced Appellant to 60 years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR I 422; CR II 306; CC III 294; RR VIII 162-64).

### **STATEMENT OF FACTS**

In the early morning of September 30, 2021, a man knocked on the front door of Arif Ibrahim's home. (RR VI 46-47). Arif opened the front door, and the man asked him for money. (RR VI 47). After Arif told the man he didn't have any money, the man insulted Arif and then kicked the front door open. (RR VI 47-48). Arif's head hit the wall behind the door and the man pulled out a knife and pointed it at Arif. (RR VI 47-48). Arif fell to the ground and the man began stabbing him. (RR VI 51).

Wasif Ibrahim, Arif's son, was sleeping in his bedroom when he heard Arif screaming loudly. (RR V 136-37). Wasif ran out of his bedroom and saw the man



standing over Arif and stabbing him multiple times. (RR V 137). When the man became aware that Wasif was in the room, the man ran over to him and stabbed Wasif in various places. (RR V 148-50, 198). Kashifa Ibrahim, Arif's daughter, was also sleeping in her bedroom when she heard Wasif's screams and came out into the living room. (RR V 150, 237). Kashifa saw the man punching Wasif and that the man had a knife. (RR V 238). The man then pointed the knife at Kashifa's forehead and demanded money from her. (RR V 151, 239). Kashifa went into her room and came back with jewelry which the man took and put in his pocket. (RR V 152, 199).

The man then followed Wasif and Kashifa around the house and into Wasif's room where he looked around for something to give the man. (RR V 152-54, 241). The man took Wasif's cellphone. (RR V 154, 241). Next, the man went into Arif's bedroom but couldn't find anything to take. (RR V 155). Wasif, Kashifa, and the man then went back into the living room, where the man took Arif's cellphone and an Xbox console.<sup>1</sup> (RR V 155, 203, 242). The man then ran out of the house through the front door. (RR V 155-56, 242). Within five to ten minutes of the man leaving, Kashifa called the police. (RR V 156-57; State's Exhibit 1). Prior to calling the police, Kashifa, Arif, and Wasif discussed who they believed the suspect was, and they determined that it was the man that painted their house. (RR V 267). Kashifa told the 911 operator that the person

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<sup>1</sup> At a prior hearing, Wasif testified that a PlayStation was not taken, but at the second trial, he stated that he is just hearing about a PlayStation for the first time. (RR V 225).

who robbed their home was the man who had painted the Ibrahim's house about two weeks prior to the incident. (RR V 157, 229; State's Exhibit 1).

When police and EMS arrive at the Ibrahims' home, they quickly start providing medical care to Arif and Wasif. (RR V 245). Arif and Wasif were transported to the Houston Northwest Hospital. (RR V 245). Kashifa stayed on the scene and told officers that her mom, Rafiqua Ibrahim, had been at work at the time of the offense. (RR VI 126-28). Rafiqua worked with the sister of the man who painted their house. (RR II 6-7; RR VI 221-23). Kashifa called Rafiqua while in front of the officers and told Rafiqua that the person who painted their house was the person that committed the offense. (RR III 10-11). Over the phone, Rafiqua gives Appellant's name to Kashifa and the officers. (RR III 11-12).

Deputy Galvez went to the school where Rafiqua worked to interview her and the suspect's sister.<sup>2</sup> (RR VI 132-38). During the interview, Deputy Galvez found a suspect and then relayed that information to officers at the scene. (RR VI 136-37). Before concluding the interview and returning to the scene, Deputy Galvez showed a booking photo of Appellant to Rafiqua.<sup>3</sup> (RR II 27-28; RR VI 155; State's Exhibit 62). A photo of Appellant was then sent to other officers, though Deputy Galvez was not

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<sup>2</sup> Deputy Galvez testified at Appellant's second trial under her married name, Dillon.

<sup>3</sup> Before Appellant's first trial, there was a pre-trial hearing on his motion to suppress. Rafiqua Ibrahim testified at the hearing that Deputy Galvez showed her a booking photo of Appellant before she was shown the photo array. (RR II 27-28). Rafiqua also testified that the booking photo she was shown was the same photo included in the photo array where she later identified Appellant as the person who painted her family's home. (RR II 28-29, 38-39). Rafiqua did not testify during the trial at issue.

sure if officers were sent the same booking photo of Appellant that she had shown Rafiqua. (RR VI 144). After the interview, Rafiqua called Kashifa and told her that she had just identified the man who painted their house. (RR II 24). Rafiqua then went to the scene. (RR III 41-42).

Deputy Kevin Cote was given the suspect's name by a patrolman and then created a photo array to show to Kashifa at the scene. (RR III 40-41; RR VI 170-71; State's Exhibit 50). Appellant's photo was included in the array and the photo used was the same booking photo shown to Rafiqua by Deputy Galvez. (State's Exhibit 50, 62). When viewing the photo array, Kashifa told Deputy Cote that she needed to see "his full body shape" to be certain that she was identifying the right person. (RR VI 187-88). At 9:51 A.M., Kashifa identified Appellant with 100% certainty as the man who committed the offense. (State's Exhibit 50). Deputy Cote did not write a report on Kashifa's identification of Appellant in the photo array. (RR VI 184).

At some point after her interview, Rafiqua arrives at the scene.<sup>4</sup> (RR III 41-42). Roughly an hour after Kashifa's identification of Appellant, Deputy Cote shows Rafiqua a photo array that includes the same photo of Appellant that she was shown earlier by Deputy Galvez. (RR IX 5-6 (MTS Defense's Exhibit 1)). Rafiqua identifies Appellant with 90% certainty as the person who painted her home. (RR II 28-29, 38-39; RR IX 5-6 (MTS Defense's Exhibit 1)).

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<sup>4</sup> It is unclear from the record at what time Rafiqua arrived on the scene. At a pre-trial hearing, Rafiqua stated that she saw Kashifa in a police car but did not see officers conducting a photo array with Kashifa. (RR II 39-40).

Two weeks after the offense, Appellant was arrested on October 11, 2021. (RR VII 173-74). On December 11, 2023, Appellant's first trial ended in a mistrial. (CR I 328). On August 12, 2024, a jury found Appellant guilty of aggravated robbery as charged in the indictment. (CR I 409; CR II 306; CR III 294). After a punishment hearing, the jury found two enhancement paragraphs true and sentenced Appellant to 60 years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR I 422; CR II 325; CR III 313).

### **SUMMARY OF THE ARGUMENT**

Appellant's identification as the perpetrator of the offense was the only factual issue before the jury at his trial. During the guilt/innocence phase, Appellant's trial counsel presented facts alleging that law enforcement did not follow proper procedures regarding Appellant's out-of-court identification by a complaining witness. Specifically, Appellant's counsel presented evidence to the jury that the complaining witness may have been shown an individual photograph of Appellant by an investigator prior to the witness being asked to pick Appellant out of a photo array by a different officer.

The impermissibly suggestive pretrial procedure tainted the out-of-court identification of Appellant, which gave rise to a very substantial likelihood of irreparable misidentification during the trial. The trial court abused its discretion by denying Appellant's Motion to Suppress Identification when it admitted a tainted in-court identification of Appellant at trial.

The trial court also erred in denying Appellant's request for a jury instruction under article 38.23 of the Texas Code of Criminal Procedure and, because the identity of the perpetrator was the only contested issue at trial, Appellant suffered harm by the trial court's exclusion of the instruction.

### **APPELLANT'S FIRST POINT OF ERROR**

The trial court abused its discretion in denying Appellant's Motion to Suppress Identification.

#### Relevant Facts

On March 7, 2023, prior to his first trial, Appellant filed a Motion to Suppress Identification seeking to suppress out-of-court identifications made in violation of the due process clauses within Art. 1, Sec. 19 of the Texas Constitution and the Fourteenth Amendment of the United States Constitution. (CR I 188-89). Appellant alleged that the pre-trial identifications were impermissibly suggestive because a witness was shown a single photograph of Appellant and then that same photo was then placed into a photo array from which that same witness identified Appellant. (CR I 188-89). Appellant furthered that the pre-trial identifications were impermissibly suggestive, which rendered any future identifications unreliable. (CR I 188-89). On November 30, 2023, a hearing was held on Appellant's motion to suppress the out-of-court identification made by Kashifa Ibrahim.<sup>5</sup> See RR II-III.

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<sup>5</sup> It is unclear from the record why Rafiqua Ibrahim's out-of-court identification was not addressed at this hearing when her pre-trial identification was mentioned in Appellant's Motion to Suppress Identification. Regardless, the trial court did rule on both Rafiqua and Kashifa's out-of-court identifications.

Rafiqua Ibrahim testified first at the hearing. On September 30, 2021, Rafiqua was at work, so she did not witness the offense. (RR II 6, 36). She testified that the first picture she saw of Appellant was in the photo array. (RR II 7-8). After circling his photo in the array, she stated that she was certain it was Appellant because he had worked at her house for three days. (RR II 8). After identifying Appellant as the man who painted her house and while still at work, Rafiqua called her daughter, Kashifa. (RR II 23-26). She told Kashifa that she identified the painter but said that she didn't describe the photo to Kashifa. (RR II 26). Defense counsel then showed Rafiqua bodycam footage from her interview with Deputy Galvez while at her work. (RR II 27).

During Rafiqua's interview, the footage revealed that she was shown a booking photo of Appellant by Deputy Galvez prior to being shown the photo array by Deputy Cote while at the scene of the offense. (RR II 27). Rafiqua stated that the booking photo shown to her was the same photo that was then placed into the photo array. (RR II 28-29). The trial court confirmed that it understood that Rafiqua's testimony on cross-examination conflicted with her testimony on direct: "I remember her saying she had not seen the photo before being presented with the array and I have watched the video that shows something counter to that." (RR II 28). On cross-examination, Rafiqua testified that she had previously seen Appellant four times prior when he was painting their home and that she worked with Appellant's sister. (RR II 31-33, 36-37).

Kashifa Ibrahim testified next at the hearing. When officers arrived at the scene on the date of the offense, Kashifa gave them a description of the assailant: "he was

wearing a red shirt, maybe a white undershirt, and long jean shorts.” (RR III 6). She did not describe the race or gender of the assailant at that time. (RR III 7). Officers then began asking for more information on the assailant, and Kashifa told them that her mom might know the painter’s name. (RR III 9). Kashifa then called her mom in front of the officers. (RR III 10-11). Kashifa told her mom that the painter who was working on their house was the person who committed the offense. (RR III 10-11). Officers then spoke with Rafiqua on Kashifa’s phone, and got her work address so that an officer could go to Rafiqua’s work to speak with her. (RR III 11). Over the phone, Rafiqua gave Appellant’s name to Kashifa and the officers. (RR III 11-12).

After law enforcement went to Rafiqua’s work, Kashifa spoke with the lead investigator who she could not name but identified as a black male. (RR III 12). Kashifa stated that the investigator showed her an individual photo of Appellant but then corrected herself and said that the investigator was the one who showed her the photo array. (RR III 13-14). Defense counsel played Deputy Broadhead’s bodycam footage for Kashifa.<sup>6</sup> (RR III 16-17). Kashifa identified the lead investigator in the video as being the man who showed her the photo array. (RR III 16). Kashifa agreed with defense counsel that the footage appeared to show that she was pointing at something and saying, “that’s him.” (RR III 17-20). A few moments after this portion of the footage, Deputy Cote, who Kashifa identified as a white male, is seen taking out the

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<sup>6</sup> The reporter’s record of this hearing refers to the bodycam video belonging to Deputy Cote, but the video revealed that Deputy Cote was not wearing a bodycam on this day. *See* State’s Exhibit 5. The only officer wearing a bodycam during Kashifa’s identification was Deputy Broadhead. (State’s Exhibit 5).

photo array and showing it to Kashifa—after she had already pointed and said, “that’s him.” (RR III 20-21). Kashifa stated that she was wrong when she said that it was a black officer who had shown her the photo array. (RR III 21).

Lastly, Officer Kevin Cote testified at the suppression hearing. He stated that his first interaction with Kashifa was when he showed her the photo array. (RR III 41). He also did a photo array with Rafiqua after Kashifa did hers. (RR III 41-42). When reviewing Deputy Broadband’s bodycam footage from that day, Deputy Cote stated that, before being shown the photo array, Kashifa pointed at something the investigator was showing her and said something that sounded like “that’s him.”<sup>7</sup> (RR III 43-46).

After hearing the arguments from both parties, the trial court denied the motion to suppress Rafiqua and Kashifa’s out-of-court identifications and allowed both witnesses to make an in-court identification. (RR III 66).<sup>8</sup> After giving its ruling allowing the admission of Rafiqua and Kashifa’s testimony at trial, the court did not give its reasoning, nor does the record support that the court filed any findings of fact

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<sup>7</sup> At Appellant’s second trial, the following exchange occurred on cross examination of Deputy Cote:

Q. (Defense Counsel) So again, Officer, in your review of the camera footage, would you agree with me that at some point before being shown the photo array, Ms. Kashifa Ibrahim points and says something that sounds like “that’s him?”

A. (Deputy Cote) Yes.

Q. Okay. And would you also agree with me that you are standing there during that time frame?

A. Correct.

Q. And I believe you said Deputy Willrich is also standing there during that time frame?

A. Correct.

Q. And it’s before you show her what is indicated in this photo array, around the 29-minute mark?

A. Yes.

(RR VI 190).

<sup>8</sup> It is unclear whether Rafiqua testified at Appellant’s first trial, but she did not testify at his second trial.



and conclusions of law on this issue. At Appellant's second trial, the trial court refused to relitigate the motion to suppress from the pretrial hearing in the first trial since the prior judge already spent hours hearing testimony on the issue. (RR V 7-8). The trial court concluded that the pretrial hearing transcript would be attached to the record for purposes of appeal. (RR V 7-8).

### Standard of Review

A trial judge's decision to admit or exclude evidence is reviewed by appellate courts under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016). A trial judge abuses her discretion when her decision to admit or exclude evidence falls outside the zone of reasonable disagreement. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003) (citing to *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). A trial court's decision will be upheld if it is within the zone of reasonable disagreement. *Buntion v. State*, 482 S.W.3d 58, 71 (Tex. Crim. App. 2016).

"[A] pretrial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Conner v. State*, 67 S.W.3d 192, 200 (Tex. Crim. App. 2001). Suggestiveness may be created by the way a pretrial identification procedure was conducted, such as law enforcement pointing out a suspect or suggesting that a suspect is in the photo array. *Barley*, 906 S.W.2d at 33; *Herrera v. State*, 682 S.W.2d 313 (Tex. Crim. App. 1984).

In determining the admissibility of a pretrial identification, reviewing courts use a two-step analysis. *Aviles-Barroso v. State*, 477 S.W.3d 363, 381 (Tex. App.--Houston [14th Dist.] 2015, pet. ref'd). Looking at the totality of the circumstances, reviewing courts consider whether the pretrial identification procedure was impermissibly suggestive and if so, whether the impermissibly suggestive pretrial procedure “gave rise to a very substantial likelihood of irreparable misidentification.” *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993).

In making its determination as to whether the identification has been irreparably tainted, examining courts will consider several factors including: 1) the witness’ opportunity to view the suspect at the time of the offense; 2) the witness’ degree of attention; 3) the accuracy of the witness’s prior description of the criminal; 4) the level of certainty at the time of confrontation, and 5) the time between the crime and confrontation. *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999); *Neil v. Biggers*, 409 U.S. 188, 199-00 (1972). These factors are reviewed by the appellate court *de novo*. *Santos v. State*, 116 S.W.3d 447, 454 (Tex. App.--Houston [14th Dist.] 2003, pet. ref’d).

It is the defendant’s burden to prove by clear and convincing evidence that the pre-trial identification is unreliable. *Id.* at 451. “If the indicia of reliability outweigh the influence of an impermissibly suggestive pretrial identification, the identification testimony is admissible.” *Id.*

The pretrial identification procedure was impermissibly suggestive.

The testimony and evidence presented at the motion to suppress hearing showed that the pre-trial identifications were impermissibly suggestive. First, Rafiqua said the first time she saw Appellant's photo was in the array when, in fact, she was shown a single booking photo of Appellant before she was shown the photo array that contained *the same photo of Appellant* she was shown earlier. (RR II 26-28). At this same hearing, Deputy Cote testified that showing a witness an individual photo before a photo array would not be considered proper procedure and protocol for law enforcement. (RR III 46). A pretrial identification is not reliable when law enforcement shows the witness a photo of the suspect and then puts that same photo into a photo array for that same witness to choose from later. *See, e.g., Simmons v. United States*, 390 U.S. 377, 383 (1968) (danger of misidentification increases if police show a witness a single photo of a person who generally resembles the person the witness saw); *Vasquez v. State*, 101 S.W.3d 794, 796 (Tex. App.--Houston [1st Dist.] 2003, pet. ref'd) (pretrial identification can be impermissibly suggestive if law enforcement suggests that a suspect is included in a photo array).

Regarding Kashifa's pretrial identification, she testified at the hearing that it was the lead investigator, who she identified as being black, that showed her an individual photo of Appellant but then corrected herself to say that the lead investigator was the one who showed her the photo array. (RR III 13-14). When shown Deputy Broadhead's bodycam, Kashifa again identified the lead investigator as the person who showed her the photo array but then stated that she was wrong once she saw Deputy

Cote was the one who showed her the photo array. (RR III 16-21). Kashifa agreed that she pointed to something being shown to her by the lead investigator and said something that sounds like, “that’s him.” (RR III 16-22). Kashifa’s mother, Rafiqua, admitted to being shown a single photo of Appellant prior to seeing that same photo in the array, therefore, it is not inconceivable that Kashifa would have also been shown this same photo before the array—especially since the same exact photo was used in both photo arrays. *Compare* Defendant’s MTS Exhibit 1 *with* State’s Exhibit 50.

Furthermore, Deputy Broadhead’s bodycam clearly revealed that the lead investigator showed Kashifa something prior to her being shown the photo array which prompted her to point and say something that sounded like, “that’s him.” (MTS Defendant’s Exhibit 3; State’s Exhibit 5). Deputy Cote agreed that the bodycam footage appeared to show that Kashifa pointed at something being shown to her and said what sounded like “that’s him” prior to him ever showing her the photo array. (RR III 45-46). It would be unlikely that Kashifa would be talking with the officers about anything other than the suspect’s identity at that exact moment because she is filling out paperwork explaining the photo array procedure at the time when she made that gesture and spoke, and mere seconds later, she was shown the photo array. *See* MTS Defendant’s Exhibit 3; State’s Exhibit 5.

Rafiqua was at work when the offense occurred and was told by Kashifa that the painter was the person who committed the offense. (RR III 10-11). Rafiqua identified Appellant based on Kashifa telling her that the painter was the suspect, followed by

Deputy Galvez showing her a single photo of Appellant. (RR II 27, RR III 11-12). Rafiqua and Kashifa spoke on the phone again after Rafiqua was shown a photo of Appellant but prior to Kashifa's identification. (RR II 23-26). Immediately prior to Kashifa's identification, she was shown something by the lead investigator that prompted her to point and say something that sounded like, "that's him," prior to seeing the photo array. (MTS Defendant's Exhibit 3; State's Exhibit 5). Being shown a single photo of Appellant prior to being asked to pick out the painter (in Rafiqua's case) or the suspect (in Kashifa's case) is an impermissibly suggestive pretrial procedure that tainted the pretrial identifications of Appellant by Rafiqua and Kashifa.

The impermissibly suggestive pretrial procedure gave rise to a very substantial likelihood of irreparable misidentification.

Because Rafiqua did not testify at the second trial, she did not provide an in-court identification of Appellant. Thus, the impermissibly suggestive pretrial procedure of showing Appellant's photo to Rafiqua before asking her to select him out of an array ultimately has no bearing on this Court's decision as to whether the procedure gave rise to a very substantial likelihood of irreparable misidentification at trial. But when analyzing the *Biggers*' factors in regards to Kashifa's out-of-court identification, the risk of irreparable misidentification from the use of an impermissibly suggestive pretrial identification procedure is quite high.

The first and second factors, the witness' opportunity to view the suspect at the time of the offense and the witness' degree of attention, weigh towards the risk of

irreparable misidentification. On the date of the offense, Kashifa was at home and interacted with the suspect while he was in the house. (RR V 150-51, 237-39). Kashifa had given the man jewelry from her room and then took the man through the house to find other items of value to give the man. (RR V 152-54, 199, 241). At the motion to suppress hearing, Kashifa stated that before police officers arrived at the scene, she did not talk about the events that just occurred with her brother, Wasif, and father, Arif. (RR III 5-6). At trial, however, Kashifa stated that prior to speaking with the officers, she discussed with Wasif and Arif who the suspect was, and they determined it was the painter. (RR V 267).

The trial testimony of Arif revealed that he was unable to identify the person that assaulted him and Wasif's testimony showed that he had only seen the painter for a total of thirty seconds while he was working in the home. (RR VI 60-62, 107, 110-12; RR V 138-44, 188). Kashifa also testified at trial that she knew the painter was the person who attacked her because she knew his facial features, but then later testified that the times she saw the painter in the house, he was facing the walls; she was mainly seeing the painter's silhouette while he was working in the home. (RR V 249, 251-52, 256-57). Thus, Kashifa had an opportunity to view the suspect during the time of the offense and her degree of attention was likely high due to her interactions with the suspect at the time of the offense. However, her ability to identify the man who painted her house is weak when considering that she did not interact with the painter in the home and conferred with Wasif and Arif before deciding that the painter was the

suspect. (RR V 267). Furthermore, Arif couldn't identify the person who painted his house at trial, and Wasif testified that he only saw the painter for a total of thirty seconds. (RR V 188; RR VI 55).

The third and fourth factors, the accuracy of the witness' prior description of the suspect and the level of certainty at the time of confrontation, weigh towards there being a risk of irreparable misidentification. Kashifa's prior description of the assailant mostly remained the same—that the man wore a red shirt and jean shorts. (RR III 6). But after a prior hearing and while under the trial court's direction to speak about what she might give sworn testimony to, Kashifa discussed what the painter looked like with Wasif and afterwards she had stated that the painter wore a "snapback." (RR VI 23-27). In her prior statements, Kashifa did not state that the painter or the assailant wore a "snapback"—that language came from Wasif. (RR VI 23-27). Thus, Kashifa's prior description of the suspect—whom she believed to be the man who painted her home—was not always consistent and she even changed her description based on her discussions with Wasif when both were instructed not to discuss what they might testify to at a later hearing.

Kashifa's level of certainty at the time of confrontation was 100% as she wrote down on the photo array. (State's Exhibit 50). However, prior to determining that she was 100% certain, Kashifa asked Deputy Cote to see "his full body shape" to be sure that she was identifying the man who painted her house, likely because she only saw the silhouette of the painter when he was in her home and not his face. (RR V 249, 251-52,

256-57; RR VI 187-88). Kashifa's written level of certainty at the time of confrontation is deceptive because even though she wrote that she was 100% certain after selecting Appellant from the array, she had asked to see the suspect's silhouette to make sure that she was correctly identifying the man who painted her house—even though she testified that she knew the painter was the person who attacked her family because she knew his eyes. (RR V 249). Thus, this factor weighs in favor of there being a risk of irreparable misidentification.

Lastly, the fifth factor, the time between the offense and the confrontation, weighs against there being a risk of irreparable misidentification. The offense took place on September 30, 2021, around 7 A.M. and Kashifa signed her photo array at 9:51 A.M. on this same date. (State's Exhibit 1, 50). Therefore, there was a minimal amount of time between the offense and Kashifa picking Appellant out in the photo array.

All evidence presented at trial casted serious doubt as to not only whether Kashifa could identify the man who painted their house, but as to whether any of the three complaining witnesses could identify the painter. Furthermore, no other evidence supported Kashifa's pre-trial identification of Appellant being the man who painted the Ibrahims' home, nor that the painter committed the offense. Thus, the totality of the circumstances show that the impermissibly suggestive pretrial procedure gave rise to a very substantial likelihood of irreparable misidentification by Kashifa.



## Conclusion

The testimony and evidence presented at the motion to suppress hearing showed that the pre-trial identifications were impermissibly suggestive and gave rise to a very substantial likelihood of irreparable misidentification of Appellant as the suspect in this offense. Thus, the trial court abused its discretion in denying Appellant's Motion to Suppress Identification when it admitted Kashifa's in-court identification of Appellant.

## **APPELLANT'S SECOND POINT OF ERROR**

The trial court committed reversible error by denying Appellant a jury instruction under article 38.23 of the Texas Code of Criminal Procedure.

## Relevant Facts

At the guilt-innocence portion of Appellant's second trial,<sup>9</sup> the State presented testimony from Wasif who was injured during the incident at his home. During direct examination, Wasif pointed to Appellant and stated that he saw him stabbing his dad multiple times. (RR V 137). Wasif said that he had seen and spoken to Appellant multiple times when he was painting inside the Ibrahims' home. (RR V 138-44). Wasif said when he woke up one morning, he saw Appellant talking to his father, Arif, right in front of the kitchen as Wasif went to get breakfast. (RR V 142-43). He stated that Arif and Appellant were talking about a movie that Arif was watching at the time. (RR V 142). Wasif stated that on the date of the offense, Appellant was wearing "a white shirt, black snapback, and blue jean shorts." (RR V 139).

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<sup>9</sup> Appellant's first trial ended in a mistrial. (CR I 326-28).

On cross-examination, defense counsel confronted Wasif with prior inconsistent statements made under oath. (RR V 178-79). Wasif agreed that he previously stated that he never interacted with or talked to the painter in his house. (RR V 180-82). Wasif also agreed that, in his previous statement, he never mentioned Arif and Appellant talking, but rather, he stated that Appellant was painting in the kitchen when he went to get breakfast, and he only saw him for five to ten seconds. (RR V 184-86). While Appellant was painting the Ibrahims' home over the course of three days, Wasif only saw him for about a total of thirty seconds. (RR V 188). Wasif described the painter as having a short beard, wore a backwards baseball cap with very short hair, weighed about 220-230 pounds, and was about 6'2 in height. (RR V 190-94). Wasif also stated that after the last time he gave his statement under oath, he spoke with his sister, Kashifa Ibrahim, about the "snapback" the suspect was alleged to be wearing during the offense. (RR V 207-08).

Next, Kashifa testified that she knew the painter was the person who attacked her family because she knew his facial features, more specifically, his eyes. (RR V 249). She stated that the painter was a black man with an average length beard and was around six feet tall. (RR V 230). Kashifa said that she saw the painter multiple times throughout the two days she observed him working in her house and that she would say hello to him. (RR V 230-35). When the State shows Kashifa the photo array that she signed on the date of the incident, she stated that she was never shown a photo of the potential

suspect prior to being shown the photo array where she picked out Appellant. (RR V 248).

On cross-examination, Kashifa said that the times she saw the painter in her house, he was in the process of painting; she was only seeing the painter's back as he faced the wall. (RR V 251-52). One time the painter came into her room for roughly one minute while Kashifa was in the room, but she was focused on her cellphone. (RR V 254-255). Kashifa mainly saw the painter's silhouette while he was working in the house. (RR V 256-57). She stated that, prior to speaking to officers, she discussed with Wasif and Arif who the suspect was, and they determined that it was the painter. (RR V 267).

When describing the painter's appearance, Kashifa said that he had a full beard that was not short in length. (RR V 257-58). She admitted that, after a prior hearing and while still under the trial court's direction not to speak about what she might give sworn testimony to, Kashifa and Wasif discussed what the painter looked like—specifically they discussed that Wasif believed the painter wore a “snapback.” (RR VI 23-27). In her prior statements, however, Kashifa did not describe that the painter or the assailant wore a hat. (RR VI 27).

Kashifa was then questioned about statements she made at a prior hearing, namely that when reviewing Officer Broadhead's bodycam footage at that hearing, Kashifa stated that it appeared that she was pointing at something and said, “that's him.” (RR VI 17-19, 37-38; State's Exhibit 5). At first, Kashifa believed that she did

that gesture and said, “that’s him,” when she was reviewing the form and the photo array. (RR VI 18-19). When reviewing the body cam footage, however, she agreed that she wasn’t looking at the photo array at the exact time she was pointing and saying, “that’s him.” (RR VI 19-21). When Kashifa was first asked who showed her the photo array, she stated that it was a black officer [Deputy Eddie Willrich]. (RR VI 19). But then stated that the officer who showed her the photo array was a white officer [Deputy Kevin Cote]. (RR VI 19). The bodycam footage showed that Kashifa was talking to the black officer first, and then the white officer came over to do the photo array. (RR VI 19).

Next, the State presented the testimony of Arif, Kashifa’s father, who was also injured during the incident in his home. When asked if he remembered what the assailant looked like, Arif said that the man “was bald from the front” and had “a light beard.” (RR VI 55). Arif said that he did not remember what the assailant was wearing at the time of his assault “because I didn’t pay attention to him.” (RR VI 55). When asked to identify Appellant in the courtroom, Arif said that he’s “trying to see,” and that he “cannot see clearly.” (RR VI 55). Arif couldn’t identify Appellant in the courtroom. (RR VI 55). The State then showed Arif State’s Exhibit 48—a photograph of Appellant—and asked Arif “what is this?” (RR VI 56-57; State’s Exhibit 48). Arif said “Broussard, Ardis.” (RR VI 57).

Defense counsel objected to State’s 48 being used as improper inquiry for identification because Arif could not identify Appellant in the courtroom. (RR VI 57-

59). The State argued that it was using this photograph to ask Arif if the person that attacked him was the same person that painted his house. (RR VI 58). The trial court overruled the objection. (RR VI 59). The State asked Arif if the photo was “a fair and accurate picture of the same person that you recognize?” (RR VI 59). Arif says yes. (RR VI 59). Arif did not state that the person in the photo was the person that assaulted him, nor was he asked that question by the prosecutor.

When questioned by Defense as to whether he had ever been shown this photo of Appellant before, Arif said that when he “came before,” he was shown this photo by one of the prosecutors. (RR VI 60-61). Later in his testimony, Arif said that he had seen a copy of Exhibit 48 “in a basket” at the prosecutor’s office when he was there with his family. (RR VI 109-10, 114-15). He stated that his wife had previously shown him the same photo on her cellphone.<sup>10</sup> (RR VI 110-12). Arif said that he was shown this photo by both his wife and his lawyer. (RR VI 112). He was told that the photo depicted the person who had assaulted him.<sup>11</sup> (RR VI 112).

During cross-examination, Arif said that the person that attacked him wore a gray shirt after he had previously stated that he did not remember what the assailant

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<sup>10</sup> Arif’s wife, Rafiqua Ibrahim, did not testify at Appellant’s trial.

<sup>11</sup> The following exchange took place during cross-examination of Arif:

A. (ARIF) Yes.

Q. Okay. And you were told that this was the person that assaulted you; is that fair?

A. Yes.

Q. Okay. And who all told you – which individuals told you that this was the person that assaulted you?

A. No one told me this.

(RR VI 112).

was wearing at the time of his assault. (RR VI 55, 72). When asked again if he could identify the person that attacked him in the courtroom, Arif said that he can see the person only “if they show me.” (RR VI 85). Arif said that of all the family members in the house, he was the person who saw and spoke with the painter the most because he was at home when the painter was working. (RR VI 85-86). After reviewing the statement that he made to an officer while at the hospital, Arif described the person who assaulted him as having a mustache and not a beard, and that the man was wearing a white cap. (RR VI 106-09). Arif also told the officer that he would not be able to identify the person that assaulted him. (RR VI 107).

Next, the State offered the testimony of Deputy Eddie Willrich, who was the lead investigator in this case and testified about the investigation at the scene. During cross-examination, Deputy Willrich stated that officers used the Flock camera system to search for Appellant’s vehicle in the street cameras in the immediate area, but Appellant’s car was never found in this search. (RR VI 241-42). Deputy Willrich said that he didn’t need to get a physical description of the suspect because he felt like he had the right person. (RR VI 243-44). When questioned whether the family could have misidentified the suspect, Deputy Willrich felt like he had the right suspect because the Ibrahims told him that Appellant had worked in their house for two weeks; thus, he believed this supported his conclusion that people who are around perpetrators of crimes for long periods of time never make misidentifications. (RR VI 244; RR VII

178). Deputy Willrich did not know that Appellant had only worked in the house for a few days, not two weeks. (RR VI 244-45).

During the jury charge conference, defense counsel requested a jury instruction under article 38.23 of the Texas Code of Criminal Procedure based on the issues raised about Appellant's identification and whether one of the complaining witnesses was shown a photo of Appellant prior to identifying him in an array. (RR VII 198-99). The trial court believed that a factual dispute was raised regarding Appellant's identification. (RR VII 200). But the court went on to explain:

My concern is that the article specifically says that no evidence can be obtained by an officer in violation of any provision of the Constitution or laws of the State of Texas. Even if -- assuming everything is true and that the photo spread was -- the procedure was violated, that doesn't rise to the level of a violation of the constitution or the laws of the State of Texas. This isn't a situation where someone was pulled over without probable cause or there was no search warrant when there was one required. Those are clearly violations of the constitution. Here the allegation is that the procedures weren't followed, which may or may not make the in-court identification impermissibly suggestive, which in my opinion is a legal issue, it's not a factual issue.

(RR VII 200-01). Defense counsel argued that it was a due process violation for the officer to suggest an identification to a witness by showing a photograph of Appellant before making an out-of-court identification. (RR VII 201). The trial court said that it had not been presented "with any specific cases where a charge under 38.23 has been used on an issue of identification," nor had it been given a suggested charge from the defense. (RR VII 199, 201). Defense counsel's 38.23 instruction request was denied. (RR VII 201).

### Standard of Review

The trial court must provide the jury with a written charge that sets forth the law applicable to the case. *Celis v. State*, 416 S.W.3d 419, 423 (Tex. Crim. App. 2013); TEX. CODE CRIM. PROC. ANN. ART. 36.14. A jury must be instructed that “if it believes, or has a reasonable doubt” that the evidence was obtained in violation of Texas or Federal law, then it must disregard the evidence. TEX. CODE CRIM. PROC. ANN. ART. 38.23. For a submission of an article 38.23 jury instruction, a defendant must meet three requirements: “(1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) that contested fact issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.” *Chambers v. State*, 663 S.W.3d 1, 4 (Tex. Crim. App. 2022); *Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007). Thus, to establish an entitlement to an article 38.23 instruction, there must be some evidence that creates a material dispute with the evidence supporting the offense at issue before the jury. *Chambers*, 663 S.W.3d at 11.

When an article 38.23 instruction is mandatory, the trial court’s failure to submit the requested charge to the jury is reversible error. *Bell v. State*, 881 S.W.2d 794, 802 (Tex. App.--Houston [14th Dist.] 1994, no pet.). Error properly preserved by an objection to the charge will require reversal “as long as the error is not harmless.” *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). The Court of Criminal Appeals has interpreted this to mean that any harm, regardless of degree, is



sufficient to require reversal. *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986).

The trial court erred when it denied Appellant a jury instruction under article 38.23 of the Texas Code of Criminal Procedure.

The trial court's reason for denying Appellant's request for an article 38.23 instruction was because an impermissibly suggestive out-of-court identification doesn't clearly violate the constitution. (RR VII 200-01). Furthermore, defense counsel's allegation that the investigating officers didn't follow proper procedures, which may have made the in-court identification impermissibly suggestive, was a legal issue, not a factual issue. (RR VII 200-01). The trial court also stated that it was not aware of "any specific cases where a charge under 38.23 has been used on an issue of identification." (RR VII 199-01). While the trial court was correct that an impermissibly suggestive out-of-court identification is a legal issue, it was incorrect to believe that only clear violations of the constitution command an article 38.23 instruction. Such an instruction is not limited to a certain type of constitutional or statutory violation; the instruction is warranted when the contested fact issue is material to the lawfulness of the challenged conduct in obtaining the evidence. *Chambers*, 663 S.W.3d at 4.

In *Chambers v. State*, the defendant was convicted of possession of a controlled substance after a police officer pulled him over for a traffic violation and found drugs in his vehicle. *Id.* at 3. At trial, the officer claimed that he initiated the stop because the defendant had no license plate when in fact, he did have a license plate. *Id.* The trial

court denied the defendant's request for an article 38.23 instruction. *Id.* The Court of Criminal Appeals found that the defendant had met the three requirements for submission of an article. 38.23 jury instruction: (1) he proved that there was an issue of fact—the record showed that the truck had a temporary license plate; (2) he proved the evidence on the fact issue was affirmatively contested—a conflict existed “between the officer’s testimony claiming that there was no license plate and the dashcam video and photos depicting a license plate”; and (3) he showed the fact issue was material to the lawfulness of the stop—the evidence showed that the traffic stop may have been unlawful. *Id.* at 4-5. The Court held that the defendant was entitled to an article 38.23 instruction. *Id.* at 5.

Like *Chambers*, Appellant meets all three requirements for an article 38.23 jury instruction. First, Kashifa testified that she was only shown the photo array, and not Appellant’s booking photo, as Rafiqua was shown. (RR V 248). However, when Deputy Broadhead’s bodycam footage was played during cross-examination, Kashifa agreed that she was pointing at something while standing next to the lead investigator and appeared to be saying, “that’s him.”<sup>12</sup> (RR VI 17-19, 37-38; State’s Exhibit 5). Kashifa also agreed that she wasn’t looking at the photo array when she made the gesture and statement. (RR VI 19-21). Thus, the record supports that Kashifa may not have been

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<sup>12</sup> Around the 27:32 mark of the bodycam footage, it is clear that Kashifa was shown something by Deputy Cote and Deputy Willrich prior to being shown a photo array. (State’s Exhibit 5). Kashifa points at what she is being shown, and it sounds like she said to the officers, “that’s him right here.” (State’s Exhibit 5). Around 28:38 in the video, Officer Cote takes out the photo array to show to Kashifa. (State’s Exhibit 5).

able to identify Appellant without being shown a photo of him minutes before picking him out of the photo array—an issue of fact before the jury. Thus, Appellant satisfied the first requirement.

Second, the evidence of Appellant’s identification was affirmatively contested. The record supports that a conflict existed between Kashifa’s testimony that she was not shown a photo of Appellant minutes before she picked him out in a photo array and the bodycam footage that showed her pointing at something and saying “that’s him” before being shown the photo array. Kashifa stated that the investigator was the person who showed her the photo array and identified him as being a black male, but it was actually Deputy Cote who showed her the photo array, who she identified as a white male. (RR VI 19). Deputy Cote testified that at some point before being shown the photo array, Kashifa points and says something that sounds like “that’s him” while standing with the investigator. (RR VI 190). Deputy Cote also testified that, as far as his knowledge, no other officer had shown Kashifa a photo of Appellant before the array, but again he admitted the bodycam footage showed that Kashifa points and said something like “that’s him” before he even took the array out of the folder. (RR VI 203-05). Thus, Appellant satisfied the second requirement because he proved that the evidence on the fact issue was affirmatively contested.

Lastly, Appellant showed that the fact issue was material to the lawfulness of Appellant’s out-of-court identification. Kashifa testified that she was not shown a photo of Appellant by an officer mere seconds before selecting Appellant in a photo

array. (RR V 248). The evidence showed, however, that she may have been shown a photo of Appellant by law enforcement immediately before she was shown a photo array that included Appellant. (RR VI 17-21, 37-38, 190, 203-05; State's Exhibit 5). The evidence also showed that a photo of Appellant was sent to other officers after Rafiqua identified Appellant as the painter of the Ibrahims' house. (RR VI 144). The record also supports that Rafiqua told Kashifa and the officers Appellant's name before Deputy Galvez went to interview her. (RR III 11-12).

The fact issue of whether Kashifa's pre-trial identification was impermissibly suggestive was a contested fact issue that was material to the lawfulness of the identification which satisfies the third requirement for entitlement to an article 38.23 instruction. *See Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (A due process violation may occur when “a pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law.”). Appellant was not required to prove that an actual due process violation had occurred for the instruction—he was only required to challenge the lawfulness of the conduct in obtaining the evidence against him. Thus, Appellant satisfied the third requirement.

Because Appellant met all three requirements as outlined in *Chambers*, he was entitled to an article 38.23 instruction regardless of the trial court denying his motion to suppress. *See Chambers* at 5 (“[W]e reiterate that the Article 38.23 instruction is a right

afforded to a defendant even after a trial court's motion to suppress ruling.”). Thus, the trial court erred in denying Appellant’s request for the instruction.

Appellant was harmed by the trial court’s denial of an article 38.23 instruction in the jury charge.

Appellant was harmed by the exclusion of an article 38.23 instruction in the jury charge. Without the instruction, the jury was not informed that it was allowed to consider whether Kashifa’s pre-trial identification of Appellant was impermissibly suggestive in violation of due process when Appellant’s identification was the only fact at issue before the jury. All evidence presented to the jury cast serious doubt as to whether Kashifa, Wasif, and Arif could identify Appellant—their testimony about Appellant’s identification contradicted one another. In fact, all three complaining witnesses described the suspect differently—their descriptions of the suspect’s clothing, hair and facial hair were all different. (RR III 6; RR V 139, 190-94, 230; RR VI 27, 55, 72)

Wasif stated that he had seen and spoken to the painter multiple times when he was inside the home, but the record revealed that Wasif only saw the painter for a total of thirty seconds. (RR V 138-44, 188). Similarly, Kashifa said she saw the painter multiple times in the home and spoke to him, only to later admit that she mainly saw the painter’s silhouette while he was facing the walls as he painted. (RR V 230-35, 251-52, 256-57). The record is also clear that Kashifa and Wasif conferred about their descriptions of the assailant’s clothing after the first trial, so that they both described

the assailant's clothing in the same way—specifically that the assailant wore a “snapback.” (RR V 207-08; RR VI 23-27).

Arif testified that after the offense, he was unable to identify the person that assaulted him until he was shown Appellant's photo by the prosecutor and his wife and only after being told that the photo depicted the person who had assaulted him. (RR VI 60-62, 107, 110-12). While in the hospital, Arif gave a statement to an officer that he would not be able to identify the person that assaulted him. (RR VI 107). At trial, Arif could not identify Appellant in the courtroom. (RR VI 55). The record also supports that Arif may never have been able to identify Appellant without the State showing him Appellant's photograph before and during trial—also an issue of fact before the jury.

Deputy Willrich's testimony highlighted that law enforcement did not investigate this case much at all, as he believed the Ibrahims' identification alone proved that Appellant committed the offense. (RR VI 243-44; RR VII 178). He testified that he knew Appellant was the right suspect because the Ibrahims told him that he had worked in their home for two weeks, when in fact, he had only worked in the home for three days. (RR VI 244; RR VII 178; RR VI 244-45). Deputy Willrich also testified that officers conducted a camera search in the area to find Appellant's vehicle; Appellant's car was not found to be in the area on the date of the offense. (RR VI 241-42). The

record reveals that law enforcement did not do much investigation in this case outside of showing Kashifa a photo array.<sup>13</sup>

The issue of Appellant's identification was the only fact at issue at his trial and he presented evidence that countered the State's assertion that Kashifa's identification of Appellant was lawful. No other evidence supported Kashifa's pre-trial identification. Appellant was harmed because the article 38.23 instruction was warranted; the contested fact issue—Appellant's pretrial identification—was material to the lawfulness of the challenged conduct in obtaining the evidence—that Kashifa's pretrial identification of Appellant may have been unlawfully obtained. *See Chambers*, 663 S.W.3d at 4.

### Conclusion

The trial court's refusal to provide the jury with the requested instruction prohibited the jury from considering the legality of the pre-trial photo array which then tainted the subsequent identification of Appellant as the perpetrator. Because the identity of the perpetrator was the only contested issue at trial, Appellant undoubtedly suffered some harm by the trial court's exclusion of an article 38.23 instruction.

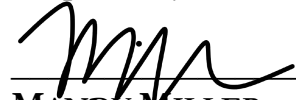
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<sup>13</sup> Rafiqua also did a photo array, but her pre-trial identification of Appellant was not presented to the jury, nor did she testify.

**PRAYER**

WHEREFORE, Appellant respectfully prays that this Honorable Court sustains his points of error, reverses his sentence, and remands the cause for a new trial.

Respectfully submitted,



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**MANDY MILLER**

Attorney for Ardis Broussard  
9722 Gaston Road, Ste. 150-257  
Katy, TX 77494  
SBN 24055561  
PHONE (832) 900-9884  
[mandy@mandymillerlegal.com](mailto:mandy@mandymillerlegal.com)

/s/ Kathleen Neilson /s/

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**KATHLEEN NEILSON**

Attorney for Ardis Broussard  
708 Main St., 10<sup>th</sup> Floor  
Houston, TX 77002  
SBN 24119561  
PHONE (713) 281-3752  
[kathleen@neilsonlaw.com](mailto:kathleen@neilsonlaw.com)



**CERTIFICATE OF COMPLIANCE**

In accordance with Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure,  
I hereby certify that appellant's brief, filed on March 17, 2025, has 9,831 words based  
upon a word count under MS Word.

  
\_\_\_\_\_  
Mandy Miller

**CERTIFICATE OF SERVICE**

Appellant has transmitted a copy of the foregoing instrument to counsel for the  
State of Texas via eservice on March 17, 2025 at:

Jessica Alane Caird  
Harris County District Attorney's Office  
caird\_jessica@hcdao.hctx.net

  
Mandy Miller

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Bar No. 24055561

paralegal@mandymillerlegal.com

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#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird		caird_jessica@dao.hctx.net	3/17/2025 5:31:34 PM	SENT