

01-24-00045-CR

**NO. ~~01-24-00303-CR~~**

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**IN THE FIRST COURT OF APPEALS  
FOR THE STATE OF TEXAS**

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**FRANK KHAMSINI  
V.  
THE STATE OF TEXAS**

FILED IN  
1<sup>ST</sup> COURT OF APPEALS  
HOUSTON, TX  
SEPT 26, 2024  
DEBORAH M. YOUNG,  
CLERK OF THE COURT

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**Appeal of Criminal Conviction  
from the 434<sup>th</sup> Judicial District Court  
Fort Bend County Texas  
Trial Court Cause No. 16-DCR-074652**

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**BRIEF OF APPELLANT, FRANK KHAMSINI**

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**SUBMITTED ON THE 16<sup>TH</sup> DAY OF AUGUST 2024**

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## **ORAL HEARING WAIVED**

Appellant, Frank Khamsini, consciously waives oral hearing in this matter before this court and requests a decision without a hearing.

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## **STATEMENT OF THE CASE**

### Nature of the Case:

On July 30, 2016, Appellant was charged with “Attempted Sexual Assault F3” of his legally married wife named Angela Khamsini. On December 5, 2016, a grand jury returned an indictment against the Appellant for Attempted Sexual Assault. The matter was referred to the 434<sup>th</sup> Judicial District Court of Fort Bend County, Texas. Appellant was released on a \$30,000 bond. The incident for which Appellant was tried and convicted occurred at the marital home of the couple, which was on the home video located at 1000 Farrell Lane, in Stafford, Texas.

The matter was initially tried before a jury on August 4, 2022. The jury reached an impasse that resulted in a hung jury.

On November 1, 2023, the matter was again called for a jury trial. The jury reached an impasse that resulted in a hung jury.

On July 23, 2023, the Court conducted a third jury trial on the matter. This time, the jury returned a jury verdict of conviction.

The sentence was for 10 years that was probated for 10 years.

Appellant did not commit the crime as charged. There is no dispute that the Appellant and his wife were married and were having normal marital issues. The State did not prove that there was remotely any attempt to commit any sexual assault by the Appellant as charged in the indictment.

Subsequent to the jury verdict, Appellant filed a motion for a new trial that was denied by the trial court.

### **TRIAL COURT'S DISPOSITION**

On December 5, 2016, the Fort Bend County Grand Jury returned a one count indictment against Appellant for Attempted Sexual Assault of his wife, Angela Khamsini.

The indictment alleged that the Attempted sexual assault occurred on July 30, 2016, at the couple's home located in Stafford, Texas.

After initial trial of the charge resulted in a hung jury, the State continued to relentlessly pursue the conviction of the Appellant. The second trial resulted in another hung jury. The prosecution did not rest.

On July 30, 2023, the State tried the case for the third time that resulted in a jury verdict of conviction.

The sentence was for 10 years, which was probated for 10 years.

On January 16, 2024, Appellant filed a "Notice of Appeal."

This case is now before this Honorable Court for disposition.

## **ISSUES PRESENTED**

- 1. Whether the State Proved the Elements of Attempted Sexual Assault Beyond a Reasonable Doubt, that Frank Khamsini committed The Alleged Attempted Sexual Assault of His Wife, Angela Khamsini.**
- 2. Whether Frank Khamsini Exhibited the Specific Intent to Sexually Assault His Wife, Angela Khamsini.**
- 3. Whether Angela and Frank had their Unique Love and Sex Language Consent that was Misconstrued by the Prosecution and the Jury.**
- 4. Whether Angela's Motive to Involve the Police was Due to the Appearance of Her Daughter Jakarta Middleton, and Angela's Intending Divorce.**
- 5. Whether the Trial Counsel for the Appellant was Ineffective in Representing Appellant, Frank Khamsini.**

## **RECORD AND PARTY REFERENCES**

### **The Parties**

This Brief will refer to the parties as follows:

Frank Khamsini: "**Frank**" or "**Appellant**"

The State of Texas: "**The State,**" or "**Appellee**"

Complainant: "**Angela Khamsini**" or "**Angela**" or "**Complainant**"

### **The Record on Appeal**

This Brief will refer to the appellate record as follows:

**Clerk's Record:** "CR at No."

**Reporter's Record:** "RR Vol. at No."

## **TO THE HONORABLE FIRST COURT OF APPEALS:**

Appellant, Frank Khamsini, files this Appellant's Opening Brief, and respectfully requests that this Honorable Court reverse his conviction for Attempted Sexual Assault and Dismiss this case, or alternatively, remand the case to the trial court for further proceedings consistent with the Court's mandate, as argued below:

### **STATEMENT OF FACTS**

On July 30, 2016, Appellant, Frank Khamsini was arrested and charged with "Attempted Sexual Assault" of his wife, Angela Frank (Nee Angela Middleton). The alleged incident occurred at the couple's home located in Stafford, Texas. Most people, including the undersigned, wondered the reason Fort Bend County District Attorney's office would insist on charging and convicting a husband who never even made any move or attempt to have sex with his wife on the date of his arrest. It is to be asked the reason Fort Bend County District Court would try the case the first time that resulted in a hung jury. (**CR at 190**). The County then used the taxpayer's funds to try the case for the second time that resulted in a hung jury. *Id.* The County then used the taxpayers' funds to try the case for the third time, that resulted in a verdict of guilt. (**CR at 162**).

Well, the prosecution of Frank Khamsini was racially motivated. Angela Middleton is a Caucasian, and Frank Khamsini is of African descent. That is the

motivation for the relentless pursuit of a conviction.

On December 5, 2016, the Grand Jury in Fort Bend County returned an indictment against Frank Khamsini charging him with an “Attempt to Commit Sexual Assault /F3.” (**CR at 22**).

The matter was referred to the 434<sup>th</sup> Judicial District Court of Fort Bend County, under cause number 16-DCR-074652, for adjudication. Honorable J Christian Bacerra, presided over the proceedings. Appellant was released on a pretrial \$10,000 bond. (**CR at 16**). Appellant is currently still on bail pending the disposition of this appeal.

Appellant Frank Khamsini (Hereinafter “Frank”), is a United States citizen who resides in Stafford Texas. As a result of the intervention of the Fort Bend County prosecutor’s office, Frank and Angela are currently divorced. Angela is currently residing in Florida. Frank is currently divorced with two children. He is a single parent. The mother of his children is deceased. He is raising the children alone.

On July 27, 2023, the State of Texas commenced a trial of the charge against Frank. The initial preliminary reading of the indictment to Frank, and his response of “not guilty” commenced the trial of the matter. (**RR Vol. 1 at 7**).

On behalf of the State of Texas, Ms. Lauren Marie Valenti presented the State’s opening statement by narrating what the State intended to prove at trial. (**RR Vol. 1 at 8**).

After the State concluded its opening statement, the attorney for Frank Khamsini, Mr. Quinon Alexis-Rahshee Brooker presented his opening statement on behalf of Frank Khamsini, stating that the State will never prove its case beyond a reasonable doubt. (**RR Vol. 1 at 9**).

**A. The state called Angela Khamsini as its First Witness**

After being duly sworn in, Angela testified that she has three children from previous relationships. (**RR Vol. 1 at 13**). The couple did not have any kids during the marriage; that she moved from Mississippi to Houston in 2009. (**RR Vol. 1 at 13**). Angela narrated that she met Frank in 2013, while working together at Memory Care Facility. (**RR Vol. 1 at 14**). As much as the prosecution goaded Angela to testify that Frank attempted to accost her aggressively during their initial meeting, Angela testified that she did not want Frank coming on to him because “he had a girlfriend.” (**RR Vol. 1 at 15**). The couple eventually entered into a marital union.

Angela narrated the relationship between her and Frank. Mostly the relationship is run-of-the-mill normal American marital life with its ups and downs. Angela admitted that sometimes Frank would be physically aggressive towards her, and sometimes she would be physically abusive towards Frank. (**RR Vol. 1 at 19**). On one occasion in 2015, Frank called the police on Angela because Angela was angry at Frank because Angela found “out that he was cheating.” (**RR**

**Vol. 1 at 19).** There were several other times that the police were summoned to the couple's home because according to Angela, Frank was "cheating." (**RR Vol. 1 at 20**). Angela testified that there were several times that she would reject sexual overtures from Frank but would later acquiesce to the advances. In her cross examination, Angela stated that:

**"Well, I mean, there would be times that I didn't want to but I would. I wouldn't express it to him, that I didn't want to. There were times that I would say, 'no'. Like, in the instance that we are talking about today. And if I ever verbally told him "no" then that wouldn't mean yes later." (RR Vol. 1 at 23).**

In essence, Angela and Frank were living a normal marital life. They never completely agreed on any matter, including sexual intercourse. Yet, they managed their marriage like any other couple, until the Fort Bend District Attorney's office decided to intervene and terminate the marriage.

Angela testified that on the date of the incident, that the camera in their home was operational and recording the incident. Frank was also aware that the camera was recording the incident. (**RR Vol. 1 at 27**). If Frank wanted to commit a crime, his first action would be to disable the home camera.

On the date of the incident as narrated by Angela during the State's direct examination, at no time did Angela state that Frank took off her clothes and attempted to have sex with her. Hear it from Angela:

Q. Do you recall if at that point in time, he was able to grab or -- or pull at your shorts or touch you in



any way?

A. No, because I was trying to move so that he couldn't.

Q. And then, he grabbed you and essentially pulled you off of the couch by your shorts, is that fair?

A. Yes.

Q. Did you want that to happen?

A. No. (**RR Vol. 1 at 44**).

During the cross-examination by Mr. Brooker, Angela testified as follows:

Q. Now, I did hear you testify, though, specifically, that he pulled you off the couch by your shorts, right?

A. Yes.

Q. And as a result of pulling you by your shorts, your shorts ripped, didn't they?

A. Yes.

Q. From the pulling, correct?

A. Correct.

Q. In fact, he tried to lift you up by your shorts, didn't he?

A. He did.

Q. But he did not pull your shorts down, did he?

A. No, he ripped them off.

Q. Pulling you off of the couch, correct?

A. Correct.

Q. Frank didn't pull his shorts down, did he?

A. No.

Q. In order to have sex doesn't he have to pull his shorts down?

A. Yes.

Q. But he didn't do that, right?

A. Not at that time. (**RR Vol.1 at 70**).

Angela described the dynamics of her sexual dynamics with Frank. Angela stated that sometimes Frank would guilt her into having sex (**RR Vol. 1 at 68**).

Such action is not foreign to marital relationships.

Angela went on to further testify that there are sometimes when she would say “no” to sexual overtures from Frank, and later agree. (**RR Vol. 1 at 69**). This

question became important to the jury after the trial, when the jurors requested whether they can “*have Angela's testimony where she describes their relationship, specifically when she is cross-examined about sometimes giving consent eventually.*” (RR Vol. 2 at 50).

To buttress Angela’s statement regarding the dynamics of her relationship with Frank, State’s expert witness, Peggy Wright testified that each family defines the parameters of their relationship and not outsiders. (RR Vol. 1 at 150).

During the cross-examination, Angela admitted that Frank never even took off his own shorts. Angela was specifically asked whether in “*order to have sex doesn’t he have to pull his shorts down?*” (RR Vol. 1 at 71). Angela agreed that in order for Frank to attempt to have sex with her, that Frank must first of all take of his clothes, which he did “*not at the time.*” (RR Vol. 1 at 72).

Frank was arrested for attempting to sexually assault Angela when even Angela did not disclose such information to the police when the initial arrest was conducted. Angela’s present sense impression did not rise to the level of providing such information to the police.

Angela admitted during her cross-examination that she instructed her daughter Jakarta to call the police when her daughter entered the room and found her and Frank in a compromising position, not in a threatening position. (RR Vol. 1 at 78).

Angela further admitted that during the alleged attempted sexual assault that she and Frank were speaking on a low tone, and she was calling Frank “honey” until Jakarta walked into the room, and Jakarta and Frank started talking, which infuriated Angela. (**RR Vol. 1 at 81**).

Angela’s testimony is at best inconsistent and coached. Her statement during her cross-examination is likely more factual than her testimony in chief.

After the interference of the police and the opportunity to reflect upon the incident, Angela admitted that both she and Frank contributed to the whole incident. (**RR Vol. 1 at 87**). Prior to the trial of the matter, and after Angela divorced Frank, on June 19, 2017, Angela sent a letter to Judge Bacerra, the trial judge of the 434<sup>th</sup> Judicial District Court of Fort Bend County. In that letter, Angela told the judge that,

**“We both contributed to what led up to the confrontation that night. Its true that he made the wrong decision, but its also true that I blew the situation up into something larger than it was. I wouldn't want one moment of unresolved grief and disappointment ruin the lives of Frank and his two innocent children. (CR at 65).**

Throughout Angela’s cross-examination testimony, Angela actually exonerated Frank’s involvement and Frank’s actions during the incident that occurred on July 30, 2016. Angela admitted that both of them were at fault for what occurred. The alleged incident led to the termination of the marital relationship. Angela divorced Frank. (**RR Vol. 1 at 44**).

**B. Testimony of State's Deputy Dishman of Fort Bend County Sheriff's Office**

Deputy Dishman testified that he was dispatched to the scene to investigate the disturbance at the address of the home of Frank and Angela. Deputy Dishman admitted his arrest of Frank was based on the video. He admitted that he did not witness any of the incidents. **(RR Vol. 1 at 113).**

Deputy Dishman admitted that he reviewed the video and saw what appeared as an assault, but did not charge Frank with an assault for allegedly choking Angela. **(RR Vol. 1 at 115).**

During his testimony, Deputy Dishman admitted that a person touching another person's buttocks in the commission of attempted sexual assault would be a relevant fact. Deputy Dishman admitted that such information was not in the police report that he prepared. **(RR Vol. 1 at 116).**

Further during his cross-examination, Deputy Dishman admitted that Frank pulled Angela's shorts up, but not down **(RR Vol. 1 at 118)**, and that Frank did not even touch Angela's underwear. **(RR Vol. 1 at 119).**

Throughout the cross-examination of Deputy Dishman, he admitted that some of the important elements to prove attempted sexual assault were not in his police report, and that Deputy Dishman's testimonies were new, and not in the police report.

**C. Testimony of State's Witness, Peggy Wright of Fort Bend Women's Center**

Peggy Wright admitted during her testimony that she had never met Frank, counseled Frank, or interviewed Frank. (**RR Vol. 1 at 143**). Peggy Wright also admitted that she never met Angela, counseled Angela, or interviewed Angela. (**RR Vol. 1 at 145**).

Ms. Wright admitted that her testimony is based on her observation of the video of the incident. (**RR Vol. 1 at 145**). Her testimony is therefore based on nothing except conjectures about male privilege.

After the testimony of Peggy Wright, the State rested, and the Defendant rested. The matter was then referred to the jury for deliberations.

The jurors requested Angela's testimony regarding their relationship, "specifically when she is cross-examined about sometimes giving consent eventually." (**RR Vol. 2 at 50**). After the jurors posed the question to the court, the court reporter was absent for a protracted period of time (The information was not part of the record). At the time the court reporter finally returned after about an hour, the jurors stated that they had reached a verdict. (**RR Vol. 2 at 54**).

The jury found Frank Khamsini guilty of attempted assault of his wife. (**RR Vol. 2 at 55**).

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## **SUMMARY OF THE ARGUMENTS**

### Case Background

- Frank Khamsini was charged with attempted sexual assault against his wife Angela.
- The prosecution alleged Frank forced himself on Angela and ripped her clothing.
- There were multiple trials, resulting in hung juries before a guilty verdict was reached.

### Evidentiary Issues

- The indictment lacked specificity regarding Frank's intent to commit sexual assault.
- Frank remained clothed during the incident.
- Angela did not testify that Frank intended to have sex with her.
- The altercation ended when their daughter entered the room.
- Angela testified that Frank did not pull down his shorts, which she acknowledged would be necessary for attempted sex.
- Officer Dishman confirmed Frank lifted Angela by her shorts, causing them to rip, but did not indicate sexual intent.

### Legal Arguments

- The defense argued there was insufficient evidence of Frank's specific intent to commit sexual assault.
- They cited the legal principle that if an accused's exculpatory statements are not disproven by the state, they are entitled to acquittal.
- The case referenced *Lopez v. State* regarding the impact of inadmissible testimony.

### Ineffective Assistance of Counsel Claims

- Frank's trial counsel failed to seek a mistrial when the court reporter was absent for over two hours.
- Counsel did not object to the state's key video evidence.

- There was no challenge to the police possession and use of video without a warrant.
- Counsel failed to include a lesser included crime in the indictment.
- No objection was made to Deputy Dishman's testimony on matters not in evidence.

### **Legal Standards**

- Ineffective assistance of counsel claims are evaluated under the *Strickland v. Washington* standard.
- Counsel's performance must fall below an objective standard of reasonableness.
- Allegations of ineffectiveness must be firmly founded in the record.

The case highlights the complexities of prosecuting and defending attempted sexual assault charges, especially in a marital context. The lack of clear evidence of intent and the alleged ineffective assistance of counsel raise significant questions about the validity of Frank Khamsini's conviction.

## **SUMMARY OF ISSUE ONE.**

**Whether the State Proved the Elements of Attempted Sexual Assault Beyond a Reasonable Doubt that Frank Khamsini committed The Alleged Attempted Sexual Assault of His Wife, Angela Khamsini.**

The case against Frank Khamsini involves a charge of attempted sexual assault under Texas law. The prosecution alleged that Frank attempted to sexually assault his wife, Angela, by forcing himself on her and ripping her clothing. However, the indictment lacked specificity regarding Frank's intent to commit sexual assault, as he remained clothed during the incident and was reportedly reacting to Angela breaking his phone. The trial was complex, resulting in two hung juries before a guilty verdict was reached. The difficulty stemmed from the marital context and insufficient evidence or testimony indicating Frank's intent to commit sexual assault. Angela did not testify that Frank intended to have sex with her, and the altercation ended when their daughter entered the room. Frank's subsequent actions, such as speaking with the daughter, were argued to show a lack of intent for sexual assault. The defense highlighted a legal principle that if the accused's exculpatory statements are not disproven by the state, they are entitled to acquittal, referencing case law like *Palafox v. State*.



## **SUMMARY OF ISSUE TWO**

### **Whether Frank Khamsini Exhibited the Specific Intent to Sexually Assault His Wife, Angela Khamsini.**

In a legal case involving Frank and Angela, the court examined whether Frank had the specific intent to attempt sexual assault. Angela testified that Frank did not pull down his shorts, which she acknowledged would be necessary for him to attempt sex with her. Instead, Frank dragged Angela off the couch by her shorts, which tore, but did not demonstrate intent to commit a sexual act. Testimonies, including one from Officer Dishman, confirmed that Frank lifted Angela by her shorts, causing them to rip, but did not indicate any sexual intent. The legal argument presented was that the evidence did not prove Frank had the specific intent required for attempted sexual assault, as he did not engage in actions beyond mere preparation. Consequently, the document argues that the case should be dismissed due to insufficient evidence of intent.

### **SUMMARY OF ISSUE THREE**

#### **Whether Angela and Frank had their Unique Love and Sex Language Consent that was Misconstrued by the Prosecution and Jury.**

The case involves allegations of spousal rape against Frank, with Angela's testimony providing insight into their complex sexual relationship. Angela admitted to feeling guilty into sex at times but did not clearly communicate her reluctance. She later sent an email to the judge suggesting she had exaggerated the situation. The State's case relied heavily on a home video, with testimonies from Deputy Dishman and counselor Peggy Wright, who based their observations on the video without direct interactions with the couple. The legal challenge lies in proving non-consensual conduct, as required by Texas Penal Code, especially when evidence is circumstantial and based on video interpretations. The case also references *Lopez v. State*, highlighting the impact of inadmissible testimony on trial outcomes.

## **SUMMARY OF ISSUE FOUR**

### **Whether Angela's Motive to Involve the Police was Due to the Appearance of Her Daughter Jakarta Middleton, and Angela's Intending Divorce.**

Angela became upset and called the police when Jakarta entered the room and witnessed a physical altercation between Angela and Frank. Angela characterized the incident as an "altercation" rather than an assault, and her reaction was primarily due to not wanting her daughter to see her in a compromising situation. The jury's conviction was based on a videotape that did not show any clear evidence of Frank attempting to undress or sexually assault Angela. Angela was not threatened by Frank but was concerned about Jakarta witnessing the altercation. The jury's verdict should be reversed due to a lack of direct evidence supporting the allegations against Frank. The prosecution's actions may have been influenced by racial dynamics.

Angela became upset and called the police when Jakarta entered the room and witnessed a physical altercation between Angela and Frank. Angela characterized the incident as an "altercation" rather than an assault, and her reaction was primarily due to not wanting her daughter to see her in a compromising situation. The jury's conviction was based on a videotape that did not show any clear evidence of Frank attempting to undress or sexually assault Angela. Angela was not threatened by Frank but was concerned about Jakarta witnessing the altercation. The jury's verdict should be reversed due to a lack of

direct evidence supporting the allegations against Frank. The prosecution's actions may have been influenced by racial dynamics.

## **SUMMARY OF ISSUE FIVE**

### **Whether the Trial Counsel for the Appellant was Ineffective in Representing Appellant, Frank Khamsini.**

Counsel's performance can be considered deficient if it falls below an objective standard of reasonableness, as stated in *Strickland v. Washington*. The appellant must show that counsel's actions or omissions during trial were more than just questionable competence, but rather affirmatively demonstrate trial counsel's alleged ineffectiveness. To do so, any allegations of ineffectiveness must be firmly founded in the record. Trial counsel should generally be given an opportunity to explain their actions before being found ineffective, and should only be found so if their conduct was so outrageous that no competent attorney would engage in it.

In the case of Frank Khamsini, his trial counsel failed to seek a mistrial when the court reporter was absent from the court for over two hours, leading to a hurried verdict by the jury. The absence of the court reporter affected the trial, and could have been avoided if counsel had objected and moved for a mistrial. Similarly, counsel failed to object to the state's only video evidence, which ultimately led to Frank's conviction. The failure to seek a mistrial in the face of the

court reporter's misconduct and the failure to object to admissible evidence constitute ineffective assistance of counsel.

Furthermore, Frank's trial counsel did not challenge the police possession and use of the video without a search warrant, which violated Frank's Fourth Amendment rights. Additionally, counsel failed to include a lesser included crime in the indictment and did not object to Deputy Dishman's testimony on matters not in evidence. These failures demonstrate ineffective representation and prejudice to Frank.

The focus should be on whether a trial attorney's performance was objectively unreasonable. In this case, the silent record as to counsel's subjective reasons for his actions may be enough to establish ineffective assistance of counsel. Despite any possible explanations, counsel's performance was so egregious that no competent attorney would have acted in the same way, leading to prejudice for the appellant. As a result, a new trial should be granted for Frank Khamsini.

## **ARGUMENT AND AUTHORITIES**

### **ISSUE ONE RESTATED**

**Whether the State Proved the Elements of Attempted Sexual Assault Beyond a Reasonable Doubt that Frank Khamsini committed The Alleged Attempted Sexual Assault of His Wife, Angela Khamsini.**

### **STANDARD OF REVIEW**

When determining whether the evidence is sufficient to support a criminal conviction, the Courts apply the well-established standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The Court reviews the evidence in the light most favorable to the verdict and determine whether a rational jury could have found all the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 313; *Brooks*, 323 S.W.3d at 899. The jury, as the fact-finder, may make reasonable inferences from the evidence presented at trial in determining an appellant's guilt. *Hooper v. State*, 214 S.W.3d 9, 14–15 (Tex. Crim. App. 2007). When there is conflicting evidence, the Court presumes the fact-finder resolved those conflicts in favor of the verdict and defer to that resolution. *Jackson*, 443 U.S. at 326; see also *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). The Court defers to the trier of fact's determinations of a witness's credibility and the weight to be given their testimony. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899. The role of the court as an intermediate appellate court is restricted to guarding against the rare

occurrence when a fact-finder does not act rationally. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) (citing *Laster v. State*, 275 S.W.3d 512, 517–18 (Tex. Crim. App. 2009))

In reviewing the legal sufficiency of the evidence, Courts view all of the evidence in the light most favorable to the verdict to determine whether any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

### **Applicable Law**

A defendant commits the offense of sexual assault by intentionally or knowingly and without the complainant’s consent (1) causing the penetration of the complainant’s anus or sexual organ by any means, (2) causing the penetration of complainant’s mouth by his sexual organ, or (3) causing the complainant’s sexual organ to contact or penetrate his mouth, anus, or sexual organ. Tex. Penal Code Ann. § 22.021 (West Supp. 2017).

To attempt to commit such an offense, Frank Khamsini must have specific intent, which is established by an act amounting to more than mere preparation that tends but fails to affect the commission of the offense intended. *Id.* § 15.01 (West 2011). The element “with specific intent to commit an offense” has traditionally been interpreted to mean that the actor must have the intent to bring about the

desired result. See, e.g., *Flanagan v. State*, 675 S.W.2d 734, 745 (Tex. Crim. App. [Panel Op.] 1982). Appellant's intent to complete the offense may be inferred from his acts. See *Romo v. State*, 568 S.W.2d 298, 304 (Tex. Crim. App. 1977).

### **Applying the Law to the Facts**

In order to properly brief this issue, and arrive at a merger between the law and the facts, the inquirer must concentrate on the testimony of Angela Khamsini and the jury questions.

Firstly, it is important for the court to be informed that the Fort Bend county Court prosecutor's office tried this matter three (3) times until the jury reached the current verdict of guilty. Two different juries were hung on the question whether Frank committed attempted sexual assault against his wife, Angela, on July 30, 2016. The reason for the two hung juries was the difficulty in wading into a marital relationship and attempting to determine the dynamics of such relationship.

According to the Indictment, the State charged Frank with the crime as follows:

**“On or about July 30, 2016, then and there, with the specific intent to commit the offense of sexual assault of Angela Khamsini, do an act, to-wit: forcing his body on top of her body and ripping her clothing off, which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended.”**



This indictment is general, but not specific. The specificity is lost on the relevant statement that at the time of the alleged assault, that Frank had his shorts on his body, and never took it off. Actually, Frank got on top of Angela, not to have sex, but grabbed her by the neck because Angela broke Frank's phone. (**RR Vol. 1 at 57**).

The United States Supreme Court recently made clear in *Musacchio v. United States* that a reviewing court's limited determination on sufficiency review does not rest on how the jury was instructed. The Supreme Court held that it "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Musacchio v. United States*, 577 U.S. \_\_\_, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016)

The reason that the State did not charge Frank with regular assault of a family member is because Angela was the first to assault Frank by slapping him. *Id.* Had it been elicited through testimony that Frank struck Angela without Angela being the first to slap Frank, there would have been another charge of assault of a family member. (**RR Vol. 1 at 115**). Rather, the Court instructed the Jury and the attorneys that the trial is limited to sexual assault and not regular assault. (**RR Vol. 2 at 21**). The Indictment had a "related" charge of Assault of a family member, but was never argued or proved at trial as a lesser offense. (**CR at 22**).

Throughout the trial of the case and the testimonies of the witnesses, there was no testimony or evidence that Frank intended to have sex with Angela on the date of the incident. Angela never testified that Frank was intending to have sex with her. When Angela's daughter Jakarta entered the room, the couple ceased all hostilities against each other. Jakarta did not force Frank to stop. The evidence reflects that Frank voluntarily and completely renounced his fight or any criminally construed activities towards Angela. *Thomas v. State*, 708 S.W.2d 861, 863 (Tex. Crim. App. 1986)

Frank actually started speaking with Jakarta, which admittedly upset Angela. **(RR Vol. 1 at 80)**. If Frank intended to rape Angela, Frank could have instructed Jakarta to leave the room. Instead, Frank started communicating with the young girl, which prompted Angela to instruct Jakarta to call 911. **(RR Vol. 1 at 79)**.

It is axiomatic in our law that "where the State puts in evidence the statements of the accused party which exculpates the accused, and does not directly or indirectly disprove them, the accused is entitled to an acquittal." *Palafox v. State*, 608 S.W.2d 177, 181 (Tex.Cr.App. 1979), quoting from *Banks v. State*, 56 Tex.Crim. R., 119 S.W. 847, 848 (Tex.Cr.App. 1909). Also see *Wormley v. State*, 366 S.W.2d 565, 566 (Tex.Cr.App. 1963).

## **ISSUE TWO RESTATED**

### **Whether Frank Khamsini Exhibited the Specific Intent to Sexually Assault His Wife, Angela Khamsini**

#### **STANDARD OF REVIEW**

Due process requires that the State provide proof beyond a reasonable doubt of every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 319-320, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Specific answer to the question above is a resounding “NO.” The answer is no, because at no time during trial did the prosecution prove that Frank Khamsini attempted to have sex with his wife Angela.

A person commits attempted sexual assault if, with the intent to commit sexual assault, he commits an act amounting to more than mere preparation that tends, but fails, to effect the commission of sexual assault. TEX. PENAL CODE ANN. § 15.01(a) (West 2011). Generally, a person's intent to commit an offense must be established by circumstantial evidence and may be inferred from the person's acts, words, and conduct, as well as the surrounding circumstances. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *Lindsey v. State*, 764 S.W.2d 376, 378 (Tex. App.-Texarkana 1989, no pet.).

Knowledge, like intent, may also be inferred from the person's acts, words, conduct, and surrounding circumstances. *Parramore v. State*, 853 S.W.2d 741, 45 (Tex. App.-Corpus Christi 1993, pet. ref'd).

For instance, during the trial to prove specific intent, Angela testified that Frank ripped her shorts off while trying to throw Angela to the ground. Angela then admitted that if Frank wanted to have sex with her, that Frank must first of all pull down his shorts. Angela stated that Frank did not pull his shorts down to attempt to have sex with her. **(RR Vol. 1 at 71).**

Angela was asked during her cross-examination:

Q. Frank didn't pull his shorts down, did he?

A. No.

Q. In order to have sex doesn't he have to pull his shorts down?

A. Yes

Q. But he didn't do that, right?

A. Not at the time.

Frank and Angela were engaged in their normal marital “fights”. After Angela slapped Frank, Frank became angry and dragged her off the couch by her shorts. The shorts tore. Frank was pulling Angela up by her shorts when the shorts

tore. **(RR Vol. 1 at 71).** He was not pulling her down to have sex with her. Angela was interrogated during cross-examination as follows:

Q. In fact, he tried to lift you up by your shorts, didn't he?

A. He did.

**(RR Vol. 1 at 71).**

To attempt to commit such an offense, Frank must have specific intent, which is established by an act amounting to more than mere preparation that tends but fails to affect the commission of the offense intended. *Id.* § 15.01 (West 2011).

The element “with specific intent to commit an offense” has traditionally been interpreted to mean that the actor must have the intent to bring about the desired result. See, e.g., *Flanagan v. State*, 675 S.W.2d 734, 745 (Tex. Crim. App. [Panel Op.] 1982). Appellant’s intent to complete the offense may be inferred from his acts. See *Romo v. State*, 568 S.W.2d 298, 304 (Tex. Crim. App. 1977).

Q. But he did not pull your shorts down, did he?

A. No, he ripped them off.

Q. Pulling you off of the couch, correct?

A. Correct. *Id.*

An attempted offense occurs when a person, with specific intent to commit an offense, does an act amounting to more than mere preparation that tends but

fails to effect the commission of the offense. *Id.* § 15.01(a). An imaginary line separates mere preparatory conduct, which is usually noncriminal, from an act that tends to effect the commission of an offense, which is always criminal. *Flournoy v. State*, 668 S.W.2d 380, 383 (Tex. Crim. App. 1984); *Adekeye v. State*, 437 S.W.3d 62, 68-69 (Tex. App.-Houston [14th Dist.] 2014, pet. ref'd). The Legislature did not intend to draw this line at the last proximate act before completing the offense. *McCravy v. State*, 642 S.W.2d 450, 460 (Tex. Crim. App. 1980).

There is nothing on the records, even on the video, tended to prove or proved that Frank was preparing to have sex with Angela. At least most reasonable people would agree that no man can perform any sexual penetration with his shorts on. The records did not reflect that Frank intentionally used any of his organs to attempt to vaginally penetrate Angela. The preparatory element was therefore absent from Frank's actions on that date.

It is also ridiculous to claim that a husband raped his own wife, even if the wife was resisting the sexual advances. It cannot amount to attempted rape. If this is the case, then the government is intentionally and knowingly wading into marital relationships to control the unique sexual relationship found in marriages.

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U. S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life.

Officer Dishman of the Fort Bend County Sheriff's Office was asked the same question regarding Angela's shorts. Deputy Dishman testified that:

Q. What is he appearing to be doing in this photo?

A. At this point, he had lifted her off the ground by her shorts and in doing so it ripped her shorts causing her to fall to the ground. **(RR Vol. 1 at 100).**

From the exchanges supra, it is clear that Frank did not have the specific intent to attempt to sexually assault Angela.

These testimonies and the video evidence failed to prove that Frank had the specific intent to have sex with his wife on that night. Examples of specific intent to commit attempted sexual assault are:

An assailant grabbed the complainant, ripped her shirt, attempted to unfasten her pants, and did so while his penis was "sticking out of his unzipped pants." *Hackbarth v. State*, 617 S.W.2d 944, 945 (Tex. Crim. App. [Panel Op.] 1981).

In *Sanders v. State*, 657 S.W.2d 869 (Tex.App.-Texarkana 1983, no pet.), the court found there was sufficient evidence to sustain a conviction of attempted aggravated rape where the defendant stated he wanted the victim, took her to an isolated spot, pulled on her blouse, and ordered her to pull her pants down, threatening to shoot her if she did not comply.

An assailant, completely naked, broke into a home, pushed the complainant onto a sofa and "threw himself on top of her." *Ford v. State*, 632 S.W.2d 151, 153

(Tex. Crim. App. 1982). An assailant positioned himself on top of the complainant and “fondled her vaginal area through her clothing and pulled up her shirt and bra and fondled and licked her breasts.” *Lindsey v. State*, 764 S.W.2d 376, 379 (Tex. App.—Texarkana 1989, no pet.).

The essential difference between these cases and the case at hand is that the cited cases all contain evidence of specific intent to sexually assault the complainants. Frank’s actions did not show evidence to commit an assault, or some actions that may be preparatory acts at another offense, but whether that offense is a sexual assault, an ordinary assault, or some other criminal act is unknown and unknowable given the state of the evidence.

Based on the evidence adduced at trial and the indictment, the State failed to prove that Frank, who never undressed himself in preparation for any sexual encounter with Angela, had the requisite intent to commit sexual assault against his wife, Angela. If this Honorable Court finds that Frank did not possess the intent to sexually assault his wife Angela, no further inquiry is necessary. The Court must therefore dismiss this case.

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### **ISSUE NO. THREE RESTATED**

#### **Whether Angela and Frank had their Unique Love and Sex Language Consent that was Misconstrued by the Prosecution and the Jury.**

The Texas Penal Code sets forth several circumstances in which a sexual assault is without the complainant's consent. *See* TEX.PENAL CODE ANN. § 22.011(b)(1)-(11). In this case, the Indictment alleged lack of consent. Under subsection (b)(3), sexual assault is without the other person's consent if "the other person has not consented and the actor knows the other person is unconscious or physically unable to resist." TEX.PENAL CODE ANN. § 22.011(b)(3).

Since Frank exercised his constitutional rights to not testify at his trial, the testimony of Angela served as the insight into the couple's sex language, and the uniqueness of the relationship. For instance, during her cross-examination, Angela disclosed how their sexual relationship was unique. She testified as follows:

Q. Do you recall saying that there were times that he would guilt you into sex?

A. Yes.

Q. So there were times where maybe you didn't want to have sex but, ultimately, you would consent based on further conversations that you would have, right?

A. Yes.

Q. And when you say you didn't want to have sex you would let him know that you didn't want to have

sex, right?

A. No.

Q. You would not let him know that you didn't want to have sex?

A. No.

Q. So you weren't clearly communicating whether you wanted to have sex or not, at certain points, were you?

A. You can tell by words and body language. **(RR Vol. 1 at 68).**

The above exchange, which is obtainable from every marital relationship in the world, indicates that what occurred between the couple that led to the alleged charge for spousal rape was not abnormal for the couple. Angela never testified that she felt forced or threatened by Frank. From the above testimony, Angela indicated that her initial refusal to engage in a sexual relationship with Frank normally leads to them having sex later and making up. She later stated that she never said "no" to any sexual advances by Frank on the day in question. The video did not portray any attempt by Angela to resist Frank. They were only fighting on the night in question as depicted on the video.

Q. And when you say you didn't want to have sex you would let him know that you didn't want to have sex, right?

A. No. *Id.*

In a prosecution for a sexual assault, the State must prove that the appellant engaged in the conduct intentionally or knowingly without the victim's consent. TEX. PENAL CODE ANN. § 22.021(a) (1)(A)(i); *See Johnson v. State*, 932 S.W.2d 296, 302 (Tex. App.-Austin 1996, pet. ref'd).

To amplify Angela's position regarding her disdain by the actions of the prosecution to charge Frank for the crime, Angela, *sua sponte*, and after her divorce from Frank, sent a letter to the prosecuting judge. She testified about the email as follows:

Q. Do you recall making the statement from your work e-mail that, I blew the situation up into something larger than it was?

A. I do not recall the -- the words in the e-mail.

Q. Do you recall making the statement that you blew the situation up into something larger than it was?

A. That e-mail does say that. **(RR Vol. 1 at 88).**

From: Angela Middleton <AMiddleton@howertoneye.com>  
Sent: Monday, June 19, 2017 2:59:34 PM  
To: Fkhamsini74@outlook.com  
Subject: Letter

Dear honorable Judge,

I know the charges against Frank make him look like a bad person. But I would like for you to understand a little bit about where Frank was mentally that night. Frank's ex-wife and mother of his two children passed away unexpectedly a year prior to these charges. Frank worked 16-hour shifts 6 days a week, and never gave himself time to grieve. He didn't realize the effect that Anna's death had on him. Frank fell into a deep depression, as he blamed himself for her death. He felt as though since they had divorced and he had moved on, she desperately looked for love in the wrong places and tragically ended up losing her life. Now he is the only parent of Caleb and Gabby.

Since the incident, Frank regrets his behavior that night, he has been baptized in our church, he attends celebrate recovery meetings regularly, he has sought help from psychologist and counselors. Frank is a good person, a good father, and is not a threat to anyone. Frank was just a person who needed help and didn't realize it. I divorced Frank for unrelated reasons, and I am not coming before you today to create excuses for him, I am not saying these things because I am being manipulated. I am merely telling you that Frank Khamsini is a good person who made a bad decision. We all make bad decisions in our life at one point or another, the only difference is that his was caught on camera.

We both contributed to what led up to the confrontation that night. Its true that he made the wrong decision, but its also true that I blew the situation up into something larger than it was. I wouldn't want one moment of unresolved grief and disappointment ruin the lives of Frank and his two innocent children. Frank worked for ten long years with several failed attempts to become a nurse, and he finally made that accomplishment and now has a career to be able to provide for Caleb and Gabby and I wouldnt want that to be compromised due to one regretted moment. He has already learned from his actions that night and have paid the consequences in his personal life, marriage, community and spiritual life. I am asking the courts to show mercy and grace and pardon his behavior. Give him a second chance to be able to live right and raise those children properly. He knows he is the only chance they have to a good life and he has rehabilitated in order to provide the care they need, not just financially but morally as well.

Thank you,  
Angela Khamsini

The email to the Honorable Judge speaks for itself. (**CR at 65**).

The State called Ms. Peggy Wright, a licensed counselor, to testify about the video of the alleged incident, without actually speaking to either Angela or Frank.

Ms. Wright testified that Angela's mood was fluctuating. Even though Ms. Wright stated that she "was talking about generalities", she specifically stated that *"I also thought she was, you know, she kinda fluctuated. Some moments she was very upset and angry and some moments she was very, very calm."* (**RR Vol. 1 at 143**). It indicates an individual who is unstable.

Ms. Wright further testified that each marital relationship is unique and that relationships are redefined everyday, and that *"those parameters can be different from one house to the next."* (**RR Vol. 1 at 150**).

If Ms. Wright, who was the State's witness, testified that each marriage is

different and unique in its methods of interaction, it is therefore against societal norms for the State to interfere in a marital relationship.

Interestingly, the states marriage counselor, Ms. Peggy Wright stated succinctly about Angela: *“I also thought she was, you know, she kinda fluctuated. Some moments she was very upset and angry and some moments she was very, very calm.”* (RR Vol. 1 at 143).

### **All the State’s Witnesses Testimonies were Based on the Home Video**

There was no direct evidence or physical observation of the actions of both Angela and Frank. All the testimonies were based on the home video. The state questioned Angela based on the video evidence.

Deputy Dishman of the Fort Bend County Sheriff’s office admitted that his testimony is based on the video that he watched. He did not observe any physical assault or any physical injuries on Angela. Only the video tape. Deputy Dishman stated that the only evidence that proves attempted sexual assault was that Frank placed his hands in Angela’s buttocks:

A. His hand appears to be underneath her buttocks.

Q. Okay. Would you consider that a potentially sexual act?

A. Yes, I would. (RR Vol. 1 at 100).

Deputy Dishman did not conclude that during a physical fight, that each individual was trying to gain any type of leverage to win the fight, therefore any

part of the body would create such leverage.

Deputy Dishman further testified that Frank was pulling Angela's shorts upward, which caused it to tear. Deputy Dishman considered such an occurrence as a sexual act. (**RR Vol. 1 at 103**).

During cross-examination by Frank's attorney, Deputy Dishman admitted again that Frank was pulling Angela UP by her shorts, but not down. (**RR Vol. 1 at 118**).

Ms. Wright, a licensed professional counselor, also testified that her conclusions were based on the video provided by the State to her. She testified that she never spoke with Frank (**RR Vol. 1 at 143**), or Angela. (**RR Vol. 1 at 146**).

Recently, in *Lopez v. State*, this Court found that the failure to object to inadmissible testimony regarding the credibility of the complainant constituted deficient performance and that there was a reasonable probability that the result of the proceeding would have been different. 315 S.W.3d 90, 101 (Tex. App.—Houston [1st Dist.] 2010, pet. granted). In *Lopez*, the jury was “exposed to a barrage of inadmissible testimony” concerning the complainant's credibility. *Id.* at 102.

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## **ISSUE NUMBER FOUR (4) RESTATED**

**Whether Angela's Motive to Involve the Police was Due to the Appearance of Her Daughter Jakarta Middleton, and Angela's Intending Divorce.**

### **STANDARD OF REVIEW**

The United States Supreme Court held that, although great weight should be given to the inferences drawn by the trial judges and law enforcement officers, determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The Court stated, "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles." *Ornelas*, 517 U.S. at \_\_\_, 116 S.Ct. at 1662, citing *Miller*, 474 U.S. at 114, 106 S.Ct. at 451-52.

### **Argument**

According to the records and Angela's testimony, the martial dispute between Angela and Frank turned into a criminal accusation when Jakarta Middleton entered the scene.

According to Frank's counsel, Brooker:

*“Angela gets angry. She gets angry when Jakarta comes out. That's when she got angry. Nobody wants their child to see them engaging in any activities, especially - - let's start with a fight. Nobody wants your kids to see you fighting. Okay? And you definitely don't want them to see you in a compromising position. Her shorts were ripped at that point, it got physical, she got pissed. She got really upset. She was angry. That's when she hit him. That's when her voice changed. That's when she said call the cops. That's when the tears came. When Jakarta, her 12-year-old daughter at the time, when she came out, that's when she got angry. Before then, "Is this what you want, Honey?" Her words. Her tone.” (RR Vol. 2 at 32).*

The above statement was the reason that Angela called the police – not because of the allegation contained in the indictment.

Jakarta was twelve years old at the time of the incident. Jakarta is Angela's daughter from a previous relationship before Angela and Frank married each other.

During Angela's cross-examination, Angela testified that everything was fine until Jakarta entered the room. Angela testified as follows:

Q. Up until that point when all of this was happening and before Jakarta walks out, is it fair to say, that you are not necessarily, you know, screaming or being very loud during this incident?

A. Correct. (RR Vol. 1 at 37).

Angela was further questioned by the State about her actions after Jakarta walked into the room:



Q. Can you explain to the jury, I guess, why that was your reaction to the assault that was taking place?

A. Because we have five kids in the house that are asleep, and I didn't want to make them up for them to see the altercation that was happening. **(RR Vol. 1 at 38).**

During her cross-examination, Angela admitted that she was using the word “honey” to refer Frank until Jakarta walked into the room. **(RR Vol. 1 at 79).** She further asked Frank, “is this what you want?” **(RR Vol. 1 at 79).**

In her own words, Angela referred to the alleged assault as an “*altercation*”, not rape. It was the prosecutor that used the word “assault” to characterize the marital scuffle. **(RR Vol. 1 at 38).** Angela admitted that at the point that she raised her voice was “*exactly at the time Jakarta came out of the room,*” and she told Jakarta to “call 911.” **(RR Vol. 1 at 79).**

Furthermore, Angela stated during her cross-examination that it upset her when Frank was talking to Jakarta. **(RR Vol. 1 at 80).**

Immediately after the alleged attempted sexual assault, Angela filed for, and divorced Frank. Angela used the alleged accusation as an impetus to divorce Frank. **(RR Vol. 1 at 82).**

### **Conclusion Regarding Issue One (1).**

The jury verdict of conviction is solely based on the videotape of the alleged sexual assault. Angela’s testimony was based on the home video. Frank’s arrest

was based on Deputy Dishman watching the video. The conclusions drawn by Ms. Wright were based on her review of the video.

If the jury's verdict was based on the video, then the video only proved that:

(1) Frank was wearing his shorts throughout the ordeal and never pulled his shorts down or pull Angela's shorts down. (**RR Vol. 1 at 72**). (2) Angela did not feel threatened by Frank, but only went into protective mode for Jakarta (**RR Vol. 1 at 81**). (3) Angela instructed Jakarta to call the police because Angela was caught in an uncomfortable position with Frank, and Angela did not want her daughter to see her in such a position. (**RR Vol. 1 at 79**). (4) From the videotape, and the testimonies of all the witnesses, there was no smoking gun that Frank attempted to undress Angela, or where Frank was naked, to attempt to have sex with Angela. (5) The relationship between Frank and Angela was unique for both of them as to how they handle their sexual relationship. Angela admitted that sometimes she would say "no", then "yes." (**RR Vol. 1 at 67**). (6) There was no testimony, and the videotape did not reveal, that Frank ever pulled out his penis, or that Angela was apprehensive of Frank's intent to rape her. There must be a "direct or logical connection" between the evidence and the fact the proponent is trying to prove. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009).

Based on the foregoing, Frank never even attempted to have sex with his wife Angela. The couple were physically assaulting each other in a normal marital dispute. The Fort Bend County prosecutor's office decided to terminate an

interracial marriage by prosecuting the black individual, which led to the couple's divorce. The jury verdict should be reversed.

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## **ISSUE NO FIVE (5) RESTATED**

### **Whether the Trial Counsel for the Appellant was Ineffective in Representing Appellant, Frank Khamsini.**

#### **STANDARD OF REVIEW**

Both the United States and the Texas Constitutions guarantee individuals the right to effective criminal representation. U.S. CONST. amend. VI; TEX. CONST. art. 1 § 10.

"To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate two things: deficient performance and prejudice." *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).; *see also Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). An appellant "bears the burden of proving by a preponderance of the evidence that counsel was ineffective." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

#### **The Law**

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. "It is not sufficient that the appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence. Rather, the record

must affirmatively demonstrate trial counsel's alleged ineffectiveness." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). The defendant must overcome "the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" and that the conduct constituted sound trial strategy. *Thompson*, 9 S.W.3d at 813; *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

To defeat this presumption, "[a]ny allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness." *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Trial counsel should generally be given an opportunity to explain his actions before being found ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). In the face of an undeveloped record, counsel should be found ineffective only if his conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). The record on direct appeal is generally insufficient to show that counsel's performance was deficient. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

## **Applying the Law to the Facts**

Counsel Failed to Seek a Mistrial When the Court Reporter was Absent from Trial for more than Two Hours, which Caused the Jury to Return a Hurried Verdict Against Frank Khamsini.

After the trial and conviction, Frank Khamsini filed a motion for a new trial. In that motion, Frank filed an affidavit in support of the motion. The affidavit contained the following verbiage:

**“On July 28th 2023, third trial took place at 434th district under Hon judge Bacerra. Jurors deliberated for about two hours and asked for Judge's direction. They were instructed to continue with deliberations. After about two hours, Jurors asked for portion of testimony from state's witness, but the court reporter was unavailable. They were instructed to continue with deliberation while court waited for the reporter to return. It was about two hours later when she returned. Court was prepared to bring jurors in for the portion of testimony they had requested, but before they were brought back in court, they sent a note to the judge that, they had reached a verdict. They were brought in court and a guilty verdict Was read. My attorney and prosecutor proceeded to the jury room, for a post-trial conference, after judge spoke to jurors. My attorney informed me that, jurors were hung 8-4, at the time they requested portion of testimony, but waited too long and the information was never provided to them, before they reached verdict. One the jurors said she was in favor of acquittal, but they never got the portion of testimony, got tired of waiting.” (CR at 210).**

It was the responsibility of Frank’s counsel to object to the absence of the court reporter. It was also the responsibility of Frank’s counsel to move for mistrial due to the absence of the court reporter. In the end, the absence of the court reporter affected the trial of the matter because the jury returned a guilty verdict

against Frank. The jurors were interviewed after the trial. One of the jurors stated that the jurors were weary from the protracted wait for the court reporter to arrive; and that they returned the verdict of guilt so they could go home. **(CR at 210).**

It is true that ordinarily this Court requires evidence from trial counsel as to his rationale for his actions or inactions before finding him ineffective. But this is not always the case. Sometimes, when the record shows that no reasonable attorney would have engaged in a particular course of conduct, an appellate court will find counsel ineffective, even with a silent record. *See Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) ("[W]hen no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as she did.").

Had Frank's trial counsel objected and moved for a mistrial due to the delay by the court reporter, the outcome of the trial would have been different.

During the relevant period of jury deliberation, the jury foreman asked the following question to the Court:

**"Can we have Angela's testimony where she describes their relationship, specifically when she is cross-examined about sometimes giving consent eventually."** (CR at 154).

Obviously, this question was relevant and probative. The answer was never provided because the court reporter returned after more than 2 hours, the jury had

become tired and decided to pronounce a verdict of guilt. But for counsel's unprofessional errors, the result of the proceeding would have been different." *Thompson v. State*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986)).

In his motion for New Trial, Frank's new counsel, Mr. Diogu, argued that "*in this case, based on this case history, the attorney's failure to raise a mistrial in the face of gross Judicial misconduct constitutes ineffective assistance of course. Especially with the possibility, that the admission and testimony, and evidence of Jury number #8, may never be recovered forever.*" (**CR at 191**).

The inherent nature of most ineffective assistance' of trial counsel 'claims' means that the trial court record will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id.* at 1918 (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (1997)). Although a motion for new trial may in some cases provide a means to develop the record on appeal, that vehicle "is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point." *Robinson v. State*, 16 S.W.3d 808, 810 (Tex.Crim.App. 2000)). (quoting *Torres*, 943 S.W.2d at 475).

There is nothing on the trial records reflecting that Frank's trial counsel objected to the absence of the court reporter or sought a mistrial, which caused the



jury question to go unanswered, which led to the guilty verdict. Counsel's representation was therefore ineffective.

Frank's Trial Counsel's Failure to Object to the State's Only Video Evidence Led to the Conviction of Frank Khamsini.

Generally, to preserve error in the admission of evidence, a party must make a proper objection, get a ruling on that objection, and continue to object each time the allegedly inadmissible evidence—or other evidence proving the same underlying fact—is offered. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004) (quoting *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003)); *Sibaluca v. State*, No. 02-19-00150-CR, 2020 WL 6601608, at \*7 (Tex. App.-Fort Worth Nov. 12, 2020, pet. filed) (mem. op., not designated for publication); The need for ongoing objections after the trial court has already announced its decision on admissibility is often referred to as "the futility rule." *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).; *Mallory v. State*, No. 02-17-00279-CR, 2019 WL 618893, at \*12 (Tex. App.-Fort Worth Feb. 14, 2019, pet. ref'd) (mem. op., not designated for publication). Failure to comply with this rule effectively forfeits any error in the admission of the objectionable evidence because "the improper admission of evidence does not constitute reversible error if the same facts are shown by other evidence which is not challenged." *Leday*, 983 S.W.2d at 717 (quoting *Crocker v. State*, 573 S.W.2d 190, 201 (Tex. Crim. App. [Panel Op.] 1978)).

Frank Khamsini's trial counsel was aware that the only evidence to be relied upon by the State was the home video provided by Angela to the police purporting to be the basis of the alleged attempted rape. The videotape did not show evidence of the marital relationship. It only provided evidence of Frank's reaction to what Angela did to Frank. For that reason, the videotape was a synopsis of the fight between the couple. A fight that was not outrageous or unusual in any marital conflict.

Had counsel filed a motion to suppress the home video evidence at pretrial, or during the introduction of the video at trial, the court may have suppressed the evidence. Rather, prior to introducing the video, counsel was asked by the court if he had an objection to the introduction, Mr. Brooker stated "no objection." The exchange was as follows:

MS. VALENTI: Judge, after tendering to opposing counsel, State offers State's Exhibit 2.

MR. BROOKER: No objections.

THE COURT: Without objections State's 2 is admitted into evidence. **(RR Vol.1 at 31).**

The videotape was probative, and the only evidence tendered by the State to procure the wrong verdict from the jury.

Counsel may be ineffective as a matter of law, where he fails to object or move to suppress inadmissible evidence. *Kimmelman v. Morrison*, All U.S. 365,

106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Cooke v. State*, 735 S.W.2d 928 (Tex. App.-Hou[14th] 1987, pet. refused).

Again, Angela testified via the video. Deputy Dishman of the Fort Bend County Sheriff's office testified to the alleged attempted sexual assault based on the video evidence. Counsel asked Deputy Dishman under cross-examination:

Q. So, you watch the video and you testified today that you had drawn certain conclusions, right?

A. Yes. **(RR Vol. 1 at 114).**

The State's third witness, Ms. Peggy Wright also testified that her testimony was based on the videotape of the alleged incident:

Q. I am not asking about any rapes. What I am asking is simply, the information that you have is limited to the video, right?

A. Correct. **(RR Vol.1 at 146).**

Had Frank's trial counsel moved to have the videotape suppressed, Frank would have never faced the trial at all. To preserve error for appeal, Frank's trial attorney must make a timely objection against the admissibility of the video that states the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint. TEX. R. APP. P. 33.1(a)(1)(A).

Due to Frank's trial attorney's failure to timely object to the admission of the video, it weakened Frank's argument on appeal because an argument on appeal must comport with the objection raised at trial. *See Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). An objection based on Rule 403 does not preserve a complaint under Rule 404(b). *See, e.g., Parmer v. State*, 38 S.W.3d 661, 668 (Tex. App.-Austin 2000, pet. ref'd) (complaint regarding admission of evidence under Rule 404(b) not preserved where no 404(b) objection made at trial); *Ross v. State*, No. 06-18-00174-CR, 2019 Tex. App. LEXIS 4404, at \*9 (Tex. App.-Texarkana May 30, 2019, pet. ref'd) (mem. op., not designated for publication) (appellant failed to preserve Rule 404(b)).

Frank's Trial Counsel Failed to File Challenge the Police possession and Use of the Video without Search Warrant

The Fourth Amendment protects against unreasonable searches and seizures by government officials. U.S. Const. amend. IV; *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). Evidence seized by the police without a warrant may be admitted only if an exception to the Fourth Amendment's warrant requirement applies. *Neal v. State*, 256 S.W.3d 264, 282 (Tex. Crim. App. 2008). A defendant challenging the admission of evidence on the basis of the Fourth Amendment bears the initial burden to prove that the search occurred without a warrant. *Id.* If the

defendant meets his burden, the burden shifts to the State to prove that an exception applies. *Id.*

Frank's trial counsel failed to timely object to the use of the video of the couple's living room without a search warrant. Frank's appellate counsel cannot therefore argue the issue regarding the warrantless search and use of the video by the State against Frank when the police obtained the video without a search warrant.

Frank's Trial Attorney Failed to Seek Lesser Included Crime as Stated in the Indictment

The indictment stated under "Related": ASSAULT BI FAM/HOUSE MEM 2+ Q/IN 12 MONTH." (**CR at 22**).

A defendant is entitled to an instruction on a lesser-included offense if it is "established by proof of the same or less than all the facts required to prove the offense charged[.]" Tex. Code Crim. Proc. art. 37.09(1). We use a two-step test to determine if an instruction on a lesser-included offense should be given. *Hall v. State*, 225 S.W.3d 524, 526 (Tex. Crim. App. 2007).

According to the indictment, Frank forced his body "on top of her body and ripping her clothes off." (CR at 22). This definition should be for an assault. There is nothing in this language that connotes sexual assault. In its regular definition, falling on top of someone who is not a spouse and pulling her by the shorts and the

shorts tore, which was not the intention of the actor, cannot conclude the intent to commit rape.

It was therefore incumbent on the counsel for Frank to inform the court to include the lesser charge of simple assault.

Frank's Trial Attorney Failed to Object to Deputy Dishman's Testimony on Matters not in Evidence.

The Due Process Clause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim.App.2011). "Testimony need not be perjured to constitute a due-process violation; rather, `it is sufficient that the testimony was false.'" *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex.Crim.App.2012) (quoting *Ex parte Robbins*, 360 S.W.3d at 459). "The question is whether the testimony, taken as a whole, gives the jury a false impression." *Id.* (citing *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim.App.2011)). To constitute a due-process violation, the allegedly false testimony must also be material. *See Ex parte Chavez*, 371 S.W.3d at 208. Materiality in this context means that there must be a reasonable likelihood that the false testimony affected the defendant's conviction or sentence. *See id.*

Severally during the cross-examination of Deputy Dishman, Frank's trial attorney interrogated him regarding his testimony about materials not in the police report.

Q. And a person touching another person's buttocks in the commission of attempted sexual assault would be a relevant fact, wouldn't it?

A. Yes

Q. But you didn't put that in your report either, did you?

A. No. **(RR Vol. 1 at 116).**

This type of exchange was prevalent throughout the trial attorney's cross-examination of Deputy Dishman. Yet, throughout the direct testimony of Deputy Dishman, Mr. Brooker failed to object to the Deputy testifying to matters that were not on the record. There is no credible reason that Mr. Brooker did not object to these testimonies.

### **Summary**

Because the proper focus should be on whether a trial attorney's performance was objectively unreasonable, a silent record as to counsel's subjective reasons for his actions, as here, nonetheless may suffice to establish that he rendered ineffective assistance of counsel. Here, nothing counsel could possibly say would change the fact that his performance was so outrageous that no competent attorney would have engaged in it. Therefore, trial counsel performed deficiently and, in doing so,

prejudiced appellant. The consequence for such ineffective representation would be for this Honorable Court to grant appellant a new trial.

### **CONCLUSION**

The State attempted, and the jury failed in its duty, by finding that Frank had the intent to commit a sexual assault on his wife, Angela by claiming that Frank who had his shorts on throughout what Angela termed as an “altercation,” and who never attempted to have sex with Angela based on the home video produced from the couple’s home, the State failed woefully in proving that Frank had intent to have sex with his wife, not to mention that Frank attempted to forcefully have sex with Angela. The video evidence – where Frank was fighting with Angela and pulled her up from the couch, which caused Angela’s shorts to tear – if proved, shows an attempt at some undefined criminal conduct, but not sexual assault.

This case was tried three times by Fort Bend Prosecutor’s office. This was a normal marital scuffle where no one was injured in any way. The involvement of the prosecutor’s office was by overzealous prosecutor who wanted to score a conviction point against a black man married to a Caucasian woman. The entire three trials were unnecessary, expensive, and time-consuming, just to end an interracial marriage.

From the jury questions to the court, it appeared that the jury was deliberating a sexual assault against Frank, rather than an attempt.



The only evidence of the alleged attempted sexual assault was based on the home video of the couple, and nothing else. Even a letter from Angela urging the judge to dismiss the case did not resonate with the prosecutor. (**CR at 55**). Angela recanted her story of the alleged event. If Frank should be charged with any crime, it should be for a lesser crime of alleged assault of a family member, but never sexual assault or the attempt thereof.

Based on the foregoing, this Honorable Court should find that the evidence was legally insufficient to support the conviction for Attempted Sexual Assault. Consequently, the Court should reverse the jury verdict in this regard.

This Honorable Court should further hold that the intent element of Attempted Sexual Assault was not met by the prosecution. At no time did Frank take an affirmative step to have sex with his wife because he had his shorts on throughout the episode; he did not get on top of his wife in a sexual manner, they were fighting; Frank and his wife were engaged in an “altercation” as most couples do; prior to Angela’s 12-year old daughter Jakarta entering the room, Angela was heard calling Frank “Honey”, and “is this what you want.?” (**RR Vol. 1 at 79**). Angela further testified that what occurred on that day was not abnormal to their sexual relationship. The absence of the court reporter during jury deliberations caused the jurors to arrive at a tainted verdict.

This Honorable Court can also reform the judgment to a lesser crime of ordinary assault.

The evidence was therefore insufficient to meet the elements of Attempted Sexual Assault as defined in the Texas Penal Code. This Honorable Court should therefore render the correct judgment of acquittal, or alternatively remand this matter to the trial court for a new trial.

**PRAYER**

Wherefore Premises Considered, Appellant, Frank Khamsini prays this Honorable Court to consider each and every point of error raised herein, to reverse Appellant's conviction, and to order a judgment of acquittal, or new trial as the law and justice demands.

Respectfully submitted,

**The Royal Ezeoke, P.C.**

A handwritten signature in black ink, appearing to read 'A. Ezeoke', with a stylized flourish at the end.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Appellant's Opening Brief has been forwarded to Appellee's Attorney of Record, on this August 16, 2024, by Texas E-Filing System

A handwritten signature in black ink, appearing to read 'A. Ezeoke', is positioned above a horizontal line.

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Alphonsus O. Ezeoke

## **CERTIFICATE OF COMPLIANCE**

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this brief (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix), is **11,401**.



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Alphonsus O. Ezeoke