CAUSE NO 01-24-00486-CR

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In The First Court of Appeals,
Houston Texas

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APPEAL FROM
From
Cause No. 21-10-17794
State of Texas
v
Raymond Philip Milligan
In The 506th Judicial District Court
Of
Waller County, Texas
Judge Gary Chaney, Presiding

****

APPELLANT BRIEF FOR
Raymond Philip Milligan,

****

Respectfully Submitted,

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Appellant was charged on October 14, 2021 (CR 8) and reindicted on December 7, 2021 (CR 13) with six counts of sexual assault of a child, specifically that Appellant intentionally and knowingly cause the penetration of the sexual organ of M.C., a child who was younger than 17 years of age by Appellant's sexual organ on or about:

a. January 9, 2021 (Count 1)

b. January 18. 2021 (Count 2)

c. April 10, 2021 (Count 3)

d. April 13, 2021 (Count 4)

e. April 15, 2021 (Count 5)

f. April 18, 2021 (Count 6)

On or about November 16, 2023, Defendant pled to the charges three of the counts as alleged in the indictment, and a punishment hearing was conducted by the Court, without jury. Counts IV, V, and VI were taken into consideration as a part of the plea.

On May 29, 2024, a sentencing hearing was conducted and Appellant was sentenced by Judgement of Conviction – Waiver of Jury Trial to 5 Years incarceration in TDCJ, Institutional Division concurrent on each of the Counts 1, 2, and 3, court costs were waived and Counts 4,5, and 6 were takin into consideration on Count 1. Appellant had 3 days of incarceration for which credit was given against the sentence imposed. CR88 et seq.

It is from these proceedings that this appeal is taken.

STATEMENT REGARDING ORAL ARGUMENT

Appellant's Counsel requests Oral Argument on the matters raised herein, and asserts that oral argument will assist the Court in identifying and narrowing the issues and authority in this matter.

ISSUES PRESENTED

ISSUE PRESENTED NUMBER ONE:

The Court committed reversible error in assessing punishment when it failed to consider the mitigation of the Romeo Juliet law as presented by Defendant because of the Court's misstatement and misunderstanding of the law.

ISSUE PRESENTED NUMBER TWO:

The Court committed reversible error when it relied on argument of counsel rather than evidence presented in assessing punishment in this case.

STATEMENT OF COMMON PERTINENT FACTS

1. Appellant was charged on October 14, 2021 (CR 8) and reindicted on December 7, 2021 (CR 13) with six counts of sexual assault of a child, specifically that Appellant intentionally and knowingly cause the penetration of the sexual organ of M.C., a child who was younger than 17 years of age by Appellant's sexual organ on or about:

    a. January 9, 2021 (Count 1)

    b. January 18. 2021 (Count 2)

    c. April 10, 2021 (Count 3)

    d. April 13, 2021 (Count 4)

    e. April 15, 2021 (Count 5)

    f. April 18, 2021 (Count 6)

2. Brian Dasher, the assigned investigator on the case (CR120), was charged with the third degree felony of Misuse of Official Information by another county. CR 17

3. Defendant's Ex-Parte request for funds for a psychosexual evaluation was approved on March 23-2023.

4. On or about November 16, 2023, Defendant pled to the charges three of the counts as alleged in the indictment, and a punishment hearing was conducted by the Court, without jury.

5. Count IV was taken into consideration of the plea of guilty to Counts 1 on or about November 16, 2023. CR45

6. Count V was taken into consideration of the plea of guilty to Counts 1 on or about November 16, 2023. CR46

7. Count VI was taken into consideration of the plea of guilty to Counts 1 on or about November 16, 2023. CR47

8. During the presentence investigation report Appellant noted that he had recently moved to Texas From Kentucky. CR70

9. Appellant further stated his understanding that a relationship with a minor was not in violation of Kentucky law if the age difference was 4 years or less and that Appellant was unaware that Texas only allowed a 3 year difference. CR70

10. The probation officer conducting the presentence investigation noted that her own research disputed the allowance of a defense in Kentucky based on age proximity. CR70

11. The probation officer conducting the presentence investigation testified in Court that, after a quick search (RR3 P16 l 1-3) Kentucky did, in fact, have a Romeo-Juliet law, but that it was applicable to both parties being under the age of 18. RR3, P13 L8

12. Consistent with the plea of guilty, Appellant acknowledged a romantic relationship spanning approximately eight months. CR70

13. The officer conducting the Presentence investigation (PSI) report referenced and filed with the PSI report the original indictment rather than the reindictment. CR116

14. Appellant's date of birth is March 25, 2002, rendering Appellant having attained the age of 18 at the time of Counts 1 & 2, and the age of 19 for count 3. CR70

15. On May 29, 2024, a sentencing hearing was conducted and Appellant was sentenced by Judgement of Conviction – Waiver of Jury Trial to 5 Years incarceration in TDCJ, Institutional Division concurrent on each of the Counts 1, 2, and 3, court costs were waived and Counts 4,5, and 6 were takin into consideration on Count 1. Appellant had 3 days of incarceration for which credit was given against the sentence imposed. CR88 et seq.

16. The victim is presented as having attained age 14 (having been born on December 31-2006 [CR 120]) on all counts. CR72

17. The PSI presented that Appellant had completed a four year enrollment after high school, studying game designing, IT support, help desk and Robotics CR 71, yet the preparer testified in open court that Appellant did not give her "what he was studying those four years", and that seemed odd. RR3 P14 L9-15

18. The Presentence Investigation reports presents Appellant as having no prior Criminal history, no drug usage history, no mental illness or treatment and gainfully employed, and a 10 month old dependent. CR70-81 RR3 P16-L5 – P18 L6 The Presentence Investigator testified that Appellant had admitted to marijuana use and alcohol, when, in fact, Appellant admitted to trying marijuana once, and occasional use of alcohol since age 21. CR72

19. Further, the person presenting the PSI testified on or about May 29, 2024, that Appellant had not seen the 10 month old in over a year, even though she also testified that Appellant saw her in April of "this year". RR3 P20 L5-13 It is a physical impossibility for Appellant to have not seen the 10 month old in over a year (the 10 month old did not exist a year ago).

20. The person presenting the PSI additionally testified that Appellant was providing $400.00 per month for the 10 month old without court ordered support. RR3 P21 L13-16

21. Receipts were acknowledged in testimony to the 10 month old's mother totaling $8500 by a cashout app. RR3 P23 L3-19

22. The father of D.C. testified that he was requesting prison or probation. RR3 P28 L4-8

23. On May 29, 2024, Appellant was sentenced by Judgement of Conviction – Waiver of Jury Trial to 5 Years incarceration in TDCJ, Institutional Division concurrent on each of the Counts 1, 2, and 3, court costs were waived and Counts 4,5, and 6 were takin into consideration on Count 1. Appellant had 3 days of incarceration for which credit was given against the sentence imposed. CR88 et seq.

24. State's Exhibit 1 is the Felony Admonitions to Defendant and was presented and signed by Defendant in Count 1 (CR37), Count 2 (CR50), and Count 3 (CR60)

25. State's Exhibit 2 is the Waivers of Constitutional Rights, Stipulations, Judicial Confession and Agreement, which was presented and signed by Defendant in Count 1 (CR39), Count 2 (CR52), and Count 3 (CR60)

26. State's Exhibit 3 is the Discovery Compliance Statement pursuant to Article 39.14(J) Texas Code of Criminal Procedure which was presented and signed by Defendant in Count 1(CR 42), Count 2 (CR55), and Count 3 (CR65)

27. The Court admitted State's exhibits 1s, 2s, and 3s in all six counts. RR2 P6 L18

28. The Court found that the Romeo and Juliet law did not apply to a 14 year old. RR3 P73 L3-5

29. The Court relied on the State's Argument that officers advised Defendant not to see Madison and he convinced her to sneak out after

that admonition [RR3 P73 L7-10] when no officer or anyone else testified to that and no admitted exhibit indicated that. RR all.

30. Defendant was sentenced to 5 years in Texas Department of Criminal Justice, with all 3 counts concurrent. RR3 P74 L2-3

SUMMARY OF THE ARGUMENT

The Trial Court misunderstood, or misstated the Romeo-Juliet law which was used by Defendant as mitigation. However because of the misunderstanding by the Court, the court failed to consider the mitigation. The Trial Court further considered as evidence, argument from the State, where the evidence alluded to by the State was never presented to the Court.

These two errors prevented the court from considering the Deferred Adjudication request of Defendant, a consideration that the Court believed would be a second chance for the Defendant. In reliance on the errors, the Court found that Defendant had already had his second chance because of the State's argument on the non-existent evidence.

For that reason, Defendant was harmed by the improper application of the Romeo-Juliet law and the acceptance, as evidence, of the State's argument. Punishment should be reconsidered giving allowance to the full range of the Romeo-Juliet defenses and recognition of the actual evidence presented not the argument based on evidence that was not presented.

Comes Now Appellant and shows the Court:

ARGUMENT AND AUTHORITIES:

ISSUE FOR REVIEW NUMBER ONE

The Court committed reversible error in assessing punishment when it failed to consider the mitigation of the Romeo Juliet law as presented by Defendant because of the Court's misstatement and misunderstanding of the law.

STANDARD OF REVIEW

In determining if error by the trial court was harmful, the appellate court must review the integrity of the process leading to the [outcome of the case], not the outcome of the case. *Harris v. State*, 790 S.W.2d 568, 587 (Tex.Crim.App.1989); *McMillan v. State*, 874 S.W.2d 189, 190 (Tex.App.-Houston (14th Dist.) 1994, pet. ref'd), cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

The appellate court must isolate the error and all of its effects, and then ask whether a rational trier of fact might have reached a different result. *Harris,* 790 S.W.2d at 588; *McMillan*, 874 S.W.2d at 190, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

Put simply, to uphold the sentence given by the trial court, the appellate

must find that beyond a reasonable doubt the erroneous admission evidence, or ignoring the effect of a statute did not contribute to an increase in the punishment. *Harris,* 790 S.W.2d at 584, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

To make this determination, the appellate court must conduct an examination of six factors: (1) the source of the error; (2) the nature of the error; (3) the extent to which the erroneous evidence was emphasized by the State; (4) its probable collateral implications; (5) the weight a finder of fact would probably give to the erroneous evidence; and (6) whether declaring the error harmless would encourage the State to repeat the error with impunity. *Harris*, 790 S.W.2d at 587; *McMillan*, 874 S.W.2d at 191, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

The appellate court therefore reviews the entire record to determine whether the error had more than a slight influence on the penalty assessed. If the appellate Court finds that the error had more than a slight influence on the penalty assessed, the appellate court must conclude the error affected the defendant's substantial rights in such a way as to require a new punishment hearing. Otherwise, the appellate court is disregarding the

error. *Guerrero v. State*, No. 10-00-217-CR, at *4 (Tex.App.-Waco July 23, 2003, no pet. h.); Flores v. State, 48 S.W.3d 397, 404-05 (Tex.App.-Waco 2001, pet. ref'd), cited by *Manning v. State*, 126 S.W.3d 552 (Tex.App.—Texarkana 2003).

ARGUMENT AND AUTHORITIES:

The case before this court presents issues of sentencing by the court as the trier of fact. Defendant pled guilty to three counts without a recommendation of punishment and an agreed sentencing hearing to the court in exchange for dismissal or consideration taken for other counts alleged in the indictment. SOF 4, 5, 6, 7

The Defendant, at the time of the hearing is 21 years of age, but was 18 years of age at the time of the offense. SOF 14

The Victim was age 14 at the time of the offense [SOF 15] and by extension was at least 16 at the time of the proceeding.

Defendant presented evidence that he believed that the Texas Romeo-Juliet law was a 4 year window, not a 3 year window, at the time of the offense. For that reason, Defendant, at the time of the offense, did not believe that his actions with a female that he believed he was having a romantic relation was statutorily prohibited. The victim, Madison, even

admitted “sneaking out” to meet the Defendant, that only now testifies that she said “no”. Without regard to the Madison’s statements, Defendant pled guilty and accepted responsibility for an inappropriate teenage relationship, after learning that he was mistaken on the Romeo-Juliet law. Defendant did request the court to consider his youth at the time of the offense and that but for the mistake of law by Defendant believing the Romeo-Juliet law Defendant would not have been in violation of the law. This mistake of law and Defendant’s youthfulness at the time of the offense was presented as mitigation in requesting Deferred Adjudication Probation. Defendant showed himself eligible and a good candidate, being employed, with no prior or subsequent criminal history, while providing for a child [SOF 19].

A "Romeo and Juliet" relationship is an affirmative defense that "the actor was not more than three years older than the victim at the time of the offense”, was not a sex offender under *Chapter 62 of the Code of Criminal Procedure,* and was unrelated to the victim for purposes of the incest statute, *Texas Penal Code§ 25.02,* and the child was at least fourteen years of age. *Id. § 22.011(e)(2).* These relationship-based affirmative defenses show that a child is capable of consent but that consent is irrelevant to the offense outside of these circumstances. *Delarosa v. State,*

677 S.W.3d 668 (Ct.Crim.App. 2023)

The trial court, improperly misstates the purpose and elements of the Romeo-Juliet law when it found the law did not apply to a 14 year old. RR3 P73 L3-5 The Court, therefore, failed to consider the mistake of law on the part of the Defendant in determining sentencing.

The law requires that a tryer of fact be provided a vehicle to give mitigating effect to that evidence if the trier of fact finds it to be mitigating *Green v. State*, 912 S.W.2d 189 (1995). This law ensures that the trier of fact can make a reasoned moral response to the mitigating evidence presented. *Morris v. State*, 940 S.W.2d 610 (1996)

For this reason, the trial court's failure to even consider the mitigation offered harmed the substantial rights of the Defendant in the sentencing process, where the Defendant showed himself to be a responsible citizen except for the relationship resulting from a mistake of law, and showed himself to have never had any other infraction of law (RR, CR, all). Defendant showed himself to be eligible for Probation or Deferred Probation so that after atoning for the mistake of law, he could return to a productive, unincumbered citizen of our country.

This appellate court should consider:

(1) the source of the error which was clearly stated by the Trial Court that it did not believe it applied to a 14 year old (even though the statute clearly identifies application to a 14 year old); [RR V3 P73 L3-5]

(2) the nature of the error, which was an affirmative misstatement of the law;

(3) the extent to which the erroneous interpretation was emphasized by the State; For this determination the Court need only look at the closing argument of the State which provides “Mr. Coufal brings up, ‘Oh, if it was only nine months later, we would have a Romeo and Juliet case.’ Who cares. Nine months, we didn't have about nine months. That could play zero part in this” which led the court to discount even mitigation from Defendant’s misunderstanding.

(4) its probable collateral implications; The collateral implications here is that it deprived the trier of fact from considering the full range of punishment.

(5) the weight a finder of fact would probably give to the erroneous evidence; In this instance there is not probably weight given to the error, the Court is clear that it did not consider the evidence because of the Court’s erroneous understanding of the statute. and

(6) whether declaring the error harmless would encourage the State to repeat the error with impunity. It is Defendant's position that failure to recognize the error will allow the State to discount affirmative defenses and mitigation evidence so that a court will erroneously rely on misstatements of the law.

The Court even acknowledges that it generally believes in second chances, but finds that because of Defendant's actions based on the court's misunderstanding of the law, Defendant should not be granted that second chance. RR3 P73-74

For this reason, Defendant requests this Court to reverse and remand for further consideration by the Court based on a corrected understanding of the mitigation evidence presented by Defendant and appropriate evidence given thereto.

ISSUE FOR REVIEW NUMBER TWO

The Court committed reversible error when it relied on argument of counsel rather than evidence presented in assessing punishment in this case.

STANDARD OF REVIEW

In determining if error by the trial court was harmful, the appellate court

must review the integrity of the process leading to the [outcome of the case], not the outcome of the case. *Harris v. State*, 790 S.W.2d 568, 587 (Tex.Crim.App.1989); *McMillan v. State*, 874 S.W.2d 189, 190 (Tex.App.-Houston (14th Dist.) 1994, pet. ref'd), cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

The appellate court must isolate the error and all of its effects, and then ask whether a rational trier of fact might have reached a different result. *Harris,* 790 S.W.2d at 588; *McMillan*, 874 S.W.2d at 190, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

Put simply, to uphold the sentence given by the trial court, the appellate must find that beyond a reasonable doubt the erroneous admission evidence, or ignoring the effect of a statute did not contribute to an increase in the punishment. *Harris,* 790 S.W.2d at 584, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

To make this determination, the appellate court must conduct an examination of six factors: (1) the source of the error; (2) the nature of the error; (3) the extent to which the erroneous evidence was emphasized by the State; (4) its probable collateral implications; (5) the weight a finder of fact would probably give to the erroneous evidence; and (6) whether

declaring the error harmless would encourage the State to repeat the error with impunity. *Harris*, 790 S.W.2d at 587; *McMillan*, 874 S.W.2d at 191, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994).

The appellate court therefore reviews the entire record to determine whether the error had more than a slight influence on the penalty assessed. If the appellate Court finds that the error had more than a slight influence on the penalty assessed, the appellate court must conclude the error affected the defendant's substantial rights in such a way as to require a new punishment hearing. Otherwise, the appellate court is disregarding the error. *Guerrero v. State*, No. 10-00-217-CR, at *4 (Tex.App.-Waco July 23, 2003, no pet. h.); Flores v. State, 48 S.W.3d 397, 404-05 (Tex.App.-Waco 2001, pet. ref'd), cited by Manning v. State, 126 S.W.3d 552 (Tex.App.—Texarkana 2003).

ARGUMENT AND AUTHORITIES:

The purpose of argument of counsel is to facilitate proper analysis of the evidence presented, but argument itself is not evidence. *Parker v. State*, 51 S.W.3d 719 (Tex.App.—Texarkana 2001) Moreover the argument should be a just and reasonable argument based on the evidence actually

presented and not on any fact not admitted into evidence. *Parker v. State*, 51 S.W.3d 719 (Tex.App.—Texarkana 2001) This criteria regarding argument of counsel is additionally supported in *Campbell v State,* 610 S.W.2d 754 (Tex. Crim. App. [Panel Op.] 1980 and *Monkhouse v. State*, 861 S,W,2d 473 (Tex.App.—Texarkana 1993, no pet.)

This criteria was disregarded in the case at hand. The State presented in opening informed the court that "The police were called, they responded to the crime, talked to the Defendant and said, 'This is serious, don't let it happen again' If it stopped there, it would be a completely different case, - but it didn't." RR V3 P8 L21-25. The State again in closing stated, "He was told not to see her, and he had her sneak out, . . . " RR V3 P70 L20-21. However the record will show that there was no testimony from an officer or that an officer was seen speaking to Defendant. RR V3, all The State argued, and apparently convincingly, evidence that was not presented to the court.

The question of harm from the State arguing evidence that was not presented is answered without equivocation when the Court summarized, "I sometimes give you a second chance to make things happen, but you know he was given that. Officers told him, don't' do this. And he continued

to do it. RR V3 L7-10

The State's presentation of argument that evidence had been presented, when it had not, deprived Defendant of consideration of the Deferred Adjudication requested.

In making its determination of the following six factors *Harris*, 790 S.W.2d at 587; *McMillan*, 874 S.W.2d at 191, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994), Appellant asserts:

(1) the source of the error was the State's argument as if the evidence had been presented, but without actually presenting the evidence;

(2) the nature of the error was the State's opening and closing argument based on evidence not before the court;

(3) the extent to which the erroneous evidence was emphasized by the State which was clearly emphasized in opening and closing remarks by the State and even inferred that charges were brought only because the relationship extended beyond the time the non-existent evidence supposedly occurred; RR V3 P8 L21-25, RR V3 P70 L20-21

(4) its probable collateral implications; the misstatement and argument of non-existent evidence clearly was taken by the court as speaking to Appellant's character for harm to eighth graders RR V3 P73 L20-22 ("So,

you know, I got major problems with all of this. So, I can't have someone out there in the community that is putting eighth graders in jeopardy")

(5) the weight a finder of fact would probably give to the erroneous evidence; obviously, given the immediately above statement by the Court the trial court placed significant weight on the reliance on non-existent evidence, and

(6) whether declaring the error harmless would encourage the State to repeat the error with impunity. There is no reason to believe that if the State can sway the finder of fact, even when it is the court, by arguing non-existent evidence, that it will not continue to do so. .

For this reason, the harm is more than apparent. This court cannot find beyond a reasonable doubt the erroneous admission evidence, or the effect of the wrongfully considered evidence did not contribute to an increase in the punishment and harmed the substantial rights of the Defendant in the sentencing process. *Harris,* 790 S.W.2d at 584, cited in *Lester v. State,* 889 S.W.2d 592 (Tex, App—Houston [14th Dist.] 1994)

For the reason set out herein, the punishment should be reversed and remanded to the court for reconsideration in light of the ruling of this court.

PRAYER

Defendant requests this Court to consider the arguments presented herein, reverse and remand the case to the trial court for further

proceedings or consideration in light of the court's ruling on the issues presented herein

Respectfully Submitted,

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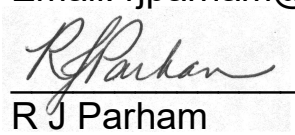

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CERTIFICATE OF COMPLIANCE

I certify that this documents complies with TRAP 9.4 (i)(3), it contains 3768 words, based on the word count by Microsoft Word.

R. Jeanette Parham

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the attached brief was served on each party attorney by electronic service on 4 November 2024

R. Jeanette Parham

ADDENDUM

MANDATORY

Trial Court's Judgment CR88 et seq

Findings of Fact and conclusions of law RR3 P72-73

Text of any Rule, Regulation, Ordinance, Statute, Constitutional Provision or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument

NA

OPTIONAL: (other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the brief.)

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