NO. 14-24-00749-CR;

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

BRIAN ALEX BERMUDEZ
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Numbers 1859840
From the 230th District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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PRESIDING JUDGE:	Hon. Chris Morton 230th District Court of Harris County 1201 Franklin, Houston, Texas 77002
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STATEMENT OF THE CASE

Appellant was charged by complaint with Assault Family Member 2nd on March 14, 2024. (C.R. 8-9.) He was indicted on April 29, 2025. (C.R. 55.) Appellant entered a plea of not guilty on September 30, 2024, with punishment to be assessed by the jury. (R.R. Vol. 4 at 9; C.R. 136.) The jury found Appellant guilty as charged in the indictment. (6 R.R. 29.) After hearing punishment evidence, the jury found one enhancement paragraph true and one paragraph not true, then assessed Appellant's sentence at 20 years in the Texas Department of Corrections. (R.R. Vol. 7 at 114.) Appellant filed a timely notice of appeal on the same day as his sentencing and the Trial Court's Certification of Defendant's Right of Appeal ensures Appellant has the right to appeal. (C.R. 208-9.)

Appellant timely filed a motion for new trial which was heard and denied by the trial court on November 25, 2024. (R.R. Vol. 9.)

This Honorable Court ordered Appellant's brief due by May 22, 2024, therefore this brief is timely filed.

REQUEST FOR ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant requests oral argument in this cause.

ISSUES PRESENTED

STATEMENT OF FACTS

In the early morning hours of March 14, 2024, the complainant, Nelly Bermudez, was out drinking with her friends and she did not want the night to end. (R.R. Vol. 9 at 105-7.) Her primary companion that evening was Alexis Cornejo and, as Alexis would testify at the hearing on Appellant's motion for new trial, the complainant was more intoxicated than she had ever seen her. (R.R. Vol. 9 at 101.) At first, Alexis was bemused and, despite Nelly's belligerence, Alexis was willing to look out for her and keep her out of trouble. (R.R. Vol. 9 at 102-3, 105.) But between 1:00am and 2:00am, Nelly had become so unruly that Alexis called Appellant--Nelly's husband--to see if he would come and bring her home. (R.R. Vol. 9 at 108.)

The two women—and a third woman who had moved to Mexico by the time of Appellant's trial-- were outside a Chevron gas station and "Magic" convenience store in East Houston when Appellant arrived. (R.R. Vol. 9 at 100-1, 109, 111.) With Nelly still insisting that she would not go home and that she wanted to keep drinking, Alexis left the scene believing that, despite Nelly's extreme intoxication, she was "good" and Appellant had control of the situation. (R.R. Vol. 9 at 112-3.)

The record is not clear what transpired over the next hour and Alexis, who had also been drinking, could not specify precisely when she left the scene. (R.R. Vol. 9 at 120.) But at approximately 2:45am at the same Chevron location, a DoorDash driver named Jhonathan Lerma saw the complainant and Appellant "arguing with each other. And the lady was running from the man." (R.R. Vol. 4 at 154.) The complainant was agitated and called out, "Help!" two or three times as she ran along the passenger side of Lerma's car before ducking down an alley. (R.R. Vol. 4 at 156, 159.) Lerma testified he then saw the complainant on the ground with Appellant hovered over her, repeatedly punching down. Lerma told the jury, "She was on the ground. Because his punches were going down, not up or like in the middle. It was like down." (R.R. Vol. 4 at 160-1.) Lerma then called 911, during which an audible struggle between Nelly and Appellant can be heard as Lerma tells the operator that Appellant is "smashing" the complainant into the ground. (SX-8.) After the call, Lerma used his phone to video record the ongoing interaction between

Nelly and Appellant. As Lerma acknowledged, however, the video recordings do not "capture the assault itself." (SX 9, 10, 11, 12.) But they did show Appellant acting in a manner that is "aggressive" and Appellant appears to be threatening Lerma for recording the interaction and interfering with the situation. (R.R. Vol. 4 at 167.) Appellant can be seen pulling the complainant and "carrying her" towards his car. (R.R. Vo. 4 at 170-1.) One officer who reviewed the video testified, "Throughout the video, you see the defendant kind of bear hug, wrap up the complaining witness. He drags her for a little bit. Places her on the ground. Picks her up again. Drags her out into the middle of the street. Drops her again on the middle of the street." R.R. Vol. 4 at 59-60.) Another officer who reviewed the video at the scene described it as depicting "the defendant picking up the complainant who was lying on the ground, dropping her, picking her up again, dropping her, dragging her across the concrete. I don't know how many times, multiple times." (R.R. Vol. 4 at 113.)

Harris County Sheriff's deputies arrived on scene at 2:54am and encountered eyewitness Lerma, the complainant Nelly, Appellant, and another woman named Laticia Alvarenga right outside the same convenience store where Alexis had departed an hour earlier. (R.R. Vol. 4 at 49-58.) Bodycam footage showed that Alvarenga was briefly questioned by police at the scene and denied witnessing an assault. (R.R. Vol. 4 at 74.) As a result, police did not mention her in their report.

(R.R. Vol. 4 at 58, 67.) Police also interviewed Nelly, who likewise denied being assaulted, denied suffering any injury, and asked officers not to arrest Appellant. (R.R. Vol. at 53.) According to officers, Nelly had two visible injuries: an old bruise underneath her eye that was unrelated to any injury she might have received that night, and "small scratches" on her elbow that were not bleeding which were consistent with her falling on the ground. (R.R. Vol. 4 at 71, 73, 103, 119.) Despite Nelly's protests, police took Appellant into custody and charged him with Assault-Family Member 2nd. (R.R. Vol. 4 at 68.)

At trial, Appellant's two primary witnesses, Nelly Bermudez and Alexis Cornejo, were never heard by the jury. (C.R. 263, 279.) Nelly was excluded based on an alleged violation of the rule of witness sequestration. (R.R. Vol.5 at 63.) The record reflects that the State sought to invoke "the rule" before jury selection. (R.R. Vol. 3 at 6.) The trial court, although unspecific in its response, appeared to agree and both parties appeared to accept that witnesses would no longer be allowed in the courtroom. (R.R. Vol. 3 at 6.) Despite this, Appellant telephoned Nelly from the jail during an overnight recess, as was his routine. Their recorded conversations indicate that they were confused about why Nelly could not be in the courtroom and why they could not discuss the trial testimony. (R.R. Vol. 5 at 62; DX 15 & 16.) Their conversations touched upon the proceedings even as they tried to avoid the subject. (C.R. 282) The record is unclear who told them about "the rule" nor what was said

when they were admonished. But, whatever their confusion, the State sought to keep Nelly from testifying and the trial court agreed that her testimony would be excluded. (R.R. Vol. 5 at 62-3.)

Nelly's exclusion was devastating to the defense, especially because the defense had failed to subpoena Alexis. With neither Nelly or Alexis available, the defense had no one to explain the sequence of events on the evening of Appellant's arrest. No one could explain that Nelly, due to her intoxication, had been out of control and too much for her friends to handle. No one could explain that Appellant had been summoned in the middle of the night by Nelly's friends. And no one could explain that Appellant's specific purpose was to get the complainant home safely. As a result, the jury never heard from anyone who could explain how Nelly and Appellant had ended up outside the gas station that night.

Probably because Nelly's testimony was excluded, the defense scrambled to subpoena Alexis Cornejo mid-trial. (C.R. 264.) At 8:12am on October 2, 2024— after Nelly had been excluded and just before closing arguments— the defense obtained a subpoena for Alexis that was apparently never served. (C.R. 176.) Despite the subpoena, Appellant's trial attorney would later falsely claim that the defense had never wanted Alexis' testimony. (C.R. 265.) In an email exchange with appellate counsel he wrote, "Because we knew we could show, and did show, that CW was intoxicated at the time of the event, we ultimately decided (Alexis

Cornejo) was not necessary to present our defense." (C.R. 265.) Obviously, the existence of the defense's mid-trial subpoena for Alexis directly contradicts the attorney's explanation.

This deceptiveness is consistent with trial counsel's overall representation of Appellant. During the pendency of Appellant's case, Appellant's attorney was arrested and charged with Driving While Intoxicated and Evading Arrest in a Motor Vehicle after purportedly leading police on a ten-mile chase down the freeway that reached speeds of 110mph. (DX 2.) A few days later, the attorney checked himself into a rehabilitation facility citing alcoholism. (DX 6.) But despite a persistent theme of alcohol abuse in both of their criminal predicaments, and despite the attorney's month-long absence from work, the attorney did not withdraw from Appellant's case. Instead, exacerbating the problem, the attorney sought special leniency in his own cases from the same district attorney's office that was prosecuting Appellant. Requesting pre-trial intervention, the attorney acknowledged his ongoing struggle with alcohol while pleading for discretionary mercy from the Harris County District Attorney's Office. (DX 4.) The day before jury selection in Appellant's case, the attorney's request was denied, though it

appears the attorney continued to seek PTI even after Appellant's conviction. (C.R. 270.)[1]

These issues, standing alone, placed the attorney in a conflicted position that was not waivable-- even if Appellant had been properly informed. (R.R. Vol. 9 at 69.) But throughout his trial, Appellant was intentionally kept in the dark about his attorney's arrest and treatment. (DX 10.) It was not until appellate counsel received the case that Appellant was finally told about his trial attorney's arrest. (C.R. 271)

At Appellant's motion for new trial hearing, trial counsel repeatedly refused to answer questions, citing his 5th Amendment right to remain silent. (R.R. Vol. 9 at 17-38.) As a result, Appellant was unable to obtain any additional elaboration about the attorney's strategy in failing to secure Alexis' appearance at Appellant's trial. However, co-counsel at Appellant's trial, Matthew Woodard, testified that the defense had wanted Alexis to testify but had lost touch with her in the days leading up to the trial. Woodard offered no explanation for why Alexis had not been subpoenaed earlier, only stating that she was "not on board" at the time of Appellant's trial. (R.R. Vol. 9 at 144.) But Woodard agreed that Alexis' potential testimony—explaining both the complainant's unruly behavior that evening and

[1] Since the trial court lost jurisdiction, Appellant's attorney has pleaded guilty to Driving While Intoxicated (Cause 2518349 in Harris County Criminal Court at Law #5) and, "as consideration for a plea agreement" his felony charge of Evading Arrest in a Motor Vehicle (Cause 1875438 in the 182nd District Court) was dismissed. Appellant requests this Honorable Court take judicial notice of the outcome of the attorney's disposition as permitted by Texas caselaw. *Office of Pub. Util. Counsel v. Public Unit. Comm'n,* 878 S.W.2d 598, 600 (Tex. 1994).

Appellant's purpose in coming to the scene—would have been vital information that the jury never heard. (R.R. Vol. 9 at 133-5.)

Without the testimony of either Nelly or Alexis, the defense could offer no context for what Jhonathan Lerma had seen and recorded on his phone. Although the investigating officers conceded Nelly was intoxicated, they merely described her as "uncooperative" with "slurred speech" and a "slight odor" of alcohol. (R.R. Vol. 4 at 53.) The officers, unlike Alexis, did not experience the complainant as an extremely intoxicated, out of control, person. Perhaps Nelly regained some of her wits during the hour between Alexis' departure and the officers' arrival. Perhaps, once Nelly realized that her husband was likely to go to jail because of her antics, she sobered up. Unfortunately, her diminished intoxication also diminished the police's—and ultimately the jury's—understanding of what had really happened. As a result they wrongly concluded that Nelly's denials of abuse were simply the false excuses of a domestic violence victim. (R.R. Vol. 4 at 78.)

Yet even without the benefit of any defense witnesses, the jury struggled to find Appellant guilty. They sent one note indicating they were deadlocked. (C.R. 170) They sent another note asking for the definitions of each alleged manner and means in the indictment—"striking, throwing and dragging." (C.R. 171.) The same note then asked, "Does forceably (sic) moving someone against their will constitute dragging?" (C.R. 171). Finally, the jury asked whether, despite believing Appellant

had been previously convicted of family violence, could they only convict him of assault as a first offender. (C.R. 169). Understood in their totality, the notes strongly suggest that, had either Nelly or Alexis testified, the trial outcome probably would not have been the same. Specifically, it appears at least some members of the jury convicted Appellant based on his "dragging" of the complainant. Alexis's testimony would have shown that Appellant, to the extent that he "dragged" the complainant and caused her injury, was merely trying to safely get the complainant home.

SUMMARY OF THE ARGUMENT

The first significant problem with Appellant's trial was that Appellant was only permitted to raise one of the three different defenses available to him. Appellant's defenses were : 1) he did not cause the complainant injury; 2) even if he did cause a minimal injury, he did not do so "intentionally and knowingly"; and 3) his actions were justified by necessity in an effort to protect the complainant from her own dangerous behavior and extreme intoxication. The jury only heard the first of the three defenses because the trial attorney failed to secure the testimony of a critical witness.

The second significant problem with Appellant's trial was that his attorney had an actual conflict of interest. The attorney was arrested during the pendency of Appellant's trial and charged with Evading Arrest in a Motor Vehicle and Driving While Intoxicated. These charges created a serious conflict of interest that ethically

required the attorney to withdraw from Appellant's case. But beyond failing to withdraw, the attorney failed to even inform Appellant of the charges and intentionally concealed his arrest from Appellant. Had Appellant known, he would have sought different counsel and the record makes clear that he would have received a different attorney from the public defenders' office. As a result, the attorney's ethical violation rises to the level of an "actual" conflict of interest and Appellant's case must be reversed.

ISSUE ONE

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S ACTUAL CONFLICT OF INTEREST.

Applicable Law

A Court of Appeals reviews a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if no reasonable view of the record could support the trial court's ruling. *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017). This is a deferential standard of review requiring the Court to view the evidence in the light most favorable to the trial court's ruling. *Id.* In applying this standard of review, a Court of Appeals presumes that the trial court disbelieved evidence supporting appellant's ineffective-assistance claims. *See id.* at 821. It should afford "almost total deference" to a trial court's determination of historical facts and its application of the law to fact questions, the resolution of which turns on

an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). A Court of Appeals affords the same deferential review to the trial court's determination of historical facts based solely on affidavits, regardless of whether the affidavits are controverted. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013). In determining whether the trial court abused its discretion, an appellate court must not substitute its own judgment for that of the trial court, and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Burch*, 541 S.W.3d at 820. A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006).

The Sixth Amendment to the United States Constitution guarantees "[in] all criminal prosecutions that the accused shall have the right to reasonably effective assistance of counsel. *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997). The Sixth Amendment also guarantees a defendant the right to "conflict-free" representation. U.S. CONST. AMEND. VI; *Ex Parte McCormick*, 645 S.W.2d 801, 802 (Tex. Crim. App. 1983); *see also Orgo v. State*, 557 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Monreal*, 947 S.W.2d at 564, and *Goody v. State*, 433 S.W.3d 74, 79 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd)).

Most claims of ineffective assistance of counsel are reviewed under the analytical framework set forth in *Strickland v. Washington.* 466 U.S. 668, 687 (1984). *Castro v. State,* 2023 WL 5623883 August 31, 2023 (Tex.App.—Houston (14th Dist.) pet. ref'd.) However, claims involving an actual conflict of interest are reviewed under *Cuyler v. Sullivan.* 446 U.S. 335, 350 (1980). *Odelugo v. State*, 443 S.W.3d 131, 136 (Tex. Crim. App. 2014).

Under *Cuyler*, a defendant demonstrates a violation of his right to reasonably effective assistance of counsel based on a conflict of interest if he can show that (1) his counsel was burdened by an actual conflict of interest; and (2) the conflict had an adverse effect on specific instances of counsel's performance. *Cuyler*, 446 U.S. at 348–50; *Acosta v. State*, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007); *see also Monreal*, 947 S.W.2d at 565. Until a defendant shows his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *Cuyler*, 446 U.S. at 350. An actual conflict of interest exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of the client's interest. *See Monreal*, 947 S.W.2d at 564; *Odelugo*, 443 S.W.3d at 136. The conflict, however, must be more than merely speculative. *James v. State*, 763 S.W.2d 776, 778–79 (Tex. Crim. App. 1989). A potential conflict of interest is insufficient to reverse a conviction. *Cuyler*, 446 U.S. at 350; *Goody*, 433

S.W.3d at 79. But, if an appellant shows an actual conflict, prejudice is presumed. *Cuyler*, 446 U.S. at 350. The critical difference between the *Cuyler* test and the *Strickland* test is that there is a lesser burden when the claim of ineffective assistance of counsel involves a conflict of interest than when a claim is based on attorney error. *Thompson v. State*, 94 S.W.3d 11, 16 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). The United States Supreme Court, in *Cuyler*, found that no harm analysis is necessary when an "actual" conflict is established. *Cuyler,* 446 U.S. at 350. Clarifying the issue, the Texas Court of Criminal Appeals has held that an adverse impact from the attorney's conflict must be shown, but once identified, reversal will be required regardless of whether the adverse impact affected the outcome. *Odelugo,* 443 S.W.3d at 136.

In Texas, a fiduciary relationship exists between attorneys and clients as a matter of law. *Goffney v. Rabson*, 56 S.W.3d 186, 193–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The Texas Supreme Court has noted that the term fiduciary "refers to integrity and fidelity" and "contemplates fair dealing and good faith ... as the basis of the transaction." *Kinzbach Tool Co. v. Corbett–Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942). To this end, the attorney-client relationship is one of "most abundant good faith," requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception. *Goffney*, 56 S.W.3d at 193 (quoting *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 263–66 (Tex. App.—

Corpus Christi 1991, writ denied)). As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). However, this duty to inform does not extend to matters beyond the scope of representation. *Joe v. Two Thirty-Nine Joint Venture*, 145 S.W.3d 150, 156–57 (Tex. 2004).

Under the Texas Rules of Professional Responsibility, a lawyer shall not represent a person if the representation of that person "reasonably appears to be or become adversely limited" by the lawyer's own interests. Tex. Disc. R. Prof. Cond. 1.06(b)(2). However, a lawyer may still represent a client in such a circumstance if the lawyer reasonably believes the representation will not be materially affected and the client "consents" to such representation after full disclosure. Tex. Disc. R. Prof. Cond. 1.06(c).

Attorneys must keep clients "reasonably informed" about the status of a matter. Tex. R. Prof. R. 1.03.

Analysis

While Appellant's case was awaiting trial, his attorney was arrested and charged with Evading in a Motor Vehicle and Driving While Intoxicated. (C.R. 266-9; DX 2.) In the aftermath of his own arrest, the attorney sought in-patient treatment for alcoholism and was unavailable to Appellant throughout a 30 day hospitalization. (D.X. 6.) Additionally, after completing his treatment program, the attorney pursued

pre-trial intervention in his cases, essentially submitting himself to the mercy of the same district attorney's office that was prosecuting Appellant. (D.X. 4.) Thus, the attorney was simultaneously tasked with advocating against the Harris County District Attorney's Office on Appellant's behalf while he was personally at the mercy of their discretion.[2]

Appellant submits that the attorney's criminal charges categorically compromised his representation of any Harris County client. An attorney has an ethical obligation to provide full and fair disclosure of facts material to a client's representation and requires absolute perfect candor, openness and honesty, and the absence of any concealment or deception. *Goffney*, 56 S.W.3d at 193. Certainly, any client facing incarceration would rightly feel entitled to know if their attorney was facing charges from the exact same district attorney's office for a felony offense. But, specifically as applied to Appellant's case, the attorney's conflict was especially troubling. Appellant's defense was essentially that his wife was exceedingly intoxicated and impossible to control. As the trial attorney acknowledged in an

[2] The record provides an incomplete understanding of the attorney's conflict. Appellant obtained an order from the trial court for all of the attorney's communications with the district attorney's office regarding his own cases. However, the State refused to comply and sought mandamus relief from this Honorable Court. *See In Re The State of Texas Ex Rel Kim Ogg*, Case NO. 14-24-00821-CR. Then the State ran out the clock on the trial court's jurisdiction before dismissing its own appeal, preventing Appellant from reviewing several documents that were included in the attorney's request for pre-trial intervention. Appellant previously filed a motion to abate this appeal so that Appellant could reinstate the trial court's jurisdiction and enforce the trial court's order. However, this Honorable Court denied Appellant's motion to abate. As a result, several documents from the trial attorney's written request for pre-trial intervention remain inaccessible.

email with appellate counsel, the defensive strategy at trial included establishing the complainant's intoxication and emphasizing her belligerence. (C.R. 265.) Yet, anything the attorney might have said to emphasize the complainant's drunken behavior had implications for the attorney's defense in his own cases. The underlying factual allegations in the attorney's cases are that he fled from officers down a freeway for over ten miles with a blood alcohol level over twice the legal limit. (DX 2; DX 5.) Given the allegations against him, the attorney was in no position to emphasize the deleterious effects of extreme alcohol consumption.

Legal ethics expert, Jennifer Hasley, testified for Appellant at the hearing on Appellant's motion for new trial. With a primary practice area of legal ethics and malpractice, Hasley has been licensed for over 30 years and exclusively litigates ethics cases where she represents lawyers in disciplinary cases, malpractice, breach of fiduciary duties and fee disputes. She also represents judges before the Judicial Conduct Commission and serves on numerous bar committees. She is a Supreme Court appointee on the Committee for Disciplinary Rules and Refenda, a member of the Committee for Civil Trial Rules, and a member of the executive committee of the Garland Walker Inns of Court. (R.R. Vol. 9 at 61-5.)

Hasley opined that Appellant's trial lawyer had three conflicts of interest that should have caused the attorney to withdraw. (R.R. Vol. 9 at 66.) First, the trial attorney's in-patient alcohol rehabilitation treatment in the weeks leading up to

Appellant's trial indicates that Appellant's representation was compromised because the attorney was obliged to focus on his recovery. Second, the trial attorney was being prosecuted by the same elected district attorney and had specifically placed himself at the mercy of the same elected district attorney by seeking pre-trial intervention. And third, according to Hasley, a "positional conflict" existed because Appellant's defense relied upon the complainant's unruly behavior and extreme intoxication. (R.R. Vol. 9 at 69.) According to Hasley, the first and third conflicts were "unwaivable," leaving the trial attorney no ethical choice but to remove himself from Appellant's case. (R.R. Vol. 9 at 69.)

The trial court only partially agreed, finding Appellant's situation demonstrated that Appellant's attorney had a "potential" conflict of interest, but not an "actual" conflict of interest. (R.R. Vol. 9 at 166.) However, Appellant asserts that the conflict metastasized into an "actual" conflict when the attorney intentionally concealed his legal predicament from Appellant. The attorney invoked his right to remain silent when called to testify at Appellant's motion for new trial hearing. (R.R. Vol. 9 at 17-39.) But in email correspondence with appellate counsel—which was admitted into evidence at the motion for new trial hearing—the attorney acknowledged that he never told Appellant about his own pending cases. (C.R. 272.) Likewise, the attorney's supervisor at the Harris County Public Defenders Office acknowledged that the attorney only began obtaining informed

consent from his clients in the aftermath of Appellant's conviction. (C.R. 273.) Finally, Appellant's affidavit—which was also admitted into evidence at the motion for new trial hearing—confirms the attorney's own unsworn statement and explicitly states that, if Appellant had known about his attorney's criminal charges, Appellant would have sought a different lawyer. (C.R. 271.) And the public defenders office supervisor confirmed that Appellant would have been given a different, conflict free public defender if Appellant had requested one. (R.R. Vol. 9 at 50-1.) Unlike previous cases before this court, (e.g. *Castro v. State*, 2023 WL 562883) there can be no dispute that Appellant was blind to his attorney's legal problems at the time of Appellant's trial.

Ultimately, under the seminal cases of *Cuyler* and *Odelugo*, there are two questions in an attorney conflict analysis: 1) Did the attorney have an "actual conflict"—*i.e.* was the attorney required to make a choice between advancing his client's interest or advancing other interests to the detriment of the client?; and 2) Did the conflict have an adverse effect on specific instances of counsel's performance? *See Monreal*, 947 S.W.2d at 564; *Odelugo*, 443 S.W.3d at 136. The answer to both questions in this case is clearly "yes."

Under the Texas Rules of Professional Responsibility 1.03 and 1.06, the trial attorney was ethically required to withdraw from Appellant's cases or, at a minimum, inform Appellant about his own legal problems. But the attorney actively

chose not to do so. This choice worked to Appellant's detriment by keeping Appellant uninformed and in the dark about his attorney's conflict. The trial attorney's choice, not coincidentally, also worked to the trial attorney's benefit allowing the attorney to avoid: 1) further employment complications; 2) evidentiary complications with his own cases; and 3) further discomfort, shame and ridicule.

Unlike private practitioners, many of whom are self-employed and handle a variety of civil and criminal matters in multiple jurisdictions, the trial attorney in Appellant's case was an assistant public defender limited to practicing in the criminal courts of Harris County. Therefore, the employment impact of the trial attorney's ethical obligations was total. Indeed, if the trial attorney had fully complied with the Texas Rules of Professional Responsibility, he would have withdrawn from all of his cases, leaving him without any functionality at work. (R.R. Vol. 9 at 61-5.)

But consider what would have happened if the trial attorney had at least partially complied with the rules of ethics and, in response to the clear conflict of interest, obtained informed consent from each of his clients. The act of informing his clients would have likely caused many of them to seek different appointed counsel, again complicating the attorney's employment. And of the clients that did not demand different counsel, many would have at least had questions about their attorney's circumstances. If trial counsel had provided answers consistent with his

PTI letter, he would have made admissions to his clients, making them potential witnesses against him in a later trial. In short, the knot of the attorney's conflicted interests would have likely become only more tangled with the attorney's disclosure.

The employment and evidentiary issues are only a small part of the greater landscape of humiliation that the trial attorney was facing. As the attorney noted in his request for pre-trial intervention, he felt "ashamed" because his picture was on the news with "Public Defender Arrested" captioned across the screen. (DX 4.) "(P)owerless" over alcohol, his PTI request repeatedly noted his own "shame," as well as the "shame" his wife endures because her colleagues also know about his cases. (DX 4.) His arrest was known to all of his colleagues at the PDO and many others with whom he worked in the Criminal Justice Center. (R.R. Vo. 9 at 136.) Imagine the daunting task of individually sitting down with dozens of clients and candidly explaining the compromising circumstances of a felony arrest. The mere prospect of it is prohibitive. So there can be little question that the trial attorney, in choosing not to have these ethically mandatory conversations, did so for his own benefit and to the detriment of his clients. Therefore, the first question in the *Cuyler/Monreal* analysis–was the attorney forced to choose between his own and his client's interest?—should be answered "yes."

As for the second part of the analysis—did the conflict have an adverse impact on specific instances of counsel's performance—again the answer is "yes." As

Appellant's affidavit clearly states, had he known of his attorney's conflict, he would have requested a different appointed attorney. (C.R. 271.) Moreover, as the attorney's supervisor at the public defenders office testified, had Appellant contacted the PDO in advance of trial to complain about his attorney's conflict, the public defenders office would have put a different, conflict-free, attorney on the case. (C.R. 273.) Of course, it is impossible to know whether a different attorney would have obtained a better result. But, unlike claims involving attorney error, claims of attorney conflict do not require proof that the outcome was affected. Rather, once it is established that the conflict had an adverse impact on the attorney's performance, prejudice must be presumed and reversal is required. *Cuyler*, 446 U.S. at 350. Here, the attorney was ethically and legally obligated to withdraw from Appellant's case. At a minimum, he was required to inform Appellant of the conflict. By failing to take any measures to address the attorney's conflicted interest, and by intentionally concealing the conflict from Appellant, the attorney's performance was adversely affected and what might have been a "potential conflict" became an "actual conflict."

Finally, Appellant notes that it was an attorney from the Harris County Public Defenders Office who represented Appellant at trial. This is notable because two recent cases alleging attorney conflict in the Houston area were appealed by the Harris County Public Defenders Office. In *Castro* and *Goody,* the Harris County

Public Defenders Office asserted an actual conflict existed based on the attorney being under indictment. *Castro v. State,* 2023 WL 5623883 August 31, 2023 (Tex.App.—Houston (14th Dist.) pet. ref'd.); *Goody v. State*, 433 S.W.3d 74 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd)). Both cases were affirmed on appeal.

Appellant's case is distinguishable in several ways. First, in *Castro v. State,* there was a factual dispute about whether the attorney informed the client of her criminal charges. The client claimed he was not informed, but the attorney insisted that, despite her charges, the client "begged (her) to stay on the case." *Castro*, p. 4. Moreover, it appears the client's case in *Castro* was transferred to a different court because the attorney's cases were initially in the same court as the defendant's cases and this overlap created a conflict. Although there was no definitive proof that the client was properly informed, the court transfer suggests the conflict's existence was recognized at the trial court level. *Id.* at 5. In Appellant's case, it is all but indisputable that Appellant was never informed of his attorney's conflict. The client, the attorney and the PDO leadership are consistent about the failure to inform Appellant.

In *Goody v. State,* the Harris County Public Defenders Office appealed a conviction where the attorney was under indictment for barratry. The issue of whether the accused was informed of his attorney's criminal liability, however, was not litigated.

Moreover, both *Castro* and *Goody* involved cases where the subject matter of the attorney's case and the client's case were wholly separate. In *Castro,* the attorney was charged with insurance fraud while the client was convicted of child molestation. In *Goody,* the attorney was charged with barratry while the client was convicted of bank robbery. Nothing in those cases indicated that the evidence from the attorney's case created a "positional conflict" with the client's case. By contrast, in both Appellant's and his trial attorney's cases, extreme alcohol intoxication played a fundamental role. Trial counsel purportedly drove for over 10 miles at speeds of up to 110 mph with a blood alcohol level of .18. This necessarily impacted his ability to criticize the complainant in Appellant's case whose behavior was erratic, belligerent and dangerous as a result of extreme alcohol intoxication.

Moreover, the PDO's involvement in all of the three cases should send a disturbing message to this Honorable Court about the effect of the *Castro* and *Goody* opinions. Having litigated and lost in both *Castro* and *Goody,* it appears the PDO leadership concluded that a conflicted attorney at trial was permissible and, rather than focusing exclusively on their client's presumption of innocence, their attorney's presumption of innocence became an equal consideration. (C.R. 273; R.R. Vol. 9 at 141-2.) Similarly, the *Castro* opinion, while making no specific holding based on the attorney's presumption of innocence, mentions it in *dicta. Id.* at 5. Appellant would therefore ask this Honorable Court to take judicial notice of the outcome of

his trial attorney's cases. Since Appellant's motion for new trial, the trial attorney has pleaded guilty to misdemeanor DWI and, only in exchange for his guilty plea was the felony Evading Arrest charge dismissed. By contrast, the attorneys in *Goody* and *Castro* both had their charges completely dismissed without a guilty plea.

Appellant would assert that, regardless of any attorney's outcome, an attorney's presumption of innocence should not be conflated with their client's presumption of innocence. Defendants are only presumed innocent in the context of a criminal case. But people are not necessarily guaranteed such a presumption in their daily lives and citizens are routinely denied employment, housing, licensures, and other essential needs because of previously dismissed or pending charges. For example, an accused child molester has no entitlement to a presumption of innocence in the context of an employment application at a elementary school.

Indeed, the fact that PDO leadership felt the need to balance their client's presumption of innocence with their attorney's presumption of innocence should highlight the compromised nature of Appellant's representation. Under the Sixth Amendment, Appellant was entitled to "conflict free" counsel. *Ex Parte McCormick*, 645 S.W.2d 801, 802 (Tex. Crim. App. 1983) But the PDO consciously determined that, despite their attorney's conflict, Appellant could be sufficiently represented by an attorney who was: 1) under felony indictment; 2) seeking special leniency from the same DA's Office that was prosecuting Appellant; 3) recently

released from in-patient treatment for alcoholism rehabilitation; and 4) positionally compromised because both cases--Appellant's and Appellant's attorney's-- involved the behavioral effects of extreme alcohol intoxication. (C.R. 273.) By intentionally leaving Appellant uninformed about his compromised and conflicted attorney, the PDO appears to be intentionally lowering its standard of representation in response to its losses in *Castro* and *Goody*. This is precisely the wrong lesson to learn.

In conclusion, there can be little question that Appellant's attorney breached his fiduciary duty to keep Appellant informed. Further, there is little question that Appellant's attorney kept Appellant uninformed to avoid employment complications, evidentiary complications in his own cases, and further humiliation from his arrest. Finally, Appellant has established that Appellant would have received a conflict-free attorney if he had only known of his attorney's actual conflict of interest. Therefore, an actual conflict of interest existed and reversal is required.

ISSUE TWO

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S FAILURE TO SECURE THE APPEARANCE OF WITNESS ALEXIS CORNEJO.

Applicable Law

A claim of ineffective assistance of counsel that was denied in a motion for new trial is reviewed under an abuse-of-discretion standard. *Charles v. State*, 146

S.W.3d 204, 208 (Tex. Crim. App. 2004). Reversal is only appropriate if the decision to deny the new-trial motion was arbitrary or unreasonable, viewing the evidence in the light most favorable to the ruling. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018)

Trial courts are in a better position to evaluate the credibility of witnesses and resolve conflicts in evidence than appellate courts, which must rely on a submitted record. *Kober v. State*, 988 S.W.2d 230, 233 (Tex. Crim. App. 1999). Accordingly, an appellate court must defer to the trial court's decision to believe or disbelieve all or any part of a witness's testimony. *Id.* This same deference applies when the testimony is by affidavit. *See Manzi v. State*, 88 S.W.3d 240, 243–44 (Tex. Crim. App. 2002). If there are two permissible views of the evidence, the trial court's choice between them cannot be held to be clearly erroneous. *Riley*, 378 S.W.3d at 457. Thus, a trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007).

When, as here, the trial court makes no findings of fact on the denial of a motion for new trial, an appellate court must "impute implicit factual findings that support the trial judge's ultimate ruling." *Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005). But there is a limitation on imputing factual findings. An

appellate court should only impute implicit factual findings that "are both reasonable and supported in the record." *Id.*; *see Escobar v. State*, 227 S.W.3d 123, 127 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

The Sixth Amendment of the United States Constitution guarantees an accused's right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) To prove a claim for ineffective assistance of counsel, an appellant must establish, by a preponderance of the evidence, that (1) his trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Lopez*, 343 S.W.3d at 142. In determining whether there was a reasonable probability of a different result but for the ineffective assistance, courts look for a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. When conducting a *Strickland* analysis, a Court of Appeals must look to the totality of the representation to determine counsel's effectiveness. *Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006) The appellant bears the burden to establish both prongs. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009)

To demonstrate ineffective assistance of counsel based on an uncalled witness, an appellant must show two things: (1) the witness would have been available to testify and (2) the witness's testimony would have been of some benefit to the defense. *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007); To make this determination, an appellate court must "compare the evidence presented by the State with the evidence the jury did *not* hear due to trial counsel's failure." *Perez v. State*, 310 S.W.3d 890, 896 (Tex. Crim. App. 2010); *See Frangias v. State*, 450 S.W.3d 125, 138–44 (Tex. Crim. App. 2013) (failure to secure deposition or request continuance to bring late-discovered witness to trial to advance sole defense was ineffective assistance of counsel).

Counsel's conduct is presumed to be reasonable and, when a record is silent regarding an attorney's strategy, an appellate court should reverse only if it cannot conceive of a reasonable trial strategy. *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). However, when counsel is given the opportunity to explain his trial strategy and fails to do so, the presumption of reasonableness does not apply. *See State v. Frias*, 511 S.W.3d 797, 811 (Tex. App.—El Paso 2016, pet. ref'd).

A defendant must show more than "that the attorney's errors had some conceivable effect on the outcome of the proceeding," *Perez*, 310 S.W.3d at 894 (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). "Rather, he must show that 'there is a reasonable probability that, absent the errors, the factfinder would

have had a reasonable doubt respecting guilt.' " *Id.* (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). An appellate court must ask whether there is a "reasonable probability sufficient to undermine confidence in the outcome that, but for counsel's errors, the outcome of the proceeding would be different." *Everage v. State*, 893 S.W.2d 219, 224 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

When an accused is denied a viable defense because of the attorney's deficient performance, harm should be found. *Ybarra v. State,* 629 S.W.2d 943, 946 (Tex.Crim.App. (panel op.) 1982); *State v. Thomas,* 768 S.W.2d 335, 336 (Tex.App.-- Houston (14th Dist.) 1989 no pet.) One error by counsel, if it is serious enough, can be the basis for a finding of ineffective assistance of counsel. *Thompson v. State,* 9 S.W.3d 808, 813 (Tex.Crim.App. 1999); *Murray v. Carrier,* 477 U.S. 478 (1986).

Analysis

Appellant maintains on appeal that he received ineffective assistance of counsel because his attorney failed to secure the appearance of witness Alexis Cornejo. According to Appellant's trial attorney, the strategy behind not calling Alexis was because she was not "necessary." In an email exchange with appellate counsel that was admitted into evidence, the trial attorney wrote, "Because we knew we could show, and did show, that CW was intoxicated at the time of the event, we ultimately

decided (Alexis Cornejo) was not necessary to present our defense." (C.R. 265.) The attorney repeatedly invoked his 5th Amendment right to remain silent during the motion for new trial hearing, so the email exchange is the attorney's only statement regarding his strategy in failing to issue a pre-trial subpoena for Alexis. (R.R. Vol. 9 at 17-39.)

Appellant asserts that the attorney's stated strategy in his email is not true—as evidenced by the mid-trial subpoena for Alexis' appearance issued on October 2, 2024. (C.R. 264) If the defense attorney never wanted Alexis' testimony, he would not have sought her appearance—belatedly or otherwise. Moreover, according to co-counsel Matthew Woodard, the defense had wanted Alexis to testify all along but concluded she was "not on board" during Appellant's trial. (R.R. Vol. 9 at 144.) Woodard's account tracks the testimony of Alexis at the motion for new trial hearing. Alexis told the court that she had spoken with Appellant's lead attorney on perhaps three occasions over the course of Appellant's case, but never in the days leading up to Appellant's trial. (R.R. Vol. 9 at 114, 118.) She said she was aware that Appellant's trial was approaching but she never received a subpoena and she did not really want to testify if she could avoid it because she was worried she had an outstanding warrant and might get arrested. (R.R. Vol. 9 at 114.) As a single mother, she did not want to risk going to jail, leaving her children unattended. (R.R. Vol. 9 at 115.) Apparently, Alexis had asked the trial attorney about her warrant,

but never received a "straight answer" about whether she would be taken into custody. (R.R. Vol. 9 at 118.) However, Alexis testified that if she had been subpoenaed, she would have abided by the court order and testified because she would not have had a choice. (R.R. Vol. 9 at 115.) The clerk's file indicates that no subpoena applications were issued for Alexis until the mid-trial subpoena on the morning of October 2, 2024. Additionally, no motion for continuance was filed or presented to the court and no motion for remote testimony over zoom was filed or presented. Indeed, the record fails to show Appellant's lead counsel made any effort to secure Alexis' appearance until after the close of evidence. Taken together, 1) Alexis's testimony at the motion for new trial hearing, 2) Matthew Woodard's testimony at the motion for new trial hearing, 3) the trial attorney's refusal to answer questions at the motion for new trial, and 4) the trial attorney's strategic explanation made by email—which is either untrue, unreasonable or both-- Appellant asserts that the attorney's failure to secure Alexis' appearance at Appellant's trial was deficient performance. *Frangias*, 450 S.W.3d at 138–44.

In addition, the failure to secure Alexis' testimony was also harmful. Although the trial attorney indicated that Alexis would only have testified "that CW was intoxicated," Alexis actually had quite a bit more to say. Comparing the evidence presented with what the jury should have heard, police told the jury that when they arrived on scene the complainant was uncooperative, intoxicated, with a

"slight odor" of alcohol on her breath. (R.R. Vol. 4 at 53.) Alexis, a TABC certified alcohol server, would have told the jury that, earlier in the evening, the complainant was "extremely" intoxicated and more drunk than Alexis had ever seen her. (R.R. Vol. 4 at 106-7.) Describing Nelly that evening Alexis testified, "She was everywhere. She was on one side of the bar. She was on the other. She was not wanting to sit down. She was driving everybody crazy. It was just a whole mess." (R.R. Vol. 4 at 104-5.) Alexis said, "I told her, let's go home. She didn't want to. And she's basically like, you know—she was like…you know… being aggressive... And I was just like okay. I will just take care of her." (R.R. Vol. 4 at 105.) Further, Alexis described the complainant as being belligerent and out of control. Nelly was behaving like she was, "(v)ery drunk. Extremely drunk. Like you could just tell. She was just everywhere, all over. She was slurring her words..." (R.R. Vol. 9 at 107.) For a while, Alexis was willing to tolerate the complainant's behavior. But as the evening dragged on and the complainant insisted on drinking more, Alexis realized that she "couldn't handle her anymore." (R.R. Vol. 9 at 106.) Alexis told the court, "I was trying my hardest and she was just not listening. She didn't want to hear nothing anybody had to tell her." (R.R. Vol. 9 at 106-7.) So Alexis called Appellant, the complainant's husband. (R.R. Vol. 9 at 108.) By that point, Alexis (who was also intoxicated, though not as far gone as the complainant) had concluded that the complainant needed to go home even though the complainant was refusing

to give up on the night. Alexis created a ruse to get the complainant out of the bar, telling her they were going to a convenience store to keep drinking. (R.R. Vol. 9 at 109.) According to Alexis, Appellant arrived to the same location where the assault would allegedly take place and his specific purpose was to bring the complainant home. (R.R. Vol. 9 at 110.) As the complainant left Alexis at the convenience store with her husband, Alexis could hear the complainant still being "very persistent" that she wanted to stay out and drink more and Alexis described the complainant as resisting her husband's efforts to bring her safely home. (R.R. Vol. 9 at 111-2.)

This information is both consistent with witness Jhonathan Lerma's testimony, while simultaneously shedding it in a different light. Lerma described the complainant running away from Appellant and screaming for help. (R.R. Vol. 4 at 154-6.) Taken out of context, Lerma understandably believed Appellant was attacking the complainant. But placed in context with Alexis' testimony, the complainant was likely resisting Appellant's efforts to get her home. Further, Lerma described Appellant as dragging the complainant against her will, and "smashing" the complainant onto the ground. (SX 8.) But the complainant had no recent facial injuries from that evening and only minor scratches on her elbow. The truth is that Appellant was struggling with the complainant, trying to pull her up and walk her to their car, which is why the complainant's only recent injury was non-bleeding scratches on her elbow. Again, with Alexis' testimony, one can understand why

Lerma thought Appellant was assaulting the complainant, even though Appellant was merely trying to control her enough to get her home.

Without Alexis' testimony, the jury was only provided one defense: that Appellant did not cause the complainant bodily injury. With Alexis' testimony, the jury would have understood that, even if the complainant suffered a small injury at Appellant's hands, Appellant may not have caused the injury "intentionally and knowingly." Rather, the scratch on Nelly's arm may have been unintentional and incidental to Appellant's efforts to get her home. Further, if Alexis had testified, the jury might have considered whether Appellant's conduct was justified on the basis of necessity. Alexis testified that the complainant's behavior was erratic and she was creating a danger to herself. (R.R. Vol. 9 at 112.) If Appellant reasonably believed his conduct was immediately necessary to avoid the complainant's imminent harm, Appellant's conduct would have been legally justified. Tex. Pen. Code § 9.22.

As the jury's deliberation notes indicate, these additional defenses would have almost certainly prevented Appellant's conviction. Appellant was charged with three distinct manner and means of committing the offense of assault—"striking," "throwing," and "dragging." (C.R. 171.) The jury asked for definitions of each of these words, but then zeroed in on the word "dragging." They asked, "Does forceably (sic) moving someone against their will constitute dragging?" (C.R. 171).

It is notable that the jury was particularly focused on the "dragging" manner and means. Unlike "striking," which almost always includes an intent to cause harm, a person may "drag" another person for benign reasons. Obviously, this is what Appellant contends he was doing. The jury's question is whether an intentional "forcible moving" that results in injury is, by definition, an assault by "dragging." In essence, the jury was wondering about the precise information they never heard: what if the defendant forcibly moved the complainant for a reason other than causing her injury? But without Alexis' testimony, the jury could only ask: did Appellant intentionally and knowingly engage in the conduct of dragging? And did the conduct of dragging cause the complainant injury? The jury had no basis for including in their analysis Appellant's intent to help the complainant. Further, the jury had no reason to evaluate whether Appellant's conduct was justified. No necessity instruction was before the jury because, without Alexis' testimony, there was no evidence of Appellant's alternate intent.

Yet even without the benefit of Alexis' testimony, the jury struggled in its deliberations. It sent out two other notes: one suggested it was deadlocked (C.R. 170); the other asked if it could nullify itself and only convict Appellant of a misdemeanor (C.R. 169). With the benefit of Alexis' testimony, a different outcome appears to be highly likely.

The trial attorney's failure to secure Alexis' testimony was both deficient performance and harmful. The attorney made no effort to secure her testimony in advance of trial with a subpoena, or a motion for continuance, or a motion for her to testify remotely. Appellant's attorney likely had no strategy for this failure as his email explanation is demonstrably false. But, if his stated strategy is to be believed, his claim that her testimony was "unnecessary" is both untrue and unreasonable. Indeed, the absence of her testimony specifically denied Appellant two viable defenses: 1) that if Appellant caused the complainant injury, he did not do so "intentionally and knowingly"; and 2) that Appellant's actions were justified by necessity. Because the trial attorney's deficient performance deprived Appellant of two viable defenses, reversal is required. *Ybarra,* 629 S.W.2d at 946.

PRAYER

For the reasons stated above, Appellant prays this Honorable Court will reverse the trial court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via electronic service on the day the brief was filed.

/s/ Mark Hochglaube
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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