No. 14-24-00484-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

MORRIS HOLTON
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1738281
From the 262nd District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Not Requested

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Statement of the Case

On September 9, 2021, Morris Holton, III was charged by indictment with aggravated sexual assault. (C.R. at 25). On June 10, 2024, Holton entered a plea of "not guilty" and proceeded to trial by jury. (2 R.R. at 115). On June 12, 2024, with visiting Judge James Anderson presiding, the jury found Holton guilty of aggravated sexual assault as charged in the indictment. (4 R.R. at 240; C.R. at 466). Holton pleaded "True" to each of the indictment's enhancement paragraphs. (5 R.R. at 9-10; C.R. at 475). On June 13, 2024, the jury assessed punishment at 99 years in the Texas Department of Criminal Justice Institutional Division and a $10,000 fine. (5 R.R. at 223; C.R. at 474, 475). On June 24, 2024, Holton filed a *pro se* Notice of Appeal. (C.R. at 480). On June 25, 2024, the trial court certified Holton's right of appeal. (C.R. at 484). On June 27, 2024, Assistant Public Defender Scott Pope, of the Harris County Public Defender's Office, was appointed to represent Holton on appeal. (C.R. at 488). An Amended Notice of Appeal was subsequently filed in this Court on July 12, 2024.

Issues Presented

Issue One

Whether the trial court committed reversible error by overruling Holton's objection to the testimony of Officer Garcia regarding whether the complainant's allegations "warranted further investigation?"

Issue Two

Whether the trial court committed reversible error by overruling Holton's objections to the opinion testimony of Officer Garcia regarding the "scattered" statements from "a victim of sexual trauma?"

Issue Three

Whether the trial Court erred by failing to instruct the jury *sua sponte* regarding the standard of proof applicable to extraneous offenses and bad acts in the punishment phase of trial?

Statement of the Facts

The guilt/innocence phase of Holton's trial centered around one complainant, A.O. A.O. operated an unlicensed in-home massage business and alleged that an incident of aggravated sexual assault occurred after she invited Holton into her home for a massage appointment. The penalty phase of trial included extraneous offense allegations regarding three other complainants who were sex workers of varying degrees. One of them was a minor. No mitigation evidence was presented.

A.O.—the Complainant[1]

At the time of her testimony, A.O. was working as a real estate agent. (4 R.R. at 114). She is a mother who has family both in the area and in her country of origin. (4 R.R. at 115-116). A.O. stated that at the time of the incident she was employed full-time as a massage therapist, providing full-body reflexology massages that were not sexual in nature. (4 R.R. at 116-117). She was not licensed and said she had only been in business for "a couple of months." (4 R.R. at 117; 183). She did not register her cash business or file any tax returns. (4 R.R. at 190-191). It was her testimony that she advertised on multiple websites—including one called "Rub Ratings"—and had five or six phone numbers associated with her phone. (4 R.R. at 118, 183). She said she received a lot of messages in a day and had trouble keeping up with them. (4 R.R. at 118-119).

She said she was at the Galleria when she received a text from what was later established to be Holton's phone; she was only given the name "Mos." (4 R.R. at 121). She also noted that she used the name "Mercedes" to "protect [her] identity." (4 R.R. at 123). She said there was nothing personal behind her use of various terms of endearment like "hun and "love" in the text messages. (4 R.R. at 93, 123-124;

[1] Undersigned counsel uses her initials for the purpose of protecting her confidentiality. *See Ukwuachu v. State*, 613 S.W.3d 149, 151 n. 2 (Tex. Crim. App. 2020).

State Ex. 95). She stated she had not met Holton before March 16, 2021. (4 R.R. at 126).

A.O. testified that when Holton arrived, she took him to the massage room, asked him how long of a session he wanted and then said, "I'm going to collect first, let you get comfortable; and I'll be right with you." (4 R.R. at 129-130). She stated that she left so he could get undressed, and when she returned, he was not on the massage table. (4 R.R. at 130). A.O. stated at this point Holton pointed a gun at her. (4 R.R. at 130). It was her testimony that the gun he pointed at her looked like the one in State Exhibit 100. (4 R.R. at 130).

A.O. stated she was scared and in shock and that Holton next bent her over the massage table, and zip-tied her hands and feet with zip ties similar to those pictured in State Exhibit 28. (4 R.R. at 131). She testified that he walked her to the stairs and then carried her up the stairs on his shoulder. (4 R.R. at 132).

A.O. was not sure when or how the zip ties were removed, but guessed it was "[p]robably with scissors." (4 R.R. at 135). She did not remember whether she or Holton removed her clothes. (4 R.R. at 136). She did not recall him saying anything, but he held the gun. (4 R.R. at 136). She stated Holton pulled down his pants and made her perform oral sex. (4 R.R. at 137). She thought her feet were still tied at this point but did not remember if her hands were. (4 R.R. at 137). She was "petrified." (4 R.R. at 137). A.O. testified that she performed the act for '[a] couple

of minutes," and that he ejaculated. (4 R.R. at 138). It was her testimony that Holton wanted her to swallow the ejaculate, and when the prosecution asked if she did, she replied, "I think I had to, but I think I tried to spit it when he wasn't looking." (4 R.R. at 138).

A.O. identified State Exhibits 103 through 107 (explicit photographs) as pictures of her. (4 R.R. at 139). She stated that in an attempt to save her life, she offered him "everything I have in my bank account." (4 R.R. at 140).

A.O. stated Holton then began calling people to have someone come and sit with her while he went to the ATM. (4 R.R. at 142). She stated Holton took her to the downstairs bathroom—still tied up—let someone into the house and then told her someone was going to wait there with her. (4 R.R. at 146-147). She did not hear another voice but got a response after knocking. (4 R.R. at 148). A.O. made an in-court identification of Holton. (4 R.R. at 149).

A.O. stated she remembered Holton's hand tattoo. (4 R.R. at 150). She also testified that Holton took $2,000 from her account during multiple trips to the ATM—including one where she went with him. (4 R.R. at 150-151). She stated that he left her tied up while he went alone to the ATM and returned to her home to stay the night. (4 R.R. at 152-153). She stated that Holton carried her upstairs again and told her to shower. (4 R.R. at 154). A.O. did not recall whether she was zip-tied during the shower, but stated she was afterwards. (4 R.R. at 154). She stated Holton

was holding a weapon while she showered and when she was done, he told her to lie on the bed. (4 R.R. at 155).

A.O. was unnerved by Holton's conversations suggesting that maybe they could build a relationship. (4 R.R. at 156). She stated she engaged him in conversation trying to "get on his good side." (4 R.R. at 157). At some point, she said he took off her clothes and his penis penetrated her vagina. (4 R.R. at 159-160). She was afraid he was going to kill her. (4 R.R. at 160). She did not remember whether her clothes had been removed or just pulled down. (4 R.R. at 161).

Though she was unsure of the time, it was A.O.'s testimony that she eventually began to fall asleep in the early morning hours of March 17 because the incident had begun the previous day at about 4:00 p.m. (4 R.R. at 162). She stated that at about 5:30 a.m., Holton said it was time to go to the ATM and threatened her not to make a scene. (4 R.R. at 164). She stated that after she withdrew $1,000, he threatened her not to tell police and they returned to her home. (4 R.R. at 167).

It was A.O.'s testimony that as soon as Holton left, she called her niece and her best friend to tell them what happened. (4 R.R. at 169). Her friend advised her to go to a hotel and call the police. (4 R.R. at 169). Once she got to the hotel, she called her girlfriend. (4 R.R. at 170). Once her girlfriend arrived, they went to the hospital. (4 R.R. at 170).

A.O. stated she had a bruise on her ankle from the zip ties. (4 R.R. at 172; State Ex. 80). She also stated the white spots visible on the pillow in State Exhibit 18 were from when she spit out Holton's ejaculate. (4 R.R. at 174).

A.O. testified that when she saw the March 17th message from Holton that read, "Everything cool on that end correct?" she thought, "[Y]eah, everything's cool." (4 R.R. at 175). She also stated that when she was texting Holton's phone on March 20th, she did not realize it was him due to the large number of messages she received on her six different phone numbers. (4 R.R. at 175-176). A.O. called police when she realized she was texting with Holton's phone. (4 R.R. at 176).

On April 15th, A.O. received an Instagram message. (4 R.R. at 177). The person inquired about her other job in "network marketing." (4 R.R. at 178). She explained that she worked for something called "IM Academy, where they teach you how to trade foreign exchange." (4 R.R. at 178). A.O. stated that without realizing it was Holton, she agreed to have a business video call with him. (4 R.R. at 178-179). [A]s soon as I answered the call, he went like [indicating] and showed me like his teeth, like he wanted me to like – and I immediately recognized him, like immediately," A.O. added. (4 R.R. at 179). She was afraid he had been stalking her and called the police. (4 R.R. at 179).

A.O. testified that the white board pictured in State Exhibits 12 and 13 was for her network marketing job and not massage clients. (4 R.R. at 197-198).

According to A.O., the terms "in call" and "out call" are not in reference to sex work: "in call means that I do my sessions at my location. Out call means that I go to the person's location." (4 R.R. at 213).

Responding officer interviews A.O., goes to scene

On March 17, 2021, Houston Police Department Officer Cynthia Garcia was dispatched to Houston Northwest Hospital to investigate a sexual assault allegation. (2 R.R. at 129-130; State Ex. 1). After speaking with A.O., Garcia went to A.O.'s apartment to collect evidence. (2 R.R. at 138; 140).

The State published State Exhibit 2—a muted body worn camera video depicting Officers Garcia and Erives investigating at the complainant's home—the scene of the alleged incident. (2 R.R. at 142). The video shows A.O. walking Garcia and Erives through the home while they talk and collect evidence. (State Ex. 2).

On the first floor, Garcia observed a massage room and a dry erase board with client names and appointments. (2 R.R. at 143-144; State Ex. 10 & 13). Garcia stated that upstairs, "the bed is a mess, and there's – there was a pillow on the floor that appeared to have something that may look like semen." (2 R.R. at 144). Over objection, Garcia stated this pillow "was consistent to her statement given at the hospital." (2 R.R. at 145).

Garcia stated the other woman present with the complainant after the incident was her girlfriend—emphasizing that A.O. was in a "same sex relationship." (2 R.R.

at 145). The officers collected the bedsheets, a pillow, a towel, and the Arizona Tea can for potential analysis. (2 R.R. at 146-147; State Ex. 17 & 21). They retrieved the advertisement for her massage services, but those were not included in the State's evidence. (2 R.R. at 148; 165).

On cross-examination, Garcia testified that she came to a conclusion about the substance on the pillow based on her "training and experience." (2 R.R. at 155). However, she admitted that her training and experience did not include performing an analysis of substances, and that it was an assumption because she did not perform any analysis of the pillow. (2 R.R. at 156). Regarding the Arizona Tea can, Garcia was unsure whether anyone attempted to lift fingerprints from it. (2 R.R. at 161; State Ex. 21). State's Exhibit 27, a photograph of the complainant's inner ankle, depicts a red mark; Garcia was unsure whether any analysis was done on the wound. (2 R.R. at 164). Garcia agreed the complainant appeared calm while showing police around her apartment. (2 R.R. at 169).

Lead detective acquires items from Holton's car

Detective Jose Garza was the lead detective. (2 R.R. at 172). Believing he would find evidence relevant to the instant case, Garza obtained a search warrant for Holton's car about three months after the alleged incident. (2 R.R. at 173). Upon executing the search warrant, investigators found: "two cellular devices…pairs of gloves…zip ties…a beanie…a coat…a motel card…[and] a credit card." (2 R.R. at

173). Garza also obtained a search warrant for the phones they found. (2 R.R. at 173-174). Later, Special Agent Chapman got a second search warrant that was larger in scope. (2 R.R. at 174). Garza indicated that State's Exhibits 28-43 depict items recovered from the search of Holton's car. (2 R.R. at 175). He opined the zip ties pictured in State Ex. 28 had been fashioned into handcuffs. (2 R.R. at 177).

Holton's phone data retrieved

Before becoming a Texas Ranger, Garrett Chapman was a special agent in the Texas Department of Public Safety, Criminal Investigations Division. (2 R.R. at 185). He helped Houston Police Department with the search warrants for the instant case. (2 R.R. at 188). He turned the phones over to Department of Homeland Security Agent Prentice Lucas. (2 R.R. at 194). Lucas is a computer forensics analyst. (3 R.R. at 7). He explained that the data extraction process involves copying data stored on an electronic device. (3 R.R. at 8). Lucas identified State Exhibits 54 through 60 as the data extraction reports generated for the phones that were searched. (3 R.R. at 20-44).

DNA is analyzed

David Ferguson, retired officer formerly of the Houston Police Department, identified Holton by an article of clothing he was wearing. (3 R.R. at 49). Ferguson stated he was familiar with Holton because Holton was a witness in a 2011 homicide case he investigated. (3 R.R. at 48-49). He had obtained a search warrant for

Holton's DNA in the 2011 case, and collected it using buccal swabs. (3 R.R. at 49-50; State Ex. 62-65). Ferguson indicated he had no reason to believe the 2011 evidence had been tampered with, but he could not tell the jury where the items were or the conditions in which they had been kept for the last thirteen years. (3 R.R. at 58).

Kelsi Toombs is a "forensic nurse" or "Sexual Assault Nurse Examiner." (SANE) for the Texas Forensic Nursing Examiners. (3 R.R. at 61, 64). She testified regarding State Exhibit 66—A.O.'s medical forensic chart from the day of Toombs' examination: March 17, 2021. (3 R.R. at 82). The State also offered State Exhibits 67-80—a series of photographs of evidence Toombs collected. (3 R.R. at 83).

Toombs swabbed for DNA evidence and collected A.O.'s underclothes. (3 R.R. at 100; State Ex. 74). She also testified about the injury map she had prepared during the exam. (3 R.R. at 102; State Ex. 66). Regarding one suspected injury—a 1.3 cm x 4.7 cm linear red-purple contusion on A.O.'s ankle—A.O. is reported to have said, "This is from when he tied me up." (State Ex. 66; 3 R.R. at 104).

Mary Georges, forensic analyst at the Houston Forensic Science Center, receives data from the laboratory, interprets it, compares it to known references and makes reports. (3 R.R. at 131). One such report was State Exhibit 81—Laboratory Report 1—containing a number of swabs collected from A.O.'s person, as well as swabs from her clothing. (3 R.R. at 135).

Georges stated that hairs and fibers were collected from the underwear, and after testing on item 4.7 (A.O.'s underwear) indicated the presence of semen, swabs were taken. (3 R.R. at 139). She stated testing also indicated the presence of male DNA on item 4.1.1 (portion of vaginal swabs) and item 4.721 (swab from crotch of underwear). (3 R.R. at 139; State Ex. 81). Though male DNA was detected on item 4.3 (labia minora swabs) there was an insufficient amount for further testing. (3 R.R. at 139-140; State Ex. 81).

Laboratory Report #4—State Exhibit 82—reflects Georges' "comparison of [Holton]'s sample to the evidence samples." (3 R.R. at 143). Georges' testing of item 4.2.1 (portion of labia majora swabs) and item 4.7.2.1 (portion of swab from crotch of underwear) indicated "very strong support that Morris Holton is a contributor to the DNA from this item." (3 R.R. at 144-145, 146; State Ex. 82).

Bank records, photo array and phone records lead to charges

On March 29, 2021, Detective Garza received a call from an investigator at Capital One who sent him information about "unlawful transactions with the complainant's debit card." (3 R.R. at 165-166; State Ex. 83). The bank records reflect four transactions (two completed and two unsuccessful) at different ATMs for a total amount of $2,006.00. (State Ex. 83; 3 R.R. at 169-171). Garza stated the bank surveillance captured images of the suspect, whom he identified as Holton by a grenade tattoo on his hand. (3 R.R. at 172; State Ex. 83 & 84). Garza also noted

the suspect was wearing an article of clothing on his head that still had a tag attached from the Zara clothing store. (3 R.R. at 172). He opined it was connected to a Zara shopping bag in A.O.'s bedroom, as depicted in State Exhibit 21. (3 R.R. at 173). In addition to the surveillance photos of the suspect in disguise, the car he was driving was connected to the complainant by its license plate. (3 R.R. at 173; State Ex. 83 & 84). Additional ATM surveillance video showed the complainant driving her car to an ATM, appearing to make a transaction, and driving away while a passenger sits next to her. (State Ex. 87; 4 R.R. at 19-20).

In April of 2021, the complainant told Garza about a recent Instagram chat. (4 R.R. at 9). He subpoenaed the Instagram records connected to the phone number in question, and discovered the number was registered to someone named "Daniel Monsino." (4 R.R. at 11-12). After some investigation, Garza concluded "Daniel Monsino" was not a suspect. (4 R.R. at 13). A Google search of the phone number showed it was connected to a website entitled "callescort.org." (4 R.R. at 15; State Ex. 85). The search also contained an advertisement for "companionship." (4 R.R. at 15; State Ex. 85). The advertisement phone number matched the one on the Cellebrite report for Holton's Motorolla phone. (4 R.R. at 16; State Ex. 56). A subpoena to Verizon Wireless showed that same phone number was registered to a "Donnell Austin." (4 R.R. at 20). Garza believed this person to be a suspect based on the phone number and the complainant's physical description. (4 R.R. at 21).

Because of this information, Garza created a photo array including a photo of Austin. (4 R.R. at 22). Garza stated A.O. did not identify anyone in that photo array. (4 R.R. at 23). At this point in time, Garza had no other suspects and was still awaiting the results from the specimen collection kit. (4 R.R. at 23).

Garza obtained Instagram records for the account "FNgang713" which related to a verified phone number that also matched the phone number from the Cellebrite report. (4 R.R. at 26; State Ex. 88; State Ex. 56). He determined it was Holton's phone number, so he reviewed Holton's driver's license photo. (4 R.R. at 28). Garza stated the presence of a tear drop tattoo made him suspicious, so he sought a meeting with Holton. (4 R.R. at 28).

At the meeting, Garza took several photographs of Holton that became State Exhibits 89-92. (4 R.R. at 29). In the photos, Garza noted a gold tooth, and three tattoos like the complainant's description. (State Ex. 89-92; 4 R.R. at 30). When the prosecution asked Garza if he believed the visible hand grenade tattoo in the bank surveillance video and the Holton's hand grenade tattoo were the same, Garza said he did. (4 R.R. at 31; State Ex. 83 & 92).

Garza stated that after reviewing Laboratory Report #4—the DNA report comparing Holton's DNA to the evidence collected at the hospital—he filed charges against Holton. (4 R.R. at 33; State Ex. 82). After the charges were filed, Garza received a phone extraction report of Holton's phone from Special Agent Chapman.

(4 R.R. at 35; State Ex. 57). The first item tagged in the report was an outgoing phone call to one of A.O.'s phone numbers. (4 R.R. at 38; State Ex. 57).

Garza testified regarding State Exhibit 95—an extraction of phone messages recovered from Holton's phone. He noted a message sent from Holton's phone on March 16, 2021, at 7:55:56 PM, inquiring about whether "Adreana" was available for a massage. (4 R.R. at 49). "Adreana's" responsive message listed prices, an address, and asked when the sender wanted to schedule a meeting. (State Ex. 95). The message from Holton's phone read, "Four o clock and is this a hotel or what?" (State Ex. 95; 4 R.R. at 49). "Adreana" responded that the location was a "private address," and that she accepted cash. (4 R.R. at 50; State Ex. 95). The messages continued back and forth about accessing the building and setting the meeting for 4:00. (4 R.R. at 50; State Ex. 95).

The phone extraction report reflected another message exchange between "Adreana" and Holton's phone three days after the alleged incident. (State Ex. 95; 4 R.R. at 52-53). Garza did not believe "Adreana's" March 20, 2021, contact with Holton's phone was intentional. (4 R.R. at 53). This message exchange included listing hourly rates and setting up a hotel meeting. (4 R.R. at 53-54; State Ex. 95).

State Exhibit 96, a Cellebrite report containing instant messages, begins with a message from Holton's phone that reads: "Hey Incall or outcall." (4 R.R. at 56). Garza did not know to whom the message was sent, but he stated an "in call" meant

a call for prostitution services at the sex worker's location. (4 R.R. at 56-57). He later clarified that an "out call" meant the sex worker would meet the customer at the customer's location, rather than the other way around. (4 R.R. at 104).

Garza stated the metadata of a photograph sent from Holton's phone connected it to the complainant's address. (4 R.R. at 57). Garza agreed with the prosecution that the photograph "potentially could be the complainant." (4 R.R. at 57). This message exchange included queries about the receiver's location and escalated to violent rhetoric. (4 R.R. at 58-59; State Ex. 96).

Garza stated he did not believe that Holton had a job at the time of the incident. (4 R.R. at 60). Garza believed State Exhibit 100 depicted the tan handgun allegedly used by Holton during the incident. (4 R.R. at 61). He further believed that State Exhibit 101 depicted about $2,000 in cash—the amount taken from the complainant—though he never saw or counted any actual cash. (4 R.R. at 62, 107-108). Garza stated the phone's "metadata" indicated the photo in State Ex. 101 (the cash) was taken on March 18, 2021. (4 R.R. at 62). It was Garza's testimony that the location data from the sexually explicit photos taken on Holton's phone corresponded to the vicinity of the complainant's home, and he believed the photos were taken there. (4 R.R. at 62-65; State Ex. 102-105).

Other than taking a picture of the web page where A.O. advertised her services, Garza did not investigate the websites. (4 R.R. at 88). Garza "believe[d]"

he gave that photo to the district attorney's office; he did not have his case file with him to check. (4 R.R. at 88).

Referring to State Exhibit 95—the extracted text message conversations between A.O.'s phone and Holton's phone on March 16, 2021—Garza testified that the inquiry to "Mercedes" about a massage was referring to "one of the complainant's aliases." (4 R.R. at 89-90). He also noted the purpose of an alias is to maintain anonymity. (4 R.R. at 90). Garza did not believe using terms of endearment like "baby," "hun," or "love" meant the complainant knew the person to whom she was sending the messages. (4 R.R. at 93).

Summary of the Arguments

Police testimony that the complainant's statements "warranted further investigation" is just another way to say: the witness is telling the truth, the inconsistencies are meaningless, and the defendant is guilty. Similarly, investigating officers are not permitted to opine regarding the veracity of a complaining witness's statements. The tone of the officers' testimony combined was like an invisible thumb on the scales to overcome the burden of proving the elements of the offense beyond a reasonable doubt. This breaking of the rules reveals a strategy to make up the jurors' minds for them, rather than respecting them to reach their own reasonable conclusions based on the evidence. This strategic reassurance from the state affected Mr. Holton's right to a fair trial, and he should be granted a new trial.

The trial Court committed reversible error in the penalty phase of trial by failing to instruct the jury *sua sponte* regarding the standard of proof applicable to extraneous offenses and bad acts. There were three additional complainants at punishment, but for different reasons only one of them testified. The allegations were serious and highly inflammatory in nature and, considering the evidence presented, an extraneous offense instruction should have been provided. The harm that resulted from this omission warrants a reversal and new trial regarding punishment.

Issue One

> Whether the trial court committed reversible error by overruling Holton's objection to the testimony of Officer Garcia regarding whether the complainant's allegations "warranted further investigation?"

Relevant Facts

Officer Cynthia Garcia is identified in the State's Expert Notice as an expert in police investigations. (C.R. at 211). Defense counsel objected when the State concluded Garcia's testimony with the opinion that the complainant's allegation was "consistent with the evidence." (2 R.R. at 154).

> STATE: Officer Garcia, based on your training and experience, did you believe [A.O.'s] allegation warranted further investigation?
>
> DEFENSE COUNSEL: Objection, Your Honor. Again, this is not – the jury determines whether the crime took place and not the prosecution's question and not her statement. That's a jury determination.

> COURT: Overruled, Counsel. The response was "yes."
>
> STATE: And why was that?
>
> GARCIA: Because her statement was consistent with the evidence that we gathered.

(2 R.R. at 154).

Applicable Law & Standard of Review

> Texas Rule of Evidence 702 provides:
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

TX R EVID Rule 702.

"[E]xpert testimony that a particular witness is truthful is inadmissible under Rule 702." *Yount v. State,* 872 S.W.2d 706, 711 (Tex. Crim. App. 1993). Such testimony "crosses the line" between evidence that will genuinely assist the jury and that which usurps the jury's function to judge the credibility of witnesses. *Yount,* 872 S.W.2d at 708. Instead of experts, it is jurors who must draw "conclusions concerning the credibility of the parties in issue." *Yount,* 872 S.W.2d at 710; *see Brooks v. State,* 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) ("[T]he jury is the sole judge of the witnesses' credibility and the weight to be given their testimony.").

The place for witness opinions is limited whether it is a lay person or an expert. The Court of Criminal Appeals has opined that "a lay witness, or non-expert witness usually will not be permitted to state an opinion, because he is in no better position to form an opinion, based on the facts which he possesses, than is the jury. Both are equally well qualified. His opinion testimony adds nothing to the case. It is entirely superfluous." *Hopkins v. State*, 480 S.W. 2d 212, 218 (Tex. Crim. App. 1972). Sometimes an expert's opinion is also not helpful to the jury and, therefore, superfluous. In *Dietz v. Hill Country Rests., Inc*., 398 S.W. 3d 761, 765-66 (Tex. App. – San Antonio 2011, no pet.), it was held that the trial court did not abuse its discretion in excluding expert testimony about the cause of falls on a restaurant walkway; the jury would have been able to form its own conclusion about whether the walkway posed unreasonable risk of harm by looking at photographs and hearing testimony about other falls.

This Court has also held that it was error to allow a police officer to testify that the defendant's statement to him was not credible because it was an impermissible opinion on the truth or falsity of other testimony. *Taylor v. State*, 774 S.W. 2d 31, 34 (Tex. App. – Houston [14th Dist.] 1989, pet. ref'd. *See also, Smith v. State*, 737 S.W. 2d 910, 915-16 (Tex. App. – Fort Worth 1987, pet. ref'd.) (defendant could not ask a doctor his opinion about whether a child "had been raped or not" because the response would have amounted to an impermissible comment on the

child's credibility.) Garcia's testimony here, in response to the questions asked, expressed her opinion that the complainant was telling the truth. This was impermissible.

Harm

The erroneous admission of expert testimony is non-constitutional error. *Jessop v. State,* 368 S.W. 3d 653, 678 (Tex. App. — Austin 2012, no pet.); *see Coble v. State,* 330 S.W. 3d 253, 280 (Tex. Crim. App. 2010). Accordingly, any error must be disregarded unless it affected appellant's substantial rights. *Barshaw v. State,* 342 S.W.3d 91, 94 (Tex. Crim. App. 2011); *see* Tex.R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Coble,* 330 S.W.3d at 280. If the improperly admitted evidence did not influence the jury or had but a slight effect on its deliberations, such error is harmless. *Id.* In analyzing the erroneous admission of expert testimony, the court may consider, among other things: (1) the strength of the evidence of the appellant's guilt; (2) whether the jury heard the same or substantially similar admissible evidence through another source; (3) the strength or weakness of an expert's conclusions, including whether the expert's opinion was effectively refuted; and (4) whether the State directed the jury's attention to the expert's testimony during arguments. *See id.* at 286–88.

Analysis

Strength of the Evidence

There was not overwhelming evidence supporting a finding of guilt, even if the Court finds the evidence was legally sufficient based solely on the complainant's testimony. *See Motilla v. State*, 78 S.W.3d 352, 356–57 (Tex. Crim. App. 2002) (reiterating that "overwhelming evidence" of guilt is one consideration in deciding whether improper admission of evidence was harmful); *see also Green v. State*, 607 S.W. 3d 147, 153 (Tex. App. – Houston [14th Dist.] 2020, no pet.) (*citing Lovings v. State*, 376 S.W. 3d 328, 336 (Tex. App. — Houston [14th Dist.] 2012, no pet.) A victim's uncorroborated testimony, standing alone, is sufficient to support a sexual assault conviction).

Other Sources of Same Evidence

The state's evidence was consistent with A.O. being a sex worker. The issue in this case is whether this was consensual. Further, DNA is not conclusive on the issue of non-consent, which makes Garcia's bolstering more harmful. The Arizona Tea can was not tested for fingerprints or DNA. The white stain on the pillow was not tested. Garza stated that an "out call" meant a sex worker would meet the customer at the customer's location, rather than the other way around ("in call"). (4 R.R. at 104). While the state presented A.O. as someone who was not involved in sex work, later during the punishment trial, these cases are referenced globally in

that investigators Garza and Turner saw case similarities, including the fact that the complainants were all on "sexual websites." (5 R.R. at 122).

Strength or Weakness of Expert's Conclusions

Not only is Garcia's statement an inadmissible comment on the complainant's veracity, but the state's narrative does not line up with the inconsistencies presented by the facts in its case. Therefore, the opinion was not only inadmissible, but was also weak.

State closing arguments related to this testimony

In closing, the State continued to rely on the theme that A.O.'s statements to police "warranted further investigation" and were "consistent with the evidence" despite the lack of scientific analysis on certain identified items and other reasonable inferences regarding whether A.O. was engaged in sex work. The State argued:

> --She said, "The defendant made me swallow his semen, and I spit it out when he wasn't looking." And that's where she spit it out to. Who would know better than Andrea what that is? That's her room, and she was there with the defendant. So we know it's semen. (4 R.R. at 231).
>
> --These are the Ritz crackers and the Arizona tea that the defendant had, still in the same place. She had not moved them, consistent with her narrative of what happened. (4 R.R. at 231)
>
> --And you heard Andrea. Now there are some things she doesn't remember. (4 R.R. at 232)
>
> --Now this is what she told the nurse, the same set of facts that you heard Andrea talk about on direct of what happened. (4 R.R. at 233)

> --Now A.O. is not a prostitute. So she doesn't know what in call or out call means. (4 R.R. at 235).

Conclusion

Garcia specifically stated the complainant's report "warranted further investigation"…"[b]ecause her statement was consistent with the evidence that [they] gathered." (2 R.R. at 154). The statement is an opinion on the complainant's veracity and, by extension, Holton's guilt. Considering the state of the evidence, these impermissible statements had a substantial and injurious effect or influence in determining the jury's verdict, and Holton should be entitled to a new trial.

Issue Two

> Whether the trial court committed reversible error by overruling Holton's objections to the opinion testimony of Officer Garcia regarding the "scattered" statements from "a victim of sexual trauma?"

Relevant Facts

Officer Cynthia Garcia is identified in the State's Expert Notice as an expert in police investigations. (C.R. at 211). The prosecution asked her whether the complainant was articulate or "scattered" during their interview. "It was sort of scattered," Garcia stated. (2 R.R. at 132). Defense counsel's "nonresponsive" objection to Garcia's answer was overruled. (2 R.R. at 132). After Garcia responded that A.O.'s recitation of events was "scattered," the prosecution asked: "And based on your training and experience, would you expect that type of behavior to come from **a victim of sexual trauma**?" (2 R.R. at 133). Defense counsel responded,

"Objection, Your Honor. At this point this continued reference to a sexual assault, the jury determines whether its' a sexual assault." (2 R.R. at 133). The court overruled the objection and defense counsel began to reply, "It's an allegation. It certainly isn't a --." (2 R.R. at 133). The court interrupted: "It's not an objection. It's overruled. Proceed, sir." (2 R.R. at 133).

The prosecution continued to describe the complainant as "scatterbrained." "[W]hat are you trying to do in order to gather information from them if they are scatterbrained?" the state asked Garcia. (2 R.R. at 134). "We will try to have her acknowledge that we understand that a lot happened and have her slow down for us," Garcia replied. (2 R.R. at 134).

Applicable Law & Standard of Review

Holton reasserts the applicable law recited *supra* in Issue One regarding rulings on the admission of witness opinions and the appropriate harm analysis. A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion. *Tillman v. State,* 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). A trial court abuses its discretion only if its decision "lies outside the zone of reasonable disagreement." *Martinez v. State,* 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *Montgomery v. State,* 810 S.W. 2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). Appellate courts consider the ruling in light of what was before the trial court at the time the ruling was made and uphold the trial court's decision if it lies within

the zone of reasonable disagreement. *Billodeau v. State,* 277 S.W.3d 34, 39 (Tex. Crim. App. 2009).

Analysis

With this line of questioning, the state was trying to prove the complainant was being truthful, despite the "scattered" nature of her statements to police. This would be inadmissible opinion about the witness's truthfulness whether offered as a lay or expert opinion. *See Sandoval v. State*, 409 S.W. 3d 259, 292 (Tex. App. – Austin 2013).

Though *Sandoval* concerned a child witness, the principle involved is directly analogous to the instant case. In *Sandoval*, the State asked for the detective's opinion about the child complainant's interview at the child advocacy center:

> Q. Was there anything about her demeanor when you're looking at her body language or anything about that interview that led—that gave you any sort of—that raised any red flags again? I use that term a lot, but any red flags to you that she was somehow fabricating the story?

Sandoval at 291.

The defendant in *Sandoval* made the same objection as Holton: "Counsel is interfering with the providence [sic] of the jury, that's for the jury to make up their mind." *Sandoval v. State*, 409 S.W. 3d 259, 291 (Tex. App. 2013). The trial court overruled the objection, the prosecution repeated the question and the detective replied "No." *Sandoval* at 291.

The court of appeals agreed with Mr. Sandoval and held the detective's testimony was an inadmissible opinion on the truthfulness of the complainant's allegations. *Sandoval* at 291. Moreover, the court cited the detective's inadmissible opinion testimony as part of its harm analysis and, ultimately, reversed and remanded the conviction for a new trial. *Sandoval* at 306. *See also*, *Yount v. State,* 872 S.W.2d 706, 711 (Tex. Crim. App. 1993) and *Schutz v. State,* 957 S.W.2d 52, 59 (Tex. Crim. App. 1997).

Harm

Police officer testimony attempting to rationalize the "scatterbrained" nature of the complainant's statements is an impermissible opinion on the truthfulness of A.O.'s allegations. Nothing tips the scales in favor of a witness' testimony like a police officer's legal conclusion announced from the witness stand that a complainant was inconsistent *because she was "a victim of sexual trauma*." (2 R.R. at 133). Such a conclusion is a stamp of approval that a juror could not possibly ignore—which is why the State would elicit the opinion in the first place. Moreover, this bolstering was important because the complainant's testimony was replete with gaps and other questionable circumstances:

--Why did A.O. ask a client to get undressed for a "reflexology" massage?[2]

[2] (4 R.R. at 130); According to the Cleveland Clinic, "Reflexology is when pressure is applied to specific points of the foot…It's thought that different parts of the foot correlate with different

--Why did A.O. use terms of endearment with the allegedly unknown client in the text messages calling the person "hun" and "love?" (4 R.R. at 93).

--Why did she not remember what websites she used to advertise her unlicensed in-home massage business? (4 R.R. at 185).

--She was not sure when or how the zip ties would have been removed, but guessed it was "[p]robably with scissors." (4 R.R. at 135).

--She did not remember whether she or Holton removed her clothes. (4 R.R. at 136). –She used an alias because she did not think anyone "needs to know my actual name." (4 R.R. at 189).

--She did not register her business or file any tax returns regarding this cash business. (4 R.R. at 190-191).

Does the State take the complainants as they are? Yes. But offering improper opinions to overcome potential reasonable doubts based on the evidence is not due process. Having a police officer conclude that a witness is "scattered" because she "was a victim of sexual trauma" (2 R.R. at 133) removes that officer from the witness stand and puts them in the jury box. The trial court erred in allowing this testimony.

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organs and parts of the body." REFLEXOLOGY: WHAT IT IS AND DOES IT WORK? https://health.clevelandclinic.org/reflexology (last visited January 27, 2025).

Issue Three

Whether the trial court erred by failing to instruct the jury *sua sponte* regarding the standard of proof applicable to extraneous offenses and bad acts in the punishment phase of trial?

Relevant Facts

During the punishment phase of trial, the State presented evidence of extraneous offenses alleged to have been committed during distinct occasions against three complaining witnesses. There were no objections to the punishment jury charge. (5 R.R. at 206). Holton pleaded "True" to each enhancement paragraph. (5 R.R. at 9-10; C.R. at 475). At the time of trial, Holton had eight additional charges pending and had been on parole when these charges were filed. (5 R.R. at 11).

Complainant K.C.

Trista Gleason of the Texas Forensic Nurse Examiners performed a SANE exam of K.C. (5 R.R. at 33; State Ex. 125). Defense counsel had no objection to State Ex. 125—Medical Forensic Chart for K.C. (5 R.R. at 34). According to the medical forensic chart, the complainant stated she was tied up with zip ties, robbed, sexually assaulted in various ways and possibly photographed and video recorded. (5 R.R. at 35-39; State Ex. 125). Gleason collected numerous swabs from K.C.'s person. (5 R.R. at 40; State Ex. 126-132).

Houston Forensic Science Center analyst Mary Georges authored the September 2, 2021, laboratory report that became State Exhibit 135. (5 R.R. at 57).

The report related to the zip ties from the case of complainant K.C. (5 R.R. at 58; State Ex. 135). Georges' testing of Item 2.3.1 (portion of perineal swabs) "provided moderate support that Morris Holton is not a contributor to the DNA from this item." (5 R.R. at 58-59; State Ex. 135). Holton's DNA was excluded from the Fraction 1 portion of the vulva swabs. (5 R.R. at 59; State Ex. 135). However, Georges' testing indicated moderate support that Holton was a DNA contributor to the Fraction 2 portion of vulva swabs. (5 R.R. at 59; State Ex. 135). Testing showed "very strong support" that Holton was a DNA contributor to the Fraction 2 portions of both the left and right breast swabs. (5 R.R. at 60-61; State Ex. 135). Georges found "very strong support" for the conclusion that Holton was a DNA contributor to portions of swabs from five of the seven zip ties; "moderate support" was found in one of the seven zip ties.[3] (5 R.R. at 61-State Ex. 135).

Detective Garza got involved with K.C.'s case because of a "similar MO and also the same phone number being used." (5 R.R. at 71). He believed the same suspect was involved. (5 R.R. at 71). Garza spoke with K.C. and collected surveillance video from the location of the alleged incident: K.C.'s room at the Studio 6 Hotel in Clear Lake. (5 R.R. at 72, 74; State Ex. 137 & 138).

[3] Though it was Georges' testimony that she found "very strong support" for the presence of Holton's DNA in "six of the seven zip ties," the laboratory report indicates that one of those six results provided only "moderate support." (5 R.R. at 64; State Ex. 135).

The footage shows the alleged suspect arriving at the hotel, entering the room and leaving. (5 R.R. at 75-78; State Ex. 138). Garza believed the suspect pictured was Holton, but admitted he could not identify the defendant. (5 R.R. at 76, 78). He collected more Instagram records which led him to another phone number that belonged to Holton. (5 R.R. at 80). He learned Holton was on parole for aggravated robbery in a case with facts like those of A.O. and K.C. (5 R.R. at 80-81). Garza initiated the issuance of a "blue warrant,"[4] Holton was arrested at a meeting with his parole officer and his car was searched. (5 R.R. at 83).

Garza interviewed Holton in jail, and he stated Holton denied knowing A.O. and K.C. and declined to give a buccal swab. (5 R.R. at 85). Garza also stated K.C. identified Holton in a photo array. (5 R.R. at 86).

Complainant A.S.

Houston Police Officer Dana Turner was assigned an alleged robbery investigation on April 9, 2021. (5 R.R. at 121). Detective Garza contacted Turner about his investigation and Turner saw similarities in the motive, the time of the incidents, the race and gender of the suspect and the fact that the complainants were all on "sexual websites." (5 R.R. at 122). On July 1, 2021, Houston Police Officer John Montgomery showed A.S. a photo array. (5 R.R. at 115; State Ex. 167). A.S.

[4] A blue warrant is an arrest warrant for a person who is "out on parole who is believed to have committed another offense." (5 R.R. at 82).

made a "tentative" identification of the person pictured in position #4, and she identified Holton in court by an article of clothing he was wearing. (5 R.R. at 117, 139-140, 161; State Ex. 167).

A.S. stated she met Holton on April 4, 2021. (5 R.R. at 139). A.S. had an OnlyFans account—a website where a creator can post pictures and videos, and followers can leave tips and send messages. (5 R.R. at 140-141). It was on this platform that "Carlos" messaged her. (5 R.R. at 141). A.S. stated that since OnlyFans is "really strict with like doing things that we're not supposed to on the site" she and "Carlos" exchanged phone numbers. (5 R.R. at 141-142). She stated "Carlos" wanted to give her money in person because he liked her online content; there was no agreement for or discussion about meeting for sex. (5 R.R. at 142-143). She met Holton in the hotel lobby and, though she had not planned on anything further, she allowed him to follow her to her room. (5 R.R. at 145).

She stated once they were inside the room, Holton gave her the money. (5 R.R. at 147). She put it away and the next thing she knew, "the defendant came out pointing a gun at my head and told me that I need to do everything that he says, and I won't get hurt." (5 R.R. at 147). She said the handgun pictured in State Exhibit 100 appeared to be the weapon Holton pointed at her. (5 R.R. at 148). It was her testimony that when she made a run for it, Holton struck her on the head with the

gun and she fought back against his attempts to choke, and zip tie her. (5 R.R. at 148, 150, 152; State Ex. 151 & 153).

Complainant M.C.

Texas Ranger Garrett Chapman became involved in the case because when Holton was arrested, "he was in the presence of a 16-year-old juvenile that was suspected to be a sex-trafficking victim." (5 R.R. at 183; State Ex. 181, 182). Chapman stated he was present during M.C.'s forensic interview at the Child Advocacy Center (CAC) and that she reported being a victim of human trafficking. (5 R.R. at 186-187).

After the CAC interview, Chapman interviewed Holton. (5 R.R. at 187). According to Chapman, Holton stated "he believed [M.C.] to be an adult and that they were in a – an economic and sexual contact…" (5 R.R. at 187; 197).

A SANE exam was performed on M.C. (5 R.R. at 187; State Ex. 180). Chapman read aloud various details from the Medical Forensic Chart, including that she met Holton at a strip club, had exchanged sex for money in the past and had sex with Holton. (5 R.R. at 189-190; State Ex. 180). There were no objections to this testimony.

The prosecution published State Exhibits 170 and 171—reservation records and surveillance video from a Scottish Inn hotel. The purported affidavit is not signed or dated. As State Exhibit 171 plays, Chapman narrated. (5 R.R. at 194). It

was his testimony that the video showed Holton and M.C. coming out of and going into a hotel room. (5 R.R. at 194-195).

Chapman reviewed State Exhibit 61, the Cellebrite sub-report he created by downloading information from Holton's phone. (5 R.R. at 195-196). It was Special Agent James Sears' testimony that he examined the contents of Holton's phone and discovered videos of M.C. and Holton having sex. (5 R.R. at 199, 202; State ex. 177 178 & 179). Chapman stated his review of the conversations between M.C.'s phone and Holton's phone, and statements M.C. made during the SANE exam resulted in Holton being charged with "trafficking of a child/sex assault of a child." (5 R.R. at 196-197).

Defense case

Defense counsel presented no mitigation evidence during the penalty phase of the trial but did make a closing argument. (5 R.R. at 209-216).

Applicable Law & Standard of Review

A review of alleged jury-charge error involves a two-step analysis. *Ngo v. State*, 175 S.W. 3d 738, 743–44 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W. 2d 726, 731–32 (Tex. Crim. App. 1994). First, the Court must determine whether the charge contains any actual error; second, if there is actual error, it must determine whether the error resulted in sufficient harm to require reversal. *Ngo*, 175 S.W.3d at 744; *Abdnor*, 871 S.W.2d at 731–32. If the defendant preserved the error by timely

objecting to the charge, an appellate court will reverse so long as the defendant demonstrates that he suffered some harm. *Sakil v. State*, 287 S.W. 3d 23, 25–26 (Tex. Crim. App. 2009). By contrast, if a defendant does not properly preserve error by objection, any error in the charge "should be reviewed only for 'egregious harm' under *Almanza*." *Madden v. State*, 242 S.W.3d 504, 513 (Tex. Crim. App. 2007) (citing *Almanza v. State*, 686 S.W. 2d 157, 171 (Tex. Crim. App. 1984)).

Sua Sponte Duty

Article 36.14 of the Code of Criminal Procedure requires the trial judge to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." *Delgado v. State,* 235 S.W.3d 244, 247 (Tex. Crim. App. 2007). The Texas Code of Criminal Procedure article 37.07, section 3(a)(1) provides,

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1).

Because "Article 37.07 is 'the law applicable' to all non-capital punishment proceedings[,] . . . the trial judge must *sua sponte* instruct the jury at the punishment phase concerning that law, including the fact that the State must prove any extraneous offenses beyond a reasonable doubt." *Delgado v. State*, 235 S.W.3d 244, 252 (Tex. Crim. App. 2007); *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). The trial court has the responsibility to provide a reasonable-doubt instruction *sua sponte*. *See Huizar*, 12 S.W.3d at 483–84. It is error if the trial court fails to so instruct the jury *sua sponte*. *Id.*

Analysis

In this case, despite the introduction of evidence of Holton's alleged commission of additional extraneous acts and offenses, the court's charge did not include an instruction regarding the appropriate burden of proof necessary before the jury could consider them in assessing punishment. (C.R. at 467-472). This was error.

Harm

The trial court did not include a reasonable doubt instruction in the punishment charge; therefore, error was committed. In this case because trial counsel did not object to the charge this court is to review the error under the "egregious harm" standard of *Almanza*. *Huizar v. State,* 12 S.W.3d 479, 485 (Tex. Crim. App. 2000). (5 R.R. at 206). Egregious harm consists of those errors that

affect the very basis of the case, deprive the defendant of a valuable right, vitally affect a defensive theory, or make the case for punishment clearly and significantly more persuasive. *Lee v. State,* 29 S.W.3d 570, 578 (Tex. App. – Dallas 2000, no pet.); *Matthews v. State*, 999 S.W.2d 563, 565 (Tex. App. – Houston, [14th Dist.] 1999, pet. ref'd). The harm which must be considered is the impact of the omission of a reasonable doubt instruction in the charge. *Ellison v. State*, 86 S.W.3d 226, 228 (Tex. Crim. App. 2002). The Court of Criminal Appeals has recognized that "absent such [an] instruction, the jury might apply a standard of proof less than reasonable doubt in its determination of the defendant's connections to such offenses and bad acts contrary to [Texas Code of Criminal Procedure art. 37.07] section 3(a)." *Huizar* at 484. In determining the degree of harm, the court is to look to the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information from the entire record. *Hutch v. State,* 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

Entire punishment charge

The punishment jury charge consists of instructions regarding three main areas: 1) the range of punishment 2) parole eligibility and 3) general instructions (C.R. at 467-472). The language in the charge regarding the burden of proof instructs the jury as follows:

> The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

> The prosecution has the burden of proving the allegations in the **penalty paragraphs** beyond a reasonable doubt. The prosecution does not have to prove the allegations in the **penalty paragraphs** beyond all possible doubt. The prosecution's proof must exclude all reasonable doubt concerning the **penalty paragraphs**.

(C.R. at 471) (emphasis added).

This language does not mention what the State's burden is or how it would apply to the alleged *extraneous offenses*. Additionally, immediately thereafter, the charge includes the following instruction:

> You are further instructed that in fixing the defendant's punishment, which you will show in your verdict, *you may take into consideration all the facts shown by the evidence admitted before you in the full trial* of this case and the law as submitted to you in this charge.

(C.R. at 471) (emphasis added). This instruction explicitly grants permission to consider the extraneous offenses without limitation. It is presumed the jury understood and followed the court's charge absent evidence to the contrary. *Hutch v. State,* 922 S.W.2d 166, 172 (Tex. Crim. App. 1996).

In contrast, the following charge is contained in the Texas Criminal Jury Charges regarding extraneous offenses:

§ 4:400 EXTRANEOUS OFFENSES

> The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, in determining the proper punishment for the offense for which you have found the defendant guilty. You cannot consider the testimony for any

> purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other acts, if any, were committed.

Elizabeth Berry & George Gallagher, § 4:400 EXTRANEOUS OFFENSES, Texas Crim. Jury Charges § 4:400 (2023).

It is likely the jury took the absence of a standard as permission to consider the evidence in whatever manner it chose and that that it was not bound by the high standard of beyond a reasonable doubt as it was during the guilt/innocence phase. Here the charge not only fails to ameliorate the error but increases the likelihood the jury considered the extraneous matters without requiring the State prove them beyond a reasonable doubt.

State of the Evidence

Incident of Complainant A.O.

Though the jury charge referenced "all the facts shown by the evidence admitted before you in the full trial," (C.R. at 471) the state did **not** re-offer evidence during the punishment phase that was related to the underlying offense of conviction.

Incident of Complainant K.C.

K.C. was deceased at the time of trial. The DNA report indicated support for the proposition that Holton was a DNA contributor to the items tested; (State Ex. 135).

Incident of Complainant A.S.

This extraneous allegation included a "tentative" photo array identification, (5 R.R. at 117; State Ex. 167) an in-court identification, and testimony about the incident. (*See supra*).

Incident of Complainant M.C.

M.C. did not testify and was, therefore, not subject to cross-examination and confrontation about these allegations. Though objectionable, defense counsel did not raise an objection to hearsay and the opinion testimony of Chapman regarding his legal conclusion that M.C. was a "victim of human trafficking" (5 R.R. at 186-187). Moreover, defense counsel raised no objection to hearsay and statements about M.C. making an "outcry" even though her statements would not have properly fallen under the Texas Code of Criminal Procedure 38.072 hearsay exception.[5] Defense counsel raised no objection to hearsay statements contained in the SANE report that were not for the purpose of medical diagnosis or treatment and, therefore, not a

[5] Article 38.072 is an outcry exception to the hearsay rule. *Chapman v. State*, 150 S.W.3d 809, 812 (Tex. App. – Houston [14th Dist.] 2004, pet. ref'd). Article 38.072 of the Texas Code of Criminal Procedure exempts from the hearsay rule certain statements made by a child 14 years of age or younger who is the complainant of certain offenses, including sexual assault. To be admissible in the punishment phase of a trial, the statement must describe the alleged offense and be made by the person against whom the act was committed. *Id*. at § 2(a)(1)(B); § 2(a)(2) & (3). The witness testifying about the outcry must be "the first person, 18 years of age or older, other than the defendant, to whom the child…made a statement about the offense…" *Id*. § 2(a). (*See also, Rosales v. State*, 548 S.W. 3d 796, 806 (Tex. App. – Houston [14th Dist.] 2018, pet. ref'd) (State has burden to establish elements of art. 38.072 in order for testimony to be admissible).

proper Texas Rule of Evidence 803 exception. (5 R.R. at 189-190; State Ex. 180).

In addition, the state relied on objectionable exhibits from the Scottish Inn:

> **State Ex. 170** – The purported Business Records Affidavit is not signed or dated by an affiant. It has a Harris County District Clerk filing date of April 21, 2023, but the actual reservation records show a receipt date of April 24, 2023.
>
> **State Ex. 171** – (Scottish Inn surveillance) The purported business Records Affidavit does not list the alleged surveillance video as something actually included in the responsive documents. The "affidavit" only lists "3 pages of records" and includes the following handwritten statement: "Video recordings of the guest in the public area of the hotel are also available upon request."

The state offered cell phone videos (State Ex. 177, 178, 179) believed to depict Holton and M.C. having sex. It does not appear that the jury asked to review these exhibits. (C.R. at 455-459—Jury Notes 1-4). Lastly, there was no mitigation evidence offered by defense counsel during punishment.

Arguments of counsel

Closing argument by both sides was relatively short. The State's argument was powerful and capable of inciting the jury so they would make a punishment decision based on emotions and cause them to hold Holton responsible for numerous crimes other than the one for which they were to assess punishment.

The state's closing punishment argument began with: "May it please the Court? Serial rapist." (5 R.R. at 216). The total amount of time spent in closing argument consisted of about five pages in the record. (5 R.R. at 216-221). The

allegations summarizing the case of A.O. consisted of two written paragraphs—or about ten percent. (5 R.R. at 216, 219). The balance of time related specifically to the extraneous offenses. (5 R.R. at 216-221).

Conclusion

The lack of a beyond a reasonable doubt instruction egregiously harmed Holton in that it made the case for punishment significantly more persuasive. The State has the burden of proof to prove extraneous offenses at punishment beyond a reasonable doubt. They failed to meet their burden and the trial court's failure to advise the jury of the State's burden allowed the jury to assess punishment using the extraneous offenses when the evidence did not establish Holton committed them beyond a reasonable doubt. Furthermore, the charge as given did not ameliorate the harm but instead implicitly encouraged the jury to consider the evidence without limitation. Had the jury been given the proper charge it is likely they would have followed the instruction and disregarded the testimony regarding M.C. It is also likely without considering the extraneous offenses the jury would have assessed a sentence less than ninety-nine (99) years. Accordingly, this Court should find that Holton suffered egregious harm as a result of the trial court's failure to include the instruction and should reverse and remand for a new trial on punishment.

PRAYER

For these reasons, Holton respectfully prays that this Honorable Court reverse the trial court's judgment of conviction and/or sentence and remand it for further proceedings. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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Certificate of Service

A true and correct copy of the foregoing brief was e-filed with the Fourteenth Court of Appeals and was served electronically upon the Appellate Division of the Harris County District Attorney's Office on January 30, 2025.

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