No. 01-24-00218-CR

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

TERRANCE D. McCARTER
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1712102
From the 178th District Court of Harris County, Texas

APPELLANT'S BRIEF

Alexander Bunin
Chief Public Defender
Harris County, Texas

Nicholas Mensch
State Bar of Texas No. 24070262
Assistant Public Defender
Harris County, Texas
1310 Prairie Street, 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

Attorney for Appellant

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Terrance D. McCarter TDCJ# 02495678 Cotulla Unit 610 FM 624 Cotulla, Texas 78014
TRIAL COUNSEL FOR APPELLANT:	Patti Sedita State Bar of Texas No. 00787484 Sedita Law Group 3 Sugar Creek Blvd, Suite 100 Sugar Land, Texas 77478
APPELLATE COUNSEL FOR APPELLANT:	Nicholas Mensch State Bar of Texas No. 24070262 Assistant Public Defender Harris County, Texas 1310 Prairie Street, 4th Floor Houston, Texas 77002
TRIAL COUNSEL FOR THE STATE:	Sara Siegel Delago State Bar of Texas No. 24126422 Brad Morse State Bar of Texas No. 24095833 Assistant District Attorneys Harris County, Texas 1201 Franklin Street, 6th Floor Houston, Texas 77002

APPELLATE COUNSEL FOR THE STATE:	Jessica Caird State Bar of Texas No. 24000608 Assistant District Attorney Harris County, Texas 1201 Franklin Street, 6th Floor Houston, Texas 77002
PRESIDING JUDGE:	Hon Mark Ellis (Visiting Judge) 178th District Court Harris County, Texas 1201 Franklin Street, 16th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On May 20, 2021, a Harris County grand jury returned an indictment charging Appellant with the offense of indecency with a child alleged to have occurred on or about February 25, 2021. (C.R. at 24). On March 14, 2024, the trial court found Appellant guilty as charged in the indictment. (2 R.R. at 143). On that same date, the trial court assessed Appellant's punishment at 12 years in the Texas Department of Criminal Justice – Institutional Division. (C.R. at 147-149; 2 R.R. at 150). The trial court certified Appellant's right of appeal and he timely filed his notice of appeal on March 14, 2024. (C.R. at 146, 152-153).

STATEMENT REGARDING ORAL ARGUMENT

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

ISSUES PRESENTED

1. **Whether Appellant's effectively waived his constitutional right to a jury trial, as the record fails to establish an express, knowing, and intelligent waiver on the part of the Appellant?**

2. **Whether the Child Abuse Prevention fee should be removed from the bill of costs, as the former provisions of Article 102.0186 do not apply because Appellant's offense allegedly occurred after January 1, 2020?**

3. **Whether the trial court's judgment should be modified to remove the $100 Child Abuse Prevention fine, as it was not orally pronounced by the trial court?**

STATEMENT OF FACTS

Deputy Jerome Brown was employed at the Harris County Precinct 4 Constable's Office at the time of the alleged incident. (2 R.R. at 13). On February 25, 2021, he was dispatched to an apartment complex where he made contact with the Appellant in a stairwell. (2 R.R. at 16-17; 3 R.R. State's Ex. 4). This initial contact consisted of giving the Appellant orders to place his hands behind his back. (2 R.R. at 17). Appellant was detained in handcuffs and Deputy Brown described Appellant as acting erratic and mumbling gibberish and sentences that were inappropriate at the time and place. (2 R.R. at 17). Appellant was confrontational with deputies, failed to obey commands, and failed to show his hands. (2 R.R. at 24). After Appellant's compliance was obtained, he continued to utter strange

sentences regarding either God or the devil. (2 R.R. at 25). Deputy Brown testified that they had previous contact with the Appellant on multiple occasions, and it was common for him to act in this manner. (2 R.R. at 25). Deputy Brown then went into the apartment and made contact with the Complainant and the other witnesses. (2 R.R. at 18). Deputy Brown spoke with the Complainant. (2 R.R. at 20-21). He described the Complainant's demeanor as very scared, physically upset, shaken, distraught, sad, and confused. (2 R.R. at 21). Complainant told Deputy Brown that while she was sleeping on the sofa earlier in the evening, Appellant, her uncle, put his hands down under her pants and touched her over her underwear. (2 R.R. at 21). As part of his work on this case, Deputy Brown collected the Complainant's clothing for evidence. (2 R.R. at 23). Complainant was transported to Texas Children's in the Woodlands for examination. (2 R.R. at 23).

D.M. is the Appellant's older sister. (2 R.R. at 29). She testified that the Complainant was her granddaughter. (2 R.R. at 30). D.M. testified that she raised the Appellant from age seven, as their parents died. (2 R.R. at 30). Appellant was living with her on February 25, 2021, the night of the alleged incident, and the Complainant was also spending the night along

with D.M.'s other grandchildren (2 R.R. at 32-33, 38). Complainant was 13-years old and she was sleeping on the sofa in the living room. (2 R.R. at 33). Complainant came into D.M.'s room that night crying, shaking, and trembling. (2 R.R. at 34). She told D.M. that Appellant put his fingers in her pants, outside of her panties. (2 R.R. at 34). In addition, she told D.M. that Appellant told her that he had wanted to fuck her, this and that. (2 R.R. at 46). D.M. told the Complainant to lock herself in her bathroom and D.M. went and put her other grandchildren in her bedroom. (2 R.R. at 34-35). Appellant was standing in the living room holding the blanket the Complainant was sleeping on, and D.M. asked him "what are you doing?" (2 R.R. at 35). Appellant responded by saying he was living with the wrong people. (2 R.R. at 35). D.M. did not say anything further to the Appellant and he went onto to the porch and started rapping. (2 R.R. at 35). D.M. called the police and the Complainant's father. (2 R.R. at 35). On cross-examination, D.M. testified that Appellant may have been drinking that night and was playing music on the TV. (2 R.R. at 39). The TV he was watching was in the living room where the kids were at. (2 R.R. at 39). D.M. believed that Appellant needed some sort of mental health treatment but he would always refuse. (2 R.R. at 41). He was not on any medication

at the time of the alleged incident. (2 R.R. at 41). D.M. never thought anything like this would occur. (2 R.R. at 44).

T.M. is the Appellant's nephew and D.M. is his mother. (2 R.R. at 50). He considers Appellant more like a brother than an uncle since they are so close in age. (2 R.R. at 50). He was raised alongside the Appellant. (2 R.R. at 50). T.M. is also the Complainant's father. (2 R.R. at 50). Complainant would have been 13-years old in 2021. (2 R.R. at 53). In February 2021, there were times T.M. would drop off his kids, including the Complainant, at D.M.'s apartment. (2 R.R. at 53-54). At that time, Appellant was also living with D.M. (2 R.R. at 53). On February 25, 2021, he was at work. (2 R.R. at 54). While at work, he received a phone call from his mother to come to her house. (2 R.R. at 55). He knew what happened based on this phone call. (2 R.R. at 58). When he arrived, T.M. saw the cop cars on his way to the apartment and saw Appellant with the police. (2 R.R. at 55). Appellant was being very belligerent, something he had seen before. (2 R.R. at 59-60). He then went inside the apartment and saw his three older children and his mother. (2 R.R. at 55). T.M. described their demeanors as being shaken, as he just felt the fear in their eyes. (2 R.R. at 55-56). Complainant was nervous, shaking, and she was crying. (2 R.R. at 56). He

started holding the Complainant and was checking on his other children until an officer came and spoke with him. (2 R.R. at 57). In addition, he followed EMS when they took the Complainant to the hospital and stayed with her while she was being examined. (2 R.R. at 59). A week later, T.M. took the Complainant to the Children's Assessment Center. (2 R.R. at 61).

Complainant's younger brother testified that in 2021, he would stay at his grandmother's apartment usually once every two or three weeks for a night or two. (2 R.R. at 67). In 2021, he was 10 years old, going on 11. (2 R.R. at 69). One night in 2021 while staying with his grandmother, he was sleeping on a mattress in the middle of the living room. (2 R.R. at 70). His sisters, including the Complainant, were sleeping on the couches. (2 R.R. at 70). D.M. was sleeping in her room. (2 R.R. at 70). He remembered waking up when D.M. opened her door and she Appellant watching TV and seeing his sisters. (2 R.R. at 71). After Appellant was done watching TV, he went over to the Complainant and said something to her. (2 R.R. at 71). He saw Complainant crying and afterwards he saw something Appellant did, but he did not know exactly what Appellant did to the Complainant. (2 R.R. at 71). Appellant then went into to his room. (2 R.R. at 72). Complainant's younger brother was scared, as he did not want Appellant near her. (2 R.R. at 74).

After seeing Appellant over the Complainant, he saw the Complainant crying. (2 R.R. at 75).

At the time of trial, Complainant was 16-years old. (2 R.R. at 80). She testified that in 2021 she would have been 13-years old. (2 R.R. at 85). In 2021, Appellant was living with D.M., her grandmother. (2 R.R. at 86). When she and her siblings would go to her grandmother's apartment, they would sleep in the living room. (2 R.R. at 86). Complainant always slept on the couch. (2 R.R. at 87). On the night of the alleged incident, she was staying at her grandmother's with her siblings. (2 R.R. at 87). After going to sleep around midnight, she woke up because the TV was loud and Appellant was talking really loudly. (2 R.R. at 88-89). When she woke up, she saw her brother had awakened and the Appellant was talking to himself. (2 R.R. at 90). Complainant could not go back to sleep. (2 R.R. at 90). Complainant was whispering with her brother while the Appellant was going inside and outside of the apartment. (2 R.R. at 90). Appellant then started talking to the Complainant while she was laying down on the couch, but she did not remember what he was talking to her about at that point. (2 R.R. at 90-91). However, she recalled that Appellant was saying inappropriate stuff about the Complainant's mother. (2 R.R. at 92). Complainant was a bit freaked

and weirded out. (2 R.R. at 92). Appellant then told her to give him a kiss and she did. (2 R.R. at 92). After that, Appellant put his hands in her pants on top of her private parts, but not in her underwear. (2 R.R. at 93). Complainant believed Appellant was saying something but she could not comprehend what it was. (2 R.R. at 94). She was scared to get up and was crying. (2 R.R. at 94-95). When Appellant removed his hand, he mentioned that he had a gun under his bed and that he would go get it if she were to get up. (2 R.R. at 94). She then ran into her grandmother's room. (2 R.R. at 95).

Appellant testified that he was six years old when he started living with his sister, D.M., after his mother died. (2 R.R. at 103). He did not look to his sister as a mother, and stated he was not really closer to her. (2 R.R. at 103). However, his sister had an open door for him if he needed a place to stay. (2 R.R. at 107). He babysat the children when they were little. (2 R.R. at 111-112). Appellant testified that he had no issue, no history with touching her, nothing like that because they trusted him with them. (2 R.R. at 112). Appellant would cook for the children and take care of them. (2 R.R. at 112). On February 25, 2021, he was living with his sister and was not working. (2 R.R. at 107, 110). He testified when he came home from

the store, all three children were in the living room. (2 R.R. at 112-113). He did not know if the Complainant was sleeping. (2 R.R. at 116). The lights were on and TV had a screen saver on it. (2 R.R. at 114). Appellant turned the TV on to music and sat on the couch. (2 R.R. at 115-116). Appellant and the Complainant were on the sofa, relaxing, not close to each other, talking to each other. (2 R.R. at 114-115). Complainant was not laying down. (2 R.R. at 115). Appellant told the Complainant that knew she did not like him because he did not work and she told him she don't want nothing to talk about. (2 R.R. at 116). He testified that when he was talking to her, she got up and she was surprised he knew that. (2 R.R. at 118). Complainant was happy that he told her that thought and she got emotional, started crying, because he talked to her. (2 R.R. at 118, 127). She went to his sister's room. (2 R.R. at 119). She did not seem angry or upset. (2 R.R. at 119). The other children were directly in front of the on the other sofa, asleep. (2 R.R. at 114, 118). When Appellant's sister came into the room, he went to go outside to smoke his cigarette. (2 R.R. at 120). He was waiting outside when the police detained him. (2 R.R. at 120). Appellant testified that the police did not tell him why he was being put in handcuffs. (2 R.R. at 121). All officers said was indecency, but nothing regarding a child. (2 R.R. at

122). He did not remember the Complainant coming back out. (2 R.R. at 120-121). Appellant testified he did not own a gun and did not threaten the children with a gun. (2 R.R. at 123). He denied touching the Complainant in any way. (2 R.R. at 123-124). He believed that the Complainant made it all up, perhaps because she seeking more attention from her father. (2 R.R. at 128, 131). When he discovered he had been charged with indecency of a child, he thought it was joke. (2 R.R. at 125).

On March 5, 2024, Appellant executed a written jury trial waiver prior to the commencement of the bench trial on March 14, 2024. (C.R. at 126). In full, the written waiver stated:

> NOW COMES TERRANCE MCCARTER in the captioned cause, and requests the above designated causes be heard by the Court, waiving his right to trial by jury. The State of Texas consents to this waiver.

(C.R. at 126)

While the waiver was signed by the Appellant, his counsel, and counsel for the State of Texas, it was not signed by the trial court. (C.R. at 126). Although a docket entry in the Clerk's Record notes "ORDER: WAIVER OF JURY TRIAL" on the date the jury trial waiver was filed, the docket entry provides no information that any live proceedings occurred in front of the trial court. (C.R. at 183). Prior to the start of the bench trial, there was no

discussion on the record regarding Appellant's waiver of jury trial and there is no on the record notation that the trial court accepted Appellant's jury trial waiver in open court. (2 R.R. at 6-9). There is also nothing that indicates that the trial court admonished Appellant regarding his waiver of a jury trial at any point in time.

SUMMARY OF THE ARGUMENT

Both the United States and Texas constitutions provide that a criminal defendant has the right to a jury trial. However, a defendant's right to this jury trial can be waived. Both the United States Supreme Court and the Court of Criminal Appeals have found that the record must demonstrate that the defendant made this waiver voluntarily, knowingly and intelligently. Texas statutory law further provides that the waiver must be executed in writing, signed by the State, and approved by the trial court. Although the record includes a signed written waiver of jury trial, Appellant contends that the evidence is insufficient to demonstrate that he expressly, knowingly, and intelligently waived his right to a jury trial. The record is devoid of any information that demonstrates Appellant had any knowledge regarding his right to a jury trial beyond mere speculation. Prior to the start of the bench trial, there was no discussion on the record regarding

Appellant's waiver of jury trial and there is no on the record notation that the trial court accepted Appellant's jury trial waiver in open court. As a result, the trial court was a mere spectator in these proceedings and apparently proceeded with the bench trial as a "mere matter of rote." Thus, the evidence is insufficient to demonstrate that he expressly, knowingly, and intelligently waived his right to a jury trial.

Alternatively, Appellant contends that the Child Abuse Prevention court cost should be stricken from the bill of costs, as that particular court cost was not in effect at the time of his alleged offense. In addition, Appellant contends that the $100 Child Abuse Prevention fine should be stricken from the trial court's judgment as the fine was not orally pronounced in the Appellant's presence despite the $100 fine being assessed in the written judgment.

ARGUMENT

1. Whether Appellant's effectively waived his constitutional right to a jury trial, as the record fails to establish an express, knowing, and intelligent waiver on the part of the Appellant?

A. Applicable Law

"A defendant has an absolute right to a jury trial." *Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009), citing U.S. CONST. AMD. VI ("In all

criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury[.]"), TEX. CONST. ART. I, § 15 ("The right of trial by jury shall remain inviolate."), and TEX. CODE CRIM. PROC. ART. 1.12. "A defendant also has the right to waive his right to a trial by jury." *Ragan v. State*, 608 S.W.3d 853, 854 (Tex. App.—Waco 2020, pet. ref'd), citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942). "In Texas, 'the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state." *Id.*, citing TEX. CODE CRIM. PROC. ART. 1.13(a). "Further, a written jury waiver that complies with article 1.13 of the Texas Code of Criminal Procedure is sufficient to show that a defendant intelligently waived his right to a jury trial." *Id.*, citing *Holcomb v. State*, 696 S.W.2d 190, 195 (Tex. App.—Houston [1st Dist.] 1985), *aff'd as reformed*, 745 S.W.2d 903 (Tex. Crim. App. 1988) (en banc). "Waiver of a constitutional right requires an 'intentional relinquishment or abandonment of the right." *Rios v. State*, 665 S.W.3d 467, 479 (Tex. Crim. App. 2022), citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "A waiver of a jury trial is not to be presumed from a silent record." *Ragan*, 608 S.W.3d at 854. "[C]ourts indulge every reasonable presumption against waiver of

fundamental constitutional rights." *Rios*, 665 S.W.3d at 479, quoting *Johnson*, 304 U.S. at 464 and citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "As a matter of federal constitutional law, however, the State must establish, on the record, a defendant's express, knowing, and intelligent waiver of jury trial." *Id*., citing *Hobbs*, 298 S.W.3d at 197 and *Guillett v. State*, 677 S.W.2d 46, 49 (Tex. Crim. App. 1984). "Whether 'there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." *Rios*, 665 S.W.3d at 480, citing *Adams*, 317 U.S at 278. In *Rios*, the Court of Criminal Appeals outlined many factors when determining whether a jury trial waiver was knowing and intelligent:

> (1) whether the defendant knew about his right to a jury and the nature of the right;
>
> (2) whether the defendant executed a written jury trial waiver;
>
> (3) whether the trial court admonished the defendant about his right to a jury;
>
> (4) the defendant's education, background, and legal sophistication;
>
> (5) the level of defendant's involvement in his defense;
>
> (6) his ability to understand courtroom discussion regarding waiving of a jury;

(7) discussion with trial counsel about the right to a jury;

(8) what language the defendant understands and the presence of an interpreter if not English;

(9) the lack of an objection before shortly after the bench trial began; and

(10) whether there is a docket entry indicating that the defendant expressly waived his right to a jury on the record.

Id. at 480-492 (footnotes and citations omitted)

B. Standard of Review

"Questions involving legal principles, such as waiving the right to a jury trial, and the application of that law to the established facts are properly reviewed *de novo*." *Ragan*, 608 S.W.3d at 854 (citations omitted).

C. Preservation of Error

The Court of Criminal Appeals has "explained that 'our system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.'" *Garcia v. State*, 149 S.W.3d 135, 144 (Tex. Crim. App. 2004), quoting *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). "[R]ights in the second category hand 'do not

vanish so easily. Although a litigant might give them up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record.'" *Id*., citing *Marin*, 851 S.W.2d at 280. "Regarding these rights, 'the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court." *Id*.

The Court of Criminal Appeals has determined that "[t]he right to a jury trial is a waivable-only right." *Rios*, 665 S.W.3d at 477. As a result, Appellant may raise his claim for the first time on appeal.

D. Analysis

"A defendant need not understand every nuance of the right to a jury before waiving that right (and we decline to adopt any definitive statement), but a waiver cannot be knowing and intelligent unless the record shows that the defendant had at least had sufficient awareness of the relevant circumstances and likely consequences of waiving his right to a jury." *Rios*, 665 S.W.3d at 482. Waiver of a constitutional right requires an "intentional relinquishment or abandonment of the right." See *Johnson*, 304

U.S.at 464. A waiver will not be inferred from a silent record. *Id*. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *Godinez v. Moran*, 509 U.S. 389, 400–401 (1993) (finding that the purpose of the knowing and voluntary inquiry is to determine whether the defendant actually understands the significance and consequences of a particular decision). "When a defendant challenges a jury-trial waiver on appeal, the State must establish through the trial record an express, knowing, and intelligent waiver of that right." *Martinez v. State*, 449 S.W.3d 193, 199 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

The Court of Criminal Appeals outlined many factors when determining whether a jury trial waiver was knowing and intelligent:

> (1) whether the defendant knew about his right to a jury and the nature of the right;
>
> (2) whether the defendant executed a written jury trial waiver;
>
> (3) whether the trial court admonished the defendant about his right to a jury;
>
> (4) the defendant's education, background, and legal sophistication;
>
> (5) the level of defendant's involvement in his defense;

(6) his ability to understand courtroom discussion regarding waiving of a jury;

(7) discussion with trial counsel about the right to a jury;

(8) what language the defendant understands and the presence of an interpreter if not English;

(9) the lack of an objection before shortly after the bench trial began; and

(10) whether there is a docket entry indicating that the defendant expressly waived his right to a jury on the record.

Rios, 665 S.W.3d at 480-482 (footnotes and citations omitted)

Regarding Appellant's education, background, and legal sophistication, and his participation in his own defense, Appellant testified that he started living with his sister when he was six years old after his mother died. (2 R.R. at 10). Appellant graduated from high school in 2005 and testified that he was going to Chapman School of Real Estate at the time of the alleged incident. (2 R.R. at 104). The Clerk's Record also demonstrates that Appellant was initially found incompetent to stand trial in this matter. (C.R. at 34-38). In describing Appellant's background, the initial report finding Appellant incompetent to stand trial indicated:

> It was difficult to obtain background information because [Appellant] was too defensive and fixated on persecutory material to engage with the examiner. There was not a lot of

> relevant history available to the examiner. He has had eight prior arrests, including trespassing, driving with a suspended license, DWI, forgery, cocaine possession and burglary of a motor vehicle. At the time of his current arrest, he was living with his sister, who told the investigator that he does not work, does nothing, does not help with the bills of the home, and she did not want him scaring her grandchildren.

(C.R. at 35)

In the subsequent report regarding Appellant having his competency restored, his background was described as:

> Regarding his personal history, he was raised on the north side of Houston where he resided with his older sister and her son. His parents died when he was five years old due to reasons unknown to me. He described his relationship with his sister as "okay" and he identified her as his source of support. He has two children, ages 15 and 3, with whom he identified having good relationship with them. In regards to school, he denied experiencing any behavioral or academic issues and described himself as an "average" student. Upon graduating from high school, he worked off shore doing pipework on ships.
>
> [Appellant] was very guarded about his drug use history and he initially refused to discuss the topic. He only indicated infrequent alcohol consumption and he denied ever experiencing any problems due to his use of it or participating in substance abuse treatment. Medical records from the Harris County Jail indicate a history of cocaine and cannabis use as well. He is noted to engage in weekly alcohol use. He has prior drug-related charges in Harris County as well.
>
> At the time of arrest, he resided with his sister in an apartment. He sustained himself financially by working as a barber and attending classes for real estate through the Champion School of Real Estate…

> According to the electronic medical records from the Harris County Jail, he was found incompetent to stand trial on 08/27/21 and a court order was issued to force treatment with psychoactive medication on 10/15/21. He was admitted to the Jail Based Competency Restoration Program on 06/28/22.
>
> Initially, in the program, he was noted to be suspicious with paranoid themes as well as poor insight into his mental illness. (06/29/22). At time, he has been observed to be guarded and irritable when discussing his legal predicament or mental illness as noted by him not wanting to identify his charges or the events in question (07/07/22). As he has progressed in the program, he has been able to discuss his charges in a calm manner with coherent speech. (07/27/22). He has been noted to discuss the plea options available to him with logical thought processes along with possible consequences he could face if found guilty and convicted. Despite expressing a desire to not discuss the charges he faces, he has been cooperative in the group education classes and receptive to clarification of legal terms and concepts. He has been described as having strong factual knowledge the program's staff (08/16/22).

(C.R. at 74)

Finally, the subsequent report indicated that Appellant wanted to take his case to trial to prove his innocence and testify, and further noted:

> [Appellant] understands the adversarial nature of criminal proceedings. He knows that he is accused of wrongdoing and is being involuntarily detained. He also recognizes the role of the court and understands this case must be resolved through it. He understands the role of the members of the court, and describes them as follows – the prosecuting attorney as the one who "goes against me," the defense attorney's role as the one who "defends me," and the judge as the one who is "neutral." He is aware that taking the cases to trial would provide him an opportunity to

> share his version of the event and if he is found not guilty, he would be free of the charges and not have them on his record. He is also aware that if he is found guilty and convicted, he could face prison time.

(C.R. at 76)

As a result of this information, Appellant believes that these factors weigh somewhat in favor of his decision to waive his right to a jury trial being done expressly, knowingly, and intelligently, given that Appellant had prior experience with the criminal justice system, was aware that he had the right to a trial, and wanted to (and ultimately did) testify in his own defense. See *Rios*, 665 S.W.3d at 480-482.

Appellant also concedes that there was no objection by himself or his trial counsel prior to the start of the bench trial. (2 R.R. at 6-9). In addition, on March 5, 2024, Appellant executed a written jury trial waiver prior to the commencement of the bench trial on March 14, 2024. (C.R. at 126). While in a vacuum, this could lead one to conclude that this weighs in favor of Appellant's waiver of jury trial being done expressly, knowingly, and intelligently, Appellant contends that the mere fact a written waiver was executed does not, as this bare bones waiver was not made in open court in violation of Article 1.13 of the Texas Code of Criminal Procedure. (C.R. at 126). In full, the written waiver stated:

> NOW COMES TERRANCE MCCARTER in the captioned cause, and requests the above designated causes be heard by the Court, waiving his right to trial by jury. The State of Texas consents to this waiver.

(C.R. at 126)

While the waiver was signed by the Appellant, his counsel, and counsel for the State of Texas, it was not signed by the trial court. (C.R. at 126). Although a docket entry in the Clerk's Record notes "ORDER: WAIVER OF JURY TRIAL" on the date the jury trial waiver was filed, the docket entry provides no information that any live proceedings occurred in front of the trial court regarding the jury trial waiver. (C.R. at 183). In addition, prior to the start of the bench trial, there was no discussion on the record regarding Appellant's waiver of jury trial and there is no on the record notation that the trial court accepted Appellant's jury trial waiver in open court. (2 R.R. at 6-9). There is also nothing that indicates the trial court admonished Appellant regarding his waiver of a jury trial at any point in time. "The United States Supreme Court has said that courts should not accept a jury waiver 'as a mere matter of rote but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from [jury trials] or from any of those essential elements thereof, and *with a caution increasing in degree as the offenses dealt with increase in gravity*." *Rios*, 665 S.W.3d at 479

fn. 22, quoting *United States v. Boynes*, 515 F.3d 284, 288-289 (4th Cir. 2008) (emphasis in original) (quoting *Patton v. United States*, 281 U.S. 276, 312-313 (1930). Although, the Court of Criminal Appeals noted that "numerous courts have held a colloquy regarding the waiver of jury is unnecessary," whether one occurred is still a factor to be considered. *Id*. at 480. Just because Appellant was aware that his case could be resolved via a trial, that in of itself does not demonstrate what Appellant's knowledge was regarding his right to a jury trial. See *Rios*, 665 S.W.3d at 482 ("Appellant concedes that he knew that he had the right to be tried by a jury, and while that can be a relevant consideration, we do not know on this record the extent of Appellant's knowledge about that right"). A knowing and intelligent waiver requires record evidence that the waiver was "made with the full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). See also *Rios*, 665 S.W.3d at 482 ("A defendant need not understand every nuance of the right to a jury before waiving the right (and we decline to adopt any definitive statement), but a waiver cannot be knowing and intelligent unless the record shows that the defendant at least had sufficient awareness of the relevant circumstances and likely

consequences of waiving his right to a jury."). In Appellant case, there is no indication that the trial court had any involvement in Appellant's waiver of jury trial. The trial court was at best, simply a spectator in the waiver process. Furthermore, as there was no on the record colloquy regarding Appellant's waiver of jury trial, this Court has no way of determining Appellant's actual understanding of the document he apparently signed and what, if any, discussion Appellant had with his trial counsel concerning his waiver of a jury trial. Appellant's mere execution of a written jury trial waiver, which was not read in open court, does not demonstrate a knowing and intelligent action on his part. As a result, the lack of any admonishments about Appellant's waiver of his right to a jury trial and lack of information concerning Appellant's knowledge of his right to a jury trial strongly weighs in favor of finding Appellant's waiver of jury trial was not done expressly, knowingly, and intelligently.

Finally, the judgment recites that "Defendant waived the right of trial by jury and entered the plea indicated above." (C.R. at 148). However, as the Court of Criminal Appeals determined this language "does not speak to whether the defendant expressly, intelligently, and knowingly waived the right to a jury[]" and that "[a]pplication of the presumption of regularity to

a constitutional no-waiver claim (unlike an Article 1.13(a) claim) seems inappropriate given that it does not inform the knowing and intelligent inquiry and because the burden is on the State on direct appeal to develop a record showing an express, knowing, and intelligent waiver of a defendant's right to a jury." *Rios*, 665 S.W.3d at 485. As a result, the judgment's recital does not weigh in favor of finding Appellant's waiver of jury trial was done expressly, knowingly, and intelligently.

In sum, although the record includes a signed written waiver of jury trial, the evidence is insufficient to demonstrate that Appellant expressly, knowingly, and intelligently waived his right to a jury trial. The written waiver was not made in open court. The record is devoid of any information that demonstrates Appellant had any knowledge regarding his right to a jury trial beyond mere speculation. The trial court was a mere spectator in these proceedings and apparently proceeded with the bench trial as a "mere matter of rote." Based on the foregoing, this Court should reverse Appellant's conviction and remand his case back to the trial court for a new trial.

E. Harm

The Court of Criminal has determined "that a violation of the federal constitutional right to a jury trial is structural error." *Rios*, 665 S.W.3d at 486. A 'structural error' "affect[s] the framework within the trial proceeds, rather than simply an error in the trial process itself" and render[s] a trial fundamentally unfair." *Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008). As a result, Appellant contends that the error in this case is not subject to a harmless error analysis and reversal is automatic. See *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) and *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (all errors, with the exception of certain federal constitutional errors labeled as "structural," are subject to a harm analysis).

2. Whether the Child Abuse Prevention fee should be removed from the bill of costs, as the former provisions of Article 102.0186 do not apply because Appellant's offense allegedly occurred after January 1, 2020?

An appellate court reviews the assessment of court costs to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost. *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014). When a trial court improperly includes amounts in assessed court costs, the proper appellate remedy is to reform

the judgment to delete the improper fees. *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). The Court of Criminal Appeals has held that challenges to court costs can be raised for the first time on appeal and "[c]onvicted defendants have constructive notice of mandatory court costs set by statute and the opportunity to object to the assessment of court costs against them for the first time on appeal or in a proceeding under Article 103.008 of the Texas Code of Criminal Procedure." *Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014). See also *Johnson*, 423 S.W.3d at 390-391 (an "Appellant need not have objected at trial to raise a claim challenging the bases of assessed costs on appeal[]" as cost bill is most likely unavailable at the time of the judgment).

"Senate Bill 346, effective January 1, 2020, reclassified the child abuse prevention fund cost as a fine[.]" *Shuler v. State*, 650 S.W.3d 683, 688 (Tex. App.—Dallas 2022, no pet.). Senate Bill 346 also contained a savings provision:

> Except as otherwise provided by this Act, the changes in law made by this Act apply only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose.

Id., quoting Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 5.01, 2019 Tex. Gen. Laws 3981, 4035.

Currently, Texas Code of Criminal Procedure Article 102.0186 provides: "A person convicted of an offense under Section…21.11…, Penal Code, shall pay a fine of $100 on conviction of the offense." TEX. CODE CRIM. PROC. ART. 102.0186(a). Prior to January 1, 2020, Article 102.0186 provided: "A person convicted of an offense under Section…21.11…, Penal Code, shall pay $100 on conviction of the offense." TEX. CODE CRIM. PROC. ART. 102.0186 (2018).[1]

Appellant's offense was alleged to have been committed on or about February 25, 2021, after the effective date of Senate Bill 346. (C.R. at 24). As a result, the court cost as authorized by the former provision Article 102.0186 does not apply. However, the trial court improperly assessed Appellant the court cost in the amount of $105.00. (C.R. at 151). Because that court cost can no longer be assessed against him, Appellant respectfully requests that this Court modify the trial court's judgment and delete the Child Abuse Prevention fee court cost from the bill of costs.

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[1] Prior to January 1, 2020, Article 102.0186 was entitled "Additional Costs Attendant to Certain Child Sexual Assault and Related Convictions". Under the current version of Article 102.0186 the statute is entitled "Fine for Certain Child Sexual Assault and Related Convictions."

3. Whether the trial court's judgment should be modified to remove the $100 Child Abuse Prevention fine, as it was not orally pronounced by the trial court?

"A defendant's sentence must be pronounced orally in his presence." *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004), citing TEX. CODE CRIM. PROC. ART. 42.03, § 1(a). "[F]ines generally must be orally pronounced in the defendant's presence. *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). "Fines are punitive, and they are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Texas Penal Code, which entitled 'Punishments.'" *Id*, citing *Weir v. State,* 278 S.W.3d 364, 366 (Tex. Crim. App. 2009). "When there is a conflict between the oral pronouncement of sentence and the sentence in the written judgment, the oral pronouncement controls." *Taylor*, 131 S.W.3d at 500.

Currently, Texas Code of Criminal Procedure Article 102.0186 provides: "A person convicted of an offense under Section…21.11…, Penal Code, shall pay a fine of $100 on conviction of the offense." TEX. CODE CRIM. PROC. ART. 102.0186(a). Appellant's offense was alleged to have occurred on or about February 25, 2021, and the trial court's judgment reflects that this is when the offense occurred. (C.R. at 24, 147). The judgment also reflects

that Appellant was assessed the statutorily mandated $100 Child Abuse Prevention Fine. (C.R. at 148). However, when the trial court orally pronounced Appellant's sentence, it made no mention of any fine:

> Based on the evidence presented in the trial, and the punishment phase of this trial, I will find the enhancement paragraph to be true and sentence you to 12 years confinement. You will get credit for your back tie. You will be required to register as a sex offender for the rest of your life. That's it.

(2 R.R. at 150)

As there was no oral pronouncement of a fine, the fine should be stricken from the written judgment. See *Taylor*, 131 S.W.3d at 500.

PRAYER

Appellant, Terrance McCarter, prays that this Court reverse the trial court's judgment and remand this case back to the trial court for a new trial. Alternatively, Appellant prays that this Court delete the Child Abuse Prevention fee from the bill of costs and strike the $100 fine from the trial court's judgment. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

Alexander Bunin
Chief Public Defender
Harris County Texas

/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24070262
1310 Prairie Street, 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on Jessica Caird of the Harris County District Attorney's Office on October 4, 2024 to the email address on file with the Texas E-filing system.

/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender

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/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender

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Bar No. 24070262
nicholas.mensch@pdo.hctx.net
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Nicholas Mensch	24070262	nicholas.mensch@pdo.hctx.net	10/4/2024 11:36:54 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	10/4/2024 11:36:54 AM	SENT