No. 01-24-00745-CR

IN THE
COURT OF APPEALS
FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

SONYA ZANES,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM CAUSE NO. 92857-CR
300th JUDICIAL DISTRICT COURT
BRAZORIA COUNTY, TEXAS
HONORABLE CHAD BRADSHAW, JUDGE PRESIDING

BRIEF FOR THE APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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BRIEF FOR THE APPELLANT

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Sonya Zanes, the Defendant in Cause Number 92857-CR in the 300th District Court in and for Brazoria County, Texas, submits this brief, and would respectfully show the Court the following:

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STATUTES

Tex. Pen. Code § 49.045
Texas Code Crim. Pro. §§ 38.41 & 38.42

STATEMENT OF THE CASE

This is a direct appeal from a jury verdict finding Appellant guilty of driving while intoxicated, with child passenger. (Tex. Penal Code sec. 49.045). Appellant was charged by indictment with said offense. (C.R. p. 6)

Voir Dire commenced on September 16, 2024. (RR Vol 5, p.1) A guilty verdict was returned by the jury on September 17, 2024. (RR Vol 5, p. 131) The same day Appellant was sentenced by the Court to one (1)-year of confinement in the Texas Department of Criminal Justice-State Jail division; but said sentence was suspended, with Appellant ordered to complete three (3) years' community supervision**.** RR Vol 6, p.16. Written judgment was entered on September 19, 2024. (C.R., @ 81)

A notice of appeal was filed on October 1, 2024. (C.R, p.92). Appellant filed a Motion for New Trial on October 17, 2024 (C.R., p.102). Appellant then filed a First Amended Motion for New Trial on October 19, 2024. (C.R., p. 111).

After evidentiary hearing the Court denied Appellant's First Amended Motion for New Trial on December 2, 2024. R.R. Vol. 7, p. 57 . The sole ground alleged in the First Amended Motion for New Trial was that trial counsel rendered ineffective assistance of counsel at trial. (C.R., p. 111).

ISSUES PRESENTED

Issue One

Did the Trial judge err in Denying the First Amened Motion for New Trial Alleging Ineffective Assistance of Trial Counsel?

Issue Two

Did Appellate Counsel Unreasonably Fail to Support the Claim of Trial Counsel's Ineffectiveness?

SUMMARY OF ARGUMENT

ISSUE ONE

By failing to speak with or present the testimony of numerous fact witnesses, speak to a testifying witness before using him at trial, use any expert in any way, or file a written objection to the state using affidavits in lieu of the live testimony of the chemist who conducted the blood test of Appellant, trial counsel's performance fell below an objective standard of reasonableness and prejudiced Appellant at trial.

ISSUE TWO

Appellate counsel was ineffective in failing to develop the record at the hearing held on the First Amended Motion for New Trial (Hereinafter: "the Motion"). The Court denied Appellant's First Amended Motion for New Trial**.** The Motion was denied because the trial judge did not have the information necessary to evaluate the claim. (R.R., Vol. 7 p. 55-57). Thus, Appellate counsel deprived his client of any sort of meaningful review of her claim that trial counsel was ineffective, and thus Appellate counsel was himself ineffective.

STATEMENT OF FACTS

On February 26, 2021 Texas Department of Public Safety Trooper Joshua Strawn (Hereinafter: "Trooper Strawn") pulled over Sonya Zanes (Hereinafter: "Appellant") for speeding ten (10) miles over the limit (70/60) in Brazoria County, Texas. RR Vol. 5, p.15. At the time of the stop Appellant was traveling with her Grandchild, Joseph Garcia (Hereinafter: "Joseph"), age ten (10). R.R. Vol. 5, p. 41. Appellant was driving her Grandson Joseph home after picking him up at Southside Elementary in Angleton. R.R. Vol. 5, p. 101. It was early afternoon. R.R. Vol. 5, p. 86.

Due to Appellant having slurred speech and sounding "thick-tounged" to him Trooper Strawn initiated an investigation to determine if Appellant was intoxicated. R.R. Vol. 5, p. 15. Because he did not smell alcohol Trooper Strawn suspected intoxication due to controlled substances. R.R. Vol. 5, p. 16. Due to his observations Troper Strawn decided to administer Standardized Field Sobriety tests (Hereinafter: "SFST's) to Appellant. R.R. Vol. 5, p. 16.

Trooper Strawn testified that he was unable to get a result on the first SFST called the Horizontal Gaze Nystagmus test (Hereinafter: "HGN") because Appellant did not follow his instructions. (R.R. Vol. 5, p. 17). The second SFST he administered was the Walk and Turn. (R.R. Vol. 5, p. 22). Appellant exhibited five of eight (5/8) clues on the Walk and Turn, where more than two (2) clues is indicative of intoxication. (R.R. Vol. 5, p. 50). The final SFST administered to Appellant was the

One Leg Stand. Appellant exhibited three of four (3/4) clues on the One Leg Stand. More than one clue on the One Leg Stand indicates intoxication. (R.R. Vol. 5, p. 50).

Trooper Strawn considered the results of the SFST's to be unsatisfactory and based on that and his observation of slurred speech, arrested Appellant for Driving While Intoxicated with Child Passenger. (R.R. Vol. 5, p. 23). Trooper Strawn asked for consent to draw a sample of Appellant's blood, which she refused. (R.R. Vol. 5, p. 23-24). Trooper Strawn then obtained a warrant for Appellant's blood. (R.R. Vol. 5, p. 36). Trooper Strawn then transported Appellant to a medical facility, presented the warrant, and Appellant's blood was drawn. (R.R. Vol. 5, p. 37-38). Trooper Strawn then placed Appellant in the Brazoria County jail and delivered her blood sample to the Brazoria County Crime lab for analysis. (R.R. Vol. 5, p. 27).

The state also presented the testimony of Officer Anthony Baggett of the Pearland Police Department. Officer Baggett is a drug recognition expert. (Hereinafter: "DRE"). (R.R. Vol. 5, p. 59-60). The state qualified Officer Baggett as an expert in drug recognition. (R.R. Vol. 5, p. 60-62), and though never formally tendered as an expert, he testified as such without objection. (R.R. Vol. 5, p. 65-67). During Officer Baggett's testimony the state moved to introduce their exhibit number three. (Hereinafter: "State's 3") Specifically, State's 3 is a "Certificate of Analysis/Chain of Custody Affidavit" setting forth the results of Appellant's blood test results (toxicology report), its chain of custody, and the qualifications of the chemist who conducted the testing of the blood, Daniel K. Anderson. (R.R. Vol. 5, p. 74-75). Trial counsel's

Confrontation Clause objection was overruled because he never filed a written objection to either the "Certificate of Analysis" nor to the "Chain of Custody Affidavit" (R.R. Vol. 5, p. 65-67), as required by Texas' relevant notice and demand statute. (*See,* Texas Code Crim. Pro. §§ 38.41 & 38.42).

Officer Baggett then read the results of the test to the jury. The test indicated Phentermine, Clonazepam, 7-Amino Clonazepam, Delta-9 Carboxy THC; Delta-9 THC, and Codeine in its free form. (R.R. Vol. 5, p. 76). Officer Baggett then reads from the Reference Comments setting forth the precise nature of the compounds found. (R.R. Vol. 5, p. 76-77). Officer Baggett is then asked based on his review of the evidence if he is of the opinion that probable cause existed to arrest Appellant for driving while intoxicated. (R.R. Vol. 5, p. 78-79). He testified in his opinion probable cause to arrest for driving while intoxicated existed. He then opined that the type of substances found in the blood matched the type of intoxication he observed on the video evidence. (R.R. Vol. 5, p. 79). Baggett also stated that the active ingredient in Klonopin is Clonazepam. (R.R. Vol. 5, p. 79).

Appellant's husband, Johnny Garcia testified at trial. (R.R. Vol. 5, p. 85). He stated he received a call from Appellant at the time she was being stopped. (R.R. Vol. 5, p. 87). He said during that call Appellant sounded "fine." (R.R. Vol. 5, p. 88). That Appellant had picked up their Grandson, Joseph Garcia, because he had been in a fight and his parents were not available. (R.R. Vol. 5, p. 88). He also stated that Appellant suffers from anxiety attacks and had been prescribed medications to help

her. (R.R. Vol. 5, p. 89). Appellant's husband further testified that she had had dental work done near the time of the stop entailing the extraction of her upper teeth and that made her sound thick-tongued and have trouble speaking. (R.R. Vol. 5, p. 92). Mr. Garcia also testified that Appellant was fasting at the time along with her church group to lose weight. (R.R. Vol. 5, p. 95-96). He also testified that Appellant had her Klonopin dosage cut in half because they felt the original dosage was too strong. (R.R. Vol. 5, p. 94-95). He was "surprised" to learn that Appellant told Trooper Strawn that she had taken two pills of the lowered dosage on the date of arrest. (R.R. Vol. 5, p. 97-98). He also testified that Appellant sought the reduction of her Klonopin dosage after it appeared to him one day that she looked excessively drowsy and "slurry." (R.R. Vol. 5, p. 95). He also testified that when he saw her in that condition, he did not think she could operate a motor vehicle. (R.R. Vol. 5, p. 95). He also testified that Klonopin was supposed to be taken after eating and that Appellant was fasting at the time of her arrest. (R.R. Vol. 5, p. 95).

Joseph Garcia, Appellant's Grandson, and child passenger at the time of arrest offered brief testimony. (R.R. Vol. 5, p. 100-104). He testified that he had to leave school immediately due to suspension for fighting. (R.R. Vol. 5, p. 101). He stated that Appellant was upset about the situation and was crying prior to being pulled over. (R.R. Vol. 5, p. 103). Joseph Garcia testified that just prior to being pulled over for speeding Appellant was emotional and had been crying. (R.R. Vol. 5, p. 103).

On December 2, 2024 an evidentiary hearing was held on Appellant's First Amended Motion for New Trial. (Hereinafter: "the Motion"). R.R. Vol. 7, p. 1. Appellant and her counsel at trial, Phil Morin, testified at the hearing. R.R. Vol. 7, p. 3. The sole issue was whether trial counsel was deficient at trial and whether that deficient performance, if any, prejudiced the defense. R.R. Vol. 7, p. 3.

At the **hearing on the Motion Appellant testified** as follows:

- She was stopped fifteen minutes after leaving Southside Elementary R.R. Vol. 7, p. 3 (**all cites to the record in this string are to R.R. Vol. 7**);
- While at Southside she spoke to the front-office secretary, Ms. Coffee (p. 3);
- Appellant was at Southside for approximately forty-five minutes (p. 8);
- She spoke to school resource officer Wood while at Southside (p. 9);
- Appellant spoke to the Principal, or Assistant Principal of Southside about the incident in her office before her grandson was released to her (p. 8);
- Her gums were swollen and bleeding from recent dental work causing her to sound drunk when she spoke (p. 10);
- Appellant never met with Mr. Morin outside the courtroom (p. 10);
- Trial counsel never spoke to the dentist who performed her recent dental work or her assistant, or the administrator at the school, nor to Officer Wood or Ms. Coffee. (p. 11);
- Appellant testified that trial counsel never reviewed any of the video evidence with her prior to trial (p. 11);
- Despite Appellant asking him to do so, trial counsel never acquired the video of her from Southside Elementary (p. 11);
- Despite telling him that she used CBD based hand cream trial counsel never explored whether that could have caused the presence of THC in her blood, nor did trial counsel obtain expert assistance to challenge blood test results (p. 14);
- Trial counsel never obtained sign-in, sign-out sheet from Southside (p.15);
- When she asked trial counsel about experts she was told "they" would provide experts. (p.17).

At the hearing on the Motion **Phil Morin** (Hereinafter: "trial counsel") **testified** as follows:

- Trial counsel has a duty to present all available testimony and other evidence that supports the defense of his client (R.R. Vol. 7, p. 22);
- Trial counsel was assigned the case two and one-half years prior to trial (R.R. Vol. 7 p. 22);
- That he met with Appellant outside of court but "can't remember" when (R.R. Vol. 7, p. 23);
- Did not utilize any expert of any kind for any purpose (R.R. Vol. 7, pp. 24-26);
- Appellant told him that she used CBD cream for her hands (R.R. Vol.7, p. 24);
- He did not try to obtain video from Southside (R.R. Vol. 7, p. 26);
- Never spoke to any witnesses at Southside (R.R. Vol 7, p. 26);
- Did not use a private investigator to interview witnesses, nor did he interview any witness himself (R.R. Vol.7, p. 26);

The Motion was denied. R.R. Vol. 7, p. 57. The primary reason the Motion was denied was Appellate counsel's failure to present enough credible evidence to permit the Court to grant the Motion without engaging in speculation. R.R. Vol. 7, p. 55-57.

STANDARD OF REVIEW

A trial court's ruling on a Motion for New Trial is reviewed for abuse of discretion. Cartwright v. State, 527 S.W. 2d 535; (Tex. Crim. App. 1975); Soto v. State, 671 S.W. 2d 43 (Tex. Crim. App. 1984). An abuse of discretion occurs when the trial court rules "without reference to any guiding rules and principles" or is "arbitrary or unreasonable." Downer v. Aquamarine Operators, Inc., 701 S.W. 2d 238, 241-42 (Tex. 1985); Wheelis v. First City Texas – Northeast, 853 S.W. 2d 81, 82 (Tex-App. Hou. [14th] Dist. 1993). However, there is a mixed standard for Ineffective Assistance of Counsel claims: factual findings are reviewed for abuse of discretion, whereas the application of law to facts is reviewed *de novo*. Charles v. State, 146 S.W. 3d 204 (Tex. Crim. App. 2004). In addition, great deference is given to the trial court's

credibility determinations when ruling based on live testimony. Guzman v. State, 955 S.W 2d 85 (Tex. Crim. App. 1997).

The Appellant must present a record sufficient to demonstrate an abuse of discretion. Id. An abuse of discretion also exists where there is "a clear failure by the trial court to analyze or apply the law correctly." In re HEB Grocery Co., L.P., 492 S.W. 3d 300, 302 (Tex. 2016) (orig. proceeding). The courts will not reverse a trial court ruling that is within the zone of reasonable disagreement. Montgomery v. State, 810 S.W. 2d 372, 390 (Tex. Crim. App. 1991).

ANALYSIS ISSUE ONE

Did the trial judge err in denying the First Amened Motion for New Trial alleging ineffective assistance of trial counsel?

A. Ineffective Assistance of Counsel at Trial

Ineffective Assistance of Counsel (Hereinafter: "IAC") claims are evaluated using the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). The two prongs are whether counsel's performance was deficient; and, if so, did that deficient performance prejudice the Defendant. Counsel is presumed to be competent, and the burden is on the Defendant/Appellant to establish otherwise. Strickland v. Washington, 466 U.S. 668, 668 (1984). The right to effective assistance of counsel is the right of the accused to require the prosecutor's case to survive the crucible of meaningful adversarial testing, United States v. Cronic, 466 U.S. 648, 653-65 (1984).

To show that counsel was "deficient" it must be shown that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 688 (1984). In order to show "prejudice" the evidence must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., @694.

In denying the Motion the trial court was primarily focused on the failure of trial counsel to speak to witnesses and what those witnesses may have been able to offer. (R.R. Vol.7 ,p. 72), and appeared to base his ruling on that alone, where it had been demonstrated that trial counsel's performance was deficient in other, different, ways, as well. The cumulative effect of trial counsel's multiple errors deprived the Appellant of a fair trial. In this case as is set forth in the paragraphs that follow, Trial counsel's representation of Appellant at trial was deficient, and did, indeed, prejudice the Appellant.

1, **Failure to Consult or Retain an Expert Witness of any Kind**

In this case the **absence of any expert of any kind** is strong evidence of IAC because this is a driving while intoxicated case with standardized field sobriety tests administered to an older woman on the side a busy road with big rigs blowing past, and there was blood drawn and analyzed by a chemist for the state, where intoxication is via controlled substances prescribed by a doctor present in minute amounts..

Without an expert on standardized field sobriety testing the defense was not able to illustrate to the jury the unfair nature and unreliable results of SFST's where they are administered on an older, overweight, person, nor effectively cross-examine Trooper Strawn on the reliability of his results on the SFST's.

As for the blood test results without an expert trial counsel was not in a position to argue whether or not the level of any controlled substance was merely a therapeutic dose as prescribed by a doctor that would not be expected to cause intoxication, or whether the testing was done accurately.

A central issue at trial involved the interpretation of blood test results, which the state used to assert guilt of intoxication. Despite this, counsel did not retain or consult with an independent expert, or any other expert witness, nor did they move for funds to do so under Ake v. Oklahoma, 470 U.S. 68 (1985), which guarantees indigent defendants access to expert assistance where scientific evidence is a significant issue. This failure deprived the defense of a meaningful opportunity to challenge the State's evidence or offer alternative interpretations that could have introduced a reasonable doubt. Courts have found similar omissions to be deficient. *See,* Ex Parte Briggs, 187 S.W. 3d 458, 467 (Tex. Crim. App. 2005); Hinton v. Alabama, 571 U.S. 263 (2014) (failure to secure qualified expert was ineffective assistance of counsel).

2. Failure of Trial Counsel to Investigate or interview Witnesses.

Trial counsel did not interview or speak in any meaningful was to any fact

witnesses prior to trial, whether potential prosecution or defense witnesses. (Trial counsel called Joseph Garcia to the stand as "Joseph Gutierrez") (R.R. Vol. 5, p. 100). His lack of communication with witnesses led to him putting Joseph Garcia on the stand to unwittingly proffer damaging testimony - *from a witness for the defense* - against Appellant. (R.R. Vol. 5, p. 94-98). Given the limited favorable testimony Johnny Garcia was able to offer, it is safe to say that had trial counsel interviewed the witness prior to trial he never would have taken the stand.

This amounts to a complete failure to investigate the case, which courts have repeatedly held to fall below professional norms. *See,* Wiggins v. Smith, 539 U.S. 510 (2003); Ex Parte Martinez, 195 S.W 3d 713, 720 (Tex. Crim. App. 2006).

3. Failure to Communicate with the Defendant

Appellant testified that she never met with trial counsel anywhere except inside the courtroom on days she was otherwise scheduled to appear prior to trial, nor discussed strategy, potential defenses, or the significance of the evidence R.R. Vol. 7, p. 10. (Trial counsel claims to have met outside of court with his client prior to trial but could not remember where or when). This lack of communication prevents informed decision-making by the defendant and undermines the fairness of the adversarial process. *See;* United State v. Cronic, 466 U.S. 648 (1984) (presumption of prejudice may arise where there is a complete failure of adversarial testing); Ex Parte Lilly, 656 S.W. 2d 490, 493 (Tex. Crim. App. 1983).

4. Failed to object waiving right to Confrontation

T Trial counsel failed to file a written objection to the "Certificate of Analysis" and "Chain of Custody Affidavit." (R.R. Vol. 5, p. 72). (*See;*Texas Code Crim. Pro. §§ 38.41 & 38.42) filed by the state thereby waiving Appellant's right to confront and cross-examine the chemist who performed the toxicology testing on her blood. (R.R. Vol 5, p. 72). Trial counsel's failure to object forfeited Appellant's right to confront and cross-examine the chemist who performed the analysis of her blood. Crawford v. Washington, 541 U.S. 36 2004); Deener v. State, 214 S.W 3d 522 (Tex. App.-Dallas 2006, pet. ref'd). Trial counsel's failure to object to the State's lab report after receiving notice constituted objectively unreasonable conduct.

Courts have consistently held that testimonial forensic reports may not be admitted unless the defense waives confrontation or fails to object under applicable procedural rules. (*See,* Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011)). Trial counsel's failure to object was not strategic, as there is no record of tactical reason to forego confrontation of the analyst and it is obvious from the record that trial counsel did not know how Texas' notice-and-demand statue operates. R.R. Vol. 5, p. 65-67. Texas courts and others have recognized that failure to object under notice-and-demand rules can support an Ineffective Assistance of Counsel claim. Deener v. State, 214 S.W 3d 522 (Tex. App.-Dallas 2006, pet. ref'd).

CONCLUSION ISSUE ONE

Trial counsel proceeded to trial in a felony blood-draw driving while intoxicated case without talking to any potential fact witnesses of which he was aware, with no expert assistance of any kind, without speaking to his client in any detail about the case, while waiving Appellant's right to confront and cross-examine the chemist that conducted the testing of key blood test evidence. Counsel's acts or omissions set forth above illustrates that his representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. 510, 521 (2003). Further, taken together, trial counsel's acts or omissions and the damage they did to Appellant's case, is ample evidence of "prejudice" under Strickland. Take away all the errors and consider a trial with expert witnesses, fact witnesses from the school, a cross-examination of the chemist with assistance of defense expert, without a devastating defense witness put on the stand by counsel who had never spoke to him prior to that point, and it is clear that "[t]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, @ 694. Therefore, Appellant is entitled to a new trial to vindicate her 6th Amendment right to effective assistance of counsel and a fair trial.

ANALYSIS ISSUE TWO

Did Appellate Counsel Unreasonably Fail to Support the Claim of Trial Counsel's Ineffectiveness?

B. Ineffective Assistance of Counsel on Appeal

Appellate counsel unreasonably failed to support the claim of trial counsel's ineffectiveness and was thus ineffective himself. Although appellate counsel attempted to raise a claim that trial counsel was ineffective for failing to investigate and present defense witnesses, the claim was fatally flawed: counsel failed to include or develop any evidence showing what the missing witnesses would have said, how their testimony would have aided the defense, or that they were willing and available to testify. (R.R. Vol. 7, p. 55-57).

To prevail on a claim that trial counsel was ineffective for failing to call a witness, or witnesses, it is essential to demonstrate:

- The witness existed;
- The witness was available to testify;
- Counsel was aware of or should have known about the witness;
- The witness would have testified; and
- The testimony would have been favorable to the defense;
  (*Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985)).

The only thing Appellate counsel proved at the hearing is that the witnesses existed. (R.R. Vol. 7, pp. 8-11). Appellate counsel did not in any way show that any testimony from a missing witness at trial would have been favorable to the defense. None of this

was presented. Appellate counsel failed to submit affidavits, witness statements, or any evidence to support prejudice — leaving the court to speculate as to the value of the missing testimony. As a result, the ineffective assistance of trial counsel claim was denied not because it lacked merit, but because it lacked development. (R.R. Vol. 7, p. 55). This omission was not strategic. It reflects deficient preparation, a misunderstanding of the legal standard, or a failure to investigate — all of which fall below professional norms of appellate advocacy.

1. Appellant Was Prejudiced by Appellate Counsel's Deficient Performance

Had appellate counsel properly supported the claim by eliciting testimony from the relevant witnesses at the Hearing the trial court could have found that trial counsel's failure to present this testimony undermined confidence in the outcome. The missing witnesses would have at the very least been able to testify that Appellant was not intoxicated when she picked up her grandson at Southside. Moreover, the witnesses would have been people with training and experience such that their opinion as to sobriety would have carried weight, confirming key aspects of the defenses' argument that Appellant was not intoxicated, merely emotional. (R.R. Vol. 5, p. 122). Joseph Garcia was a ten (10) year-old boy on the date in question. (R.R. Vol. 5, p. 104). The mere fact that a high-level administrator and a peace officer allowed a 10-year-old child to leave with Appellant is some evidence that those witnesses would testify favorably for Appellant, and, if not, be subject to impeachment. Their

statements may have filled critical gaps and directly supported the defendant's theory at trial. The prejudice was compounded because the trial evidence was not overwhelming — it rested on SFST's under adverse circumstances, and blood test results without any benchmark or expert testimony.

The trial judge denied the motion because the lack of proof at the Hearing would force him to engage in "speculation" as to any prejudice the potential testimony of the missing witnesses' may have had in Appellant's case. The Motion was thus denied in a case where the ineffective assistance of trial counsel claim was potentially meritorious, therefore appellate counsel's failure to support it deprived Appellant of a meaningful appeal, and Appellate counsel was himself, ineffective.

CONCLUSION ISSUE TWO

Appellate counsel failed to present necessary and available evidence to support a claim of ineffective assistance of trial counsel — specifically, by omitting testimony from witnesses who would have materially aided the defense. This failure is the primary reason the Motion was denied. R.R. Vol. 7, p. 55-57.

This failure constituted constitutionally deficient performance and prejudiced Appellant's right to a fair appeal. Accordingly, Appellant respectfully requests that the Court grant relief, vacate the prior judgment, and remand for further proceedings.

PRAYER

Wherefore, premises considered, Appellant prays that this Court find for Appellant and reverse and remand for a new trial, and/or for any and all other relief to which Appellant may be entitled.

Respectfully submitted,

/s/ Dominic J. Merino
Dominic J. Merino
Counsel for Appellant
TBN: 00797069

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Appellant's Brief has been served on counsel for the State on May 20, 2025, via email.

/s/Dominic J. Merino
Dominic J. Merino
TBN: 00797069

CERTIFICATE OF WORD COUNT

I do hereby certify that the total word count for this document is 5040 words excluding those parts specifically excluded in Texas Rule of Appellate Procedure 9.4(i)(1) which is less than 15,000 words allowed per Texas Rule of Appellate Procedure 9.4.

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