No. 01-24-00670-CR

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

TRACY B. MILES
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1712384
From the 209th District Court of Harris County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:

Hon. Brian Warren
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STATEMENT OF THE CASE

On September 29, 2021, a Harris County grand jury returned an indictment charging Appellant with the offense of murder alleged to have occurred on or about February 25, 2021. (C.R. at 20). On August 29, 2024, a jury found Appellant guilty as charged in the indictment. (6 R.R. at 43-44). On that same date, the jury assessed Appellant's punishment at 40 years in the Texas Department of Criminal Justice – Institutional Division. (C.R. at 482-484; 7 R.R. at 16). The trial court certified Appellant's right of appeal and he timely filed his notice of appeal on August 30, 2024. (C.R. at 488, 509-510).

STATEMENT REGARDING ORAL ARGUMENT

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

ISSUES PRESENTED

1. **Whether this appeal should be abated with instructions to the trial court to orally pronounce sentence in the Appellant's presence?**

2. **Whether trial counsel rendered ineffective assistance of counsel by failing to properly preserve their challenge for cause against Juror Number 2, who ultimately sat on the jury, after he indicated he could not consider the minimum range of punishment of 5 years?**

3. The trial court's judgment should be modified to delete the special finding "APPEAL WAIVED, NO PERMISSION TO APPEAL GRANTED."

STATEMENT OF FACTS

On February 25, 2021, Officer Benjamin Aber was dispatched to a corner store located directly south of the La Casita Apartments. (3 R.R. at 16-17). Initially, Officer Aber was looking for the reportee of a crime, who was the Appellant. (3 R.R. at 19; 8 R.R. at State's Ex. 1).[1] When he arrived on scene, there had been no indication that anyone had been shot or had any force used against them. (3 R.R. at 20). Officer Aber met with the Appellant and his fiancé (or wife). (3 R.R. at 20-21; 8 R.R. State's Ex. 2). From the video, Appellant informed Officer Aber that his pistol was in a bag near his fiancé inside of the store. (8 R.R. State's Ex 2 at 00:13-14). Officer Aber retrieved the pistol and put it in his vehicle, afterwards he spoke with the Appellant. (8 R.R. State's Ex. 2 at 00:14-02:00). Appellant informed Officer Aber that he and his fiancé allowed an individual to stay over at their apartment. (8 R.R. State's Ex. 2 at 02:00-02:21). The individual had a .45 pistol and he started pointing it at the Appellant and his fiancé for no apparent reason. (8 R.R. State's Ex. 2 at 02:21-02:38). Appellant explained

[1] Appellant called 911 on two occasions prior to Detective Aber's arrival. (3 R.R. at 34).

that he and his fiancé had been kidnapped for almost three days. (8 R.R. State's Ex. 2 at 02:38-02:47). Appellant said that the individual was messing with "ice." (8 R.R. State's Ex. 2 at 02:52).[2] The individual threatened them with the .45 and wanted them to stay in the bedroom of the apartment while he stayed in the living room. (8 R.R. State's Ex. 2 at 03:42-04:02). The individual needed more money and allowed the Appellant to leave and get some. (8 R.R. State's Ex 2 at 04:00-04:06). After being asked by Officer Aber if he wanted to press charges, Appellant informed him that the individual was dead. (8 R.R. State's Ex. 2 at 04:54-05:11). Appellant admitted that he shot him in the head and stated that it was done in self-defense. (8 R.R. State's Ex. 2 at 05:14-05:30). Officer Aber then placed the Appellant in handcuffs. (8 R.R. State's Ex. 2 at 05:25). Officer Aber described Appellant' affect as agitated and nervous and he was constantly moving but providing statements. (3 R.R. at 22). He also described Appellant as cooperative. (3 R.R. at 35). In addition, he testified that he had never experienced anything quite like that before, where a person does not lead with the most pertinent information, i.e. the fact that he had shot someone. (3 R.R. at 25). Once the correct apartment was found, Officer

[2] Officer Aber testified that "ice" is a street name for methamphetamine. (3 R.R. at 24).

Aber observed that the door was unlocked and a protective sweep was performed. (3 R.R. at 32-33). The deceased was located. (3 R.R. at 33).

Victoria Boren is a Crime Scene Unit Supervisor with the Houston Forensic Science Center who was dispatched to 233 Rosamond, Appellant's apartment. (3 R.R. at 39, 44). The scene was a shooting. (3 R.R. at 47). Complainant was located on the couch in the living room with his legs straight and crossed at the ankles. (3 R.R. at 47, 52; 8 R.R. State's Ex. 23).[3] A piece of candy was next to the Complainant's left arm and a cell phone was underneath his right hand and on was next to his left hand. (3 R.R. at 53, 79). No gun was found near the Complainant's hand as she found him. (3 R.R. at 53). However, a .45 caliber gun was discovered when the northern-most couch cushion was lifted up within arm's length of the Complainant's left hand. (3 R.R. at 54-55, 75-77).[4] Complainant would have had to lift the cushion to access the weapon and the handle was facing away from the Complainant's body. (3 R.R. at 82). In addition, a pipe typically

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[3] Sara Wainman, a forensic investigator with the Harris County Institute of Forensic Sciences, testified that she observed the Complainant sitting on a couch inside of the apartment with two gunshots wounds of the head. (3 R.R. at 89). Complainant's legs were crossed at the ankles and Ms. Wainman discovered that there was vomit present from his mouth and it was going down his shirt. (3 R.R. at 89).

[4] A bullet was chambered in the .45, but no fired cartridge cases were recovered. (3 R.R. at 76, 84).The .45 was swabbed for contact DNA. (3 R.R. at 80).

used to smoke illicit drugs was located near the Complainant's left arm and marijuana was found in one of his pants pockets. (3 R.R. at 73-74).

Ms. Boren testified that cartridge cases were located underneath the chair in the living room, on the couch cushions, and where the couch was after it was pulled back. (3 R.R. at 51, 56; 8 R.R. State's Exs. 18, 22, and 36). The cases were from a .32 caliber weapon. (3 R.R. at 78, 84). A cell phone was found on the living room floor. (3 R.R. at 52; 8 R.R. State's Ex. 20). Blinds behind the couch showed some area of possible blood splatter. (3 R.R. at 53; 8 R.R. State's Ex. 26).

Sergeant Adam Dudley of the Houston Police Department's Homicide Department was dispatched to Rosamond Street. (3 R.R. at 105). At the time of his dispatch, he had information that there was one decedent at an apartment and that two individuals were being questioned in connection. (3 R.R. at 106). The apartment was relatively clean and orderly. (3 R.R. at 107). Sgt. Dudley did not see any sign of a struggle. (3 R.R. at 107). Complainant was on the couch. (3 R.R. at 108). Sgt. Dudley described the body as relaxed on the couch, seated not right in the middle but kind of off to one end of the couch. (3 R.R. at 108). In addition, the Complainant's legs were crossed, kind of in a relaxed position, just sitting casually on the

couch. (3 R.R. at 108). Sgt. Dudley would not describe the Complainant's position as a normal fighting position. (3 R.R. at 108). Complainant had a candy bar in his hand and there was drug paraphernalia in the immediate vicinity on the couch of the Complainant and some cell phones. (3 R.R. at 109). What appeared to be blood splatter and brain matter was on the blinds. (3 R.R. at 110). The blood splatter was directly above the couch. (3 R.R. at 110). Underneath one of the couch cushions was a firearm, located on the opposite side of the couch from where the Complainant was seated. (3 R.R. at 111). Sgt. Dudley found no evidence to suggest that the Complainant had a gun in his hands when he was found on the couch. (3 R.R. at 116). In addition, he found no evidence that the Complainant used any form of deadly force against the Appellant. (3 R.R. at 119-120).

Chandler Bassett is a firearms examiner for the Houston Forensic Science Center. (3 R.R. at 130). In this case, Mr. Bassett performed two sets of test-fires, as he received two separate firearms. (3 R.R. at 135). One of the weapons was a .45 auto and the other was .32 auto. (3 R.R. at 135). In addition, Mr. Bassett received three fired cartridge cases and five bullet items. (3 R.R. at 137). He only did his microscopic comparison to the .32 automatic firearm, as the three fired cartridge cases were .32 auto cases. (3

R.R. at 144). Mr. Bassett also compared three bullet fragments he received from the medical examiner's office to the .32 auto. (3 R.R. at 144). He concluded that the three bullet fragments from the medical examiner were from the .32 auto. (3 R.R. at 145-146; 8 R.R. State's Ex. 56). In addition, Mr. Bassett determined that two of the three fired .32 cartridge cases were fired from the .32 automatic and one cartridge was unsuitable for identification. (3 R.R. at 145-146; 8 R.R. at State's Ex. 56).

Jude Vigil is an investigator with the Harris County District Attorney's Office in the Digital Forensics Investigations Unit. (4 R.R. at 27). Mr. Vigil reviewed call records from (346) 529-1176, as no name was associated with the phone. (4 R.R. at 42). The phone was activated on April 5, 2020 and appeared to be a prepaid phone. (4 R.R. at 42-43). On February 25, 2021, there were a lot of communication events between 12:00 a.m. and 6:11 a.m., but Mr. Vigil believed that the phone did not move anywhere and was in the area consistent with the Rosamond address. (4 R.R. at 43-44). After a 6:11 a.m. voice call, a fair amount of travel was noted, pretty much the whole city of Houston, from the north side to the southwest side. (4 R.R. at 45). This distance could not be traversed on foot, and Mr. Vigil agreed that it was fair to say that the phone was traveling in a motor vehicle. (4 R.R. at

45-46). The phone also had high usage between 6:11 a.m. and 7:32 a.m., with almost all of it being outgoing calls. (4 R.R. at 46). A lot of this activity was with Stacie Ryan, the sister of Appellant's fiancé, and Appellant's sons. (4 R.R. at 44-46, 60). Between 7:32 a.m. and 8:30 a.m. there were only two voice calls. (4 R.R. at 47). The device moved from Beltway West and Highway 59 area over to the southern side of the Sunnyside area in Houston. (4 R.R. at 46-47). At 8:57 a.m., the device pinged in the Galena Park Area where it remained stationary for basically an hour. (4 R.R. at 48-49). Between 8:57 a.m. and 9:56 a.m. the communication events involved Stacie Ryan and the Appellant's sons. (4 R.R. at 49). The device then traveled back to the Rosamond area with the first ping showing it there at 10:59 a.m. (4 R.R. at 49). From that time until 10:43 p.m., when HPD dispatch shows a unit arriving at the Rosamond area, the device remains at that location. (4 R.R. at 50).

Ana Lopez is an assistant medical examiner at the Harris County Institute of Forensic Sciences. (5 R.R. at 8). A Dr. Garrett Phillips originally performed the autopsy of the Complainant and Dr. Lopez was assigned as the substitute medical examiner. (5 R.R. at 12). After reviewing Dr. Phillips' autopsy report, the photographs that he took, the scene photos, and an

investigator report, Dr. Lopez reached her own conclusions. (5 R.R. at 12). Complainant died of gunshot wounds to the head and neck. (5 R.R. at 13). A entrance wound on the Complainant's mid right forehead was designated as gunshot wound number 1. (5 R.R. at 17). Around the wound was black soot and a dense pattern of strippling, which is the burned gunpowder particles that get deposited on the skin when the barrel of the gun is very close to the skin. (5 R.R. at 18). The barrel of the gun had to have been within 1 to 2 inches of the forehead. (5 R.R. at 18-19). Gunshot wound number 2 was an entrance wound on the Complainant's right side of his forehead towards the temple area. (5 R.R. at 19). Very sparse strippling was noted, putting the range of fire approximately 2 ½ to 3 feet. (5 R.R. at 19). The third gunshot wound was on the right side of the Complainant's face towards the jaw line and there was no soot or gunpowder strippling around this wound, indicting more of a distant range of fire. (5 R.R. at 19-20). All three gunshot wounds were fatal. (5 R.R. at 20). All of the projectiles went from front to back, right to left, and in a downward direction. (5 R.R. at 21).[5] Based upon Dr. Lopez's review of the scene photos, she believed that

[5] On cross-examination, Dr. Lopez agreed that Dr. Phillips' report he described the direction of travel only for gunshot wound number 1. (5 R.R. at 29, 35-36). Dr. Lopez

the Complainant was shot when he was sitting on the couch where he was found. (5 R.R. at 22-23). Complainant had a small amount of alcohol and methamphetamine (and its metabolite, amphetamine) in his blood. (5 R.R. at 23). Dr. Phillips collected gunshot reside stubs, but she was not aware if it was analyzed. (5 R.R. at 27).

Lamoni Ontiveros is an investigator with the Harris County Sheriff's Office. (5 R.R. at 42). He reviewed a call from the jail off the Appellant's identification number that was placed on August 26, 2024, at approximately 10:45 p.m. (5 R.R. at 43-44; 8 R.R. State's Ex. 81).[6] During this phone call, Appellant said that the .45 could not be reached from where it was it, but indicated that they were fighting over a different gun. (5 R.R. at 46-47; 8 R.R. State's Ex. 81 at 3:35-3:45). In addition, Appellant said during the phone call that he was high at the store. (5 R.R. at 47, 177-178).

Appellant testified that he met Tracie Ryan in elementary school and that he met the Complainant at the Star of Hope in a 90-day job program. (5 R.R. at 63-64, 66). Appellant was at the Star of Hope because he was

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testified that based upon her review, the other gunshot wounds had a downward direction. (5 R.R. at 37).

[6] On cross-examination, Appellant agreed that this was a jail call that he made. (5 R.R. at 176).

homeless. (5 R.R. at 137). He reconnected with Tracie through Facebook during the first couple of weeks of him being at the Star of Hope. (5 R.R. at 68). After completing the work program, Star of Hope allowed him to live at the apartment on Rosamond for one year. (5 R.R. at 67). At the time of the incident, Appellant had lived there for about a month and was the only one the lease. (5 R.R. at 67). Appellant heard from the Complainant during the cold front that occurred in February. (5 R.R. at 70). Complainant asked to come to the Appellant's apartment. (5 R.R. at 70). Although Appellant initially said no multiple times, as the Complainant got kicked out of the Star of Hope job program, he eventually allowed the Complainant to do so around February 22nd or 23rd. (5 R.R. at 70-72). Tracie was with him in the apartment. (5 R.R. at 72). Appellant had three rules for his apartment, 1) respect his fiancé; 2) clean up after himself; and 3) no drugs. (5 R.R. at 73).

Appellant knew the Complainant to carry a .45, but he was not aware that the Complainant had the gun when he came to the Appellant's apartment. (5 R.R. at 73-75).[7] After Appellant introduced the Complainant to a friend of his, the Complainant's attitude changed to being very

[7] Appellant identified State's Ex. 52 as being very similar to the weapon the Complainant had while at the Star of Hope. (5 R.R. at 74).

aggressive towards the Appellant. (5 R.R. at 77-79). Eventually, Tracie called Appellant into the back bedroom and asked him why he did not make the Complainant leave. (3 R.R. at 81). Afterwards, Appellant went back into the living room where the Complainant was and saw that he had drugs on the couch. (3 R.R. at 82-83). Appellant then asked the Complainant to leave, but he did not and started using drugs. (3 R.R. at 83-85). Appellant then confronted the Complainant regarding the drug use and the Complainant revealed the butt of a gun through his clothes and told Appellant to take his ass to his room. (3 R.R. at 85-86). Appellant complied and went to the room and comforted Tracie who was a little hysterical. (3 R.R. at 86). Complainant later came in and forced Appellant to take a hit of methamphetamine, as he had his hand over the butt of the gun. (5 R.R. at 87). Complainant also forced Tracie take a hit. (5 R.R. at 87-90). Complainant's gun was tucked, but he had access to pull it out at any time (5 R.R. at 90). Appellant was afraid for two lives, his and Tracie's. (5 R.R. at 90). They were not free to leave and the Complainant took Appellant's cell phone. (5 R.R. at 90, 95). Complainant told Appellant that if he called the police, he would start shooting. (5 R.R. at 95).

Complainant eventually asked Appellant for some money and Appellant called a friend of his, as Appellant thought things would escalate if he did not. (5 R.R. at 96-97). Appellant was able to make this call after convincing the Complainant to give him back his cell phone so that he could get some money. (5 R.R. at 103-104). After making some calls, Appellant secured a job that lasted for about an hour and half to two hours. (5 R.R. at 98, 104). He was picked up at around 6:30 a.m. and that person drove. (5 R.R. at 105). Appellant was not familiar with where they were going. (5 R.R. at 106-107). Although Appellant had his cell phone, he did not call the police. (5 R.R. at 107). This was due to the layout of his apartment that would have allowed the Complainant to see law enforcement coming and he had told the Appellant he would start shooting and he got bodies. (5 R.R. at 107-108). Appellant was also worried about Tracie. (5 R.R. at 108). Appellant was gone from the apartment for approximately two to three hours. (5 R.R. at 109-110).

When Appellant arrived back at his apartment, the Complainant was sitting close to the edge of the couch and asked for money. (5 R.R. at 112-113). Later, while Appellant was in the bedroom, he saw a .380 pistol on the table. (5 R.R. at 117). After the Complainant called the Appellant over,

and while the Complainant had his head down, Appellant went for the gun first and the Complainant grabbed the Appellant's arm. (5 R.R. at 117, 164). Appellant was in fear for his and Tracie's life. (5 R.R. at 117-118). Appellant testified:

> We go to struggling back and forth and that's when he was, like, kind of, like, almost up and I'm going to comply and say -- it might go against my defense -- but it was, like, in a direct angle and I shot, boom, and he fell back. And then I shot again and then at that time, I kind of, like, blacked -- kind of, like, blacked out and shot again; but I was off of it then. I heard Tracie saying, No, no. No, no. That's when I ran to the back.

(5 R.R. at 118)[8]

Afterwards, he did not immediately call 911 because Tracie was his biggest concern. (5 R.R. at 121).[9] Appellant then passed out and did not wake up until it was nighttime. (5 R.R. at 120-122). Appellant put the gun in a bag and went across the street to the store to call the police. (5 R.R. at

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[8] On cross-examination, Appellant testified that he picked up the gun. When I picked up the gun, Mr. Deon grabbed my arm. He grabbed my arm and we were tussling close together and that's when -- I had the gun like this here. We tussling, and I shot him. It was -- when I got it like this, I shot him, boom. And then I shot again, boom. And then I raised back and shot again; and that's when I heard my girlfriend screaming, No, no, no." (5 R.R. at 182). Complainant and he were in like a squat position. (5 R.R. at 182). In addition, Appellant testified that the Complainant's feet were not crossed after the incident happened and he agreed that the legs somehow got repositioned by someone else. (5 R.R. at 190-191).

[9] Appellant believed that in hindsight he should have called the police at that very moment. (5 R.R. at 121-122).

123-124). Police did not arrive immediately and Appellant called them again. (5 R.R. at 124-125). It took the officer nearly two hours to arrive. (5 R.R. at 125-126). Appellant denied that the gun entered into evidence by the State was the weapon that he used to shoot the Complainant. (5 R.R. at 132). Appellant was adamant that he gave a .380 to Officer Abner at the store. (5 R.R. at 170).[10] Appellant did not know why Officer Abner would lie about the .32 caliber gun being his. (5 R.R. at 170). According to the Appellant, there were no .32 shells when he left the apartment to turn himself in. (5 R.R. at 173-174).

On cross-examination, Appellant agreed that he was still on parole at the time of the incident and he was not legally allowed to possess a firearm. (5 R.R. at 135). He denied that he smoked meth with the Complainant, got paranoid, and then shot the Complainant. (5 R.R. at 178-179).

SUMMARY OF THE ARGUMENT

Initially, Appellant contends that this appeal should be abated and his case remanded back to the trial court so the trial court can properly orally pronounce Appellant's sentence in his presence. The trial court only read the punishment jury verdict form in the Appellant's presence. The trial court did

[10] In Appellant's 911 call, he stated that he thought the Complainant had a black .45. (5 R.R. at 175; 8 R.R. State's Ex. 1 at 2:01).

not orally pronounce that sentence in open court in the Appellant's presence even though Appellant was present. Thus, an abatement is required so that this Court may properly have jurisdiction over the Appellant's appeal.

In addition, Appellant contends that trial counsel rendered ineffective assistance of counsel through her failure to properly preserve her challenge for cause concerning Juror No. 2. Trial counsel failed to properly preserve a challenge for cause concerning Juror Number 2 by not following the remaining steps after a challenge for cause has been asserted, for example, by using a peremptory challenge against Juror No. 2. This constituted deficient performance given that trial counsel made a challenge for cause regarding Juror Number 2 to the trial court after he had indicated that he could not consider the full range of punishment. As a result of trial counsel's deficient performance in failing to properly preserve a challenge for cause against Juror Number 2, Appellant suffered prejudice because Juror Number 2 sat on the jury and Appellant was subjected to the full range of punishment for Murder, i.e. 5-99 years or life.

Finally, in the event this Court overruled Appellant's second issue, he requests that this Court modify the trial court's judgment to remove the special finding APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED,

as nothing in the appellate record indicates that Appellant waived his right to appeal.

ARGUMENT

1. Whether this appeal should be abated with instructions to the trial court to orally pronounce sentence in the Appellant's presence?

A. Applicable Law

"Except as provided in Article 42.14, sentence shall be pronounced in the defendant's presence. TEX. CODE CRIM. PROC. ART. 42.03, § 1(a).[11] "A criminal sentence is a prerequisite to appellate jurisdiction." *Meachum v. State*, 273 S.W.3d 803, 804 (Tex. App.—Houston [14th Dist.] 2008, order), citing *Casias v. State*, 503 S.W.2d 262, 265 (Tex. Crim. App. 1973). "The judgment, including the sentence assessed, is just the written declaration and embodiment of that oral pronouncement." *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004), citing TEX. CODE CRIM. PROC. ART. 42.03, § 1(a) and *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). "[I]t is the pronouncement of sentence that is the appealable event, and the written sentence or order simply memorializes it . . ." *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998). When no oral pronouncement is

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[11] Article 42.14 does not apply in this case as Appellant was not absent. (7 R.R. at 15) (noting Appellant present at time punishment jury verdict form was read).

made, there is no valid judgment and no conviction to appeal. *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003). Failure to pronounce sentence in the presence of a defendant is a jurisdictional error that prevents the proper presentation of a case to the court of appeals. *Meachum*, 273 S.W.3d at 805-806. The proper and more efficient remedy for the trial court's failure to orally pronounce a defendant's sentence in his presence is an abatement to the district court so that it may correct its action or failure to act. *Id*. See also TEX. R. APP. P. 44.4(a), (b).

B. Analysis

On August 29, 2024, after the jury had reached a verdict regarding Appellant's punishment, the trial court read the punishment verdict form in the Appellant's presence:

> "We, the jury, having found the defendant Tracy Miles guilty of the felony offense of murder, do find the allegations in Enhancement Paragraph 1 and Enhancement Paragraph 2 are true and assess his punishment in the Institutional Division of the Texas Department of Criminal Justice for 40 years."
>
> Signed, the foreperson of the jury.

(7 R.R. at 16)

Neither side wished to have the jury polled. (7 R.R. at 16). Afterwards the following exchange occurred between the trial court and the Appellant:

> [Trial Court]: Mr. Miles, you're going to sign your appellate paperwork.
>
> [Appellant]: Good night, Judge. Have a nice life.
>
> [Trial Court]: Okay. Good luck to you, bud. Thank You.

(7 R.R. at 16-17)

This was the entirely of the remainder of the proceedings after the punishment verdict form was read.

As detailed above, the trial court only read the punishment jury verdict form in the Appellant's presence. The trial court did not orally pronounce that sentence in open court in the Appellant's presence. Reading the punishment jury verdict form is not a substitute for orally pronouncing Appellant's sentence in his presence. See *Edic v.* State, Nos. 03-17-00788-CR & 03-17-00789-CR, 2018 Tex. App. LEXIS 3222 (Tex. App.—Austin May 8, 2018, order) (mem. op., not designated for publication) (abating appeals as trial court only read punishment jury verdict form). Because there is currently no valid judgment for the Appellant to appeal, he respectfully requests that this Court abate his appeal and remand his case back to the trial court with instructions to orally pronounce Appellant's sentence in his presence. See *Diaz v. State*, No. 01-19-00026-CR, 2019 Tex. App. LEXIS 11315 (Tex. App.—Houston [1st Dist.] Nov. 21, 2019, order) (mem. op.,

not designated for publication) (abating appeal to allow trial court to orally pronounce sentence in the defendant's presence).

2. Whether trial counsel rendered ineffective assistance of counsel by failing to properly preserve their challenge for cause against Juror Number 2, who ultimately sat on the jury, after he indicated he could not consider the minimum range of punishment of 5 years?

A. Applicable Law and Standard of Review

Under *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffective assistance of counsel claim is subjected to a two-step analysis whereby the appellant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687. An Appellant must prove ineffectiveness by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). When the record is silent, a reviewing court may not speculate to find trial counsel ineffective. *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994), citing *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Thompson*, 9 S.W.3d at 813. "An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluation the effectiveness of counsel." *Id*., citing *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

"In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test – that trial counsel's representation fell below an objective standard of reasonableness-because the record on direct appeal is undeveloped." *Lopez v. State*, 565 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd), citing *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). "When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id*., quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). "That is, the record must show

that counsel's performance fell below an objective standard of reasonableness as a matter of law and that no reasonable trial strategy could justify his deficient performance." *Dryer v. State*, 674 S.W.3d 635, 647 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd), citing *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Courts "generally will assume that counsel had a reasonable strategic motive if any reasonable trial strategy can be imagined." *Id.*, citing *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). "[I]t is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance." *Thompson*, 9 S.W.3d at 813, citing *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985). "A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole." *Dryer*, 674 S.W.3d at 647, citing *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

"The Sixth Amendment to the United States Constitution guarantees a trial before an 'impartial jury.'" *Drake v. State*, 465 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2015, no pet.), citing U.S. CONST. AMEND. VI. "A defendant's right to a fair trial before an impartial jury is ingrained within our fundamental precepts of justice." *Id.*, citing *Armstrong v. State*, 897

S.W.2d 361, 368 (Tex. Crim. App. 1995). "The voir dire process is designed to effectuate a defendant's right to a fair trial by insuring, to the fullest extent possible, that the jury will be intelligent and impartial." *Id.*, citing *Armstrong*, 897 S.W.2d at 368 and *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. [Panel Op.] 1978). "The importance in selecting a jury cannot be overestimated in our judicial system since both the State and defendant have an interest in assembling a jury free of bias and prejudice." *Id.*, quoting *Price v. State*, 626 S.W.2d 833, 835 (Tex. App.—Corpus Christi 1981, no pet.).

"A challenge for cause may be made by the defense" for the following reason:

> That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

TEX. CODE CRIM. PROC. ART. 35.16(c)(2)

"To preserve error for a trial court's erroneous denial of a challenge for cause, appellant must show that: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his

request for additional strikes was denied; and (5) an objectionable juror sat on the jury." *Davis v. State*, 329 S.W.3d 798 (Tex. Crim. App. 2010). "Both the State and defense are entitled to jurors who can consider the entire range of punishment for the particular statutory *offense--i.e.*, from the maximum to the minimum and all points in between." *Cardenas v. State*, 325 S.W.3d 179, 184 (Tex. Crim. App. 2010), citing *Johnson v. State*, 982 S.W.2d 403, 405-406 (Tex. Crim. App. 1998). "Jurors must be able to consider both 'a situation in which the minimum penalty would be appropriate and . . . a situation in which the maximum penalty would be appropriate.'" *Id.*, quoting *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992). "Therefore, both sides may question the panel on the range of punishment and may commit jurors to consider the entire range of punishment for the statutory offense." *Id.* (citations omitted). "A question committing a juror to consider the minimum punishment is both proper and permissible." *Id.*, citing *Standefer v. State*, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001). "A juror who states that he cannot consider the minimum punishment for a particular statutory offense is subject to a challenge for cause." *Id.* at 185, citing *Cumbo v. State*, 760 S.W.2d 251, 255-256 (Tex. Crim. App. 1988) and *Pierce v. State*, 696 S.W.2d 899, 902 (Tex. Crim. App.

1985). "The opposing party or trial judge may then examine the juror further to ensure that he fully understands and appreciates the position that he is taking, but unless there is further clarification or vacillation by the juror, the trial judge must grant a challenge for cause if the juror states that he cannot consider the full range of punishment." *Id.*

B. Analysis

1. Trial Counsel's performance was deficient

"Counsel's performance is deficient when his representation falls below an objective standard of reasonableness." *Cueva v. State*, 339 S.W.3d 839, 857-858 (Tex. App.—Corpus Christi-Edinburg 2011, pet. ref'd), citing *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005) and *Strickland*, 466 U.S. at 687-688. "In determining whether there is a deficiency, we afford great deference to trial counsel's ability, indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and that counsel's actions were the result of sound and reasonable trial strategy." *Id.* at 858, citing *Strickland*, 466 U.S. at 689 and *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi-Edinburg 2006, no pet.). "[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or

tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008).

Appellant acknowledges that the Court of Criminal Appeals and other appellate courts have rejected ineffective assistance of counsel claims for the failure to move to challenge for a cause a venire person when confronted with a silent record. See *Delrio v. State*, 840 S.W.2d 443, 446 (Tex. Crim. App. 1992) (per curiam) ("Although we would certainly expect the occasion to be rare, we cannot say, as the court of appeals did, that under no circumstances could defense counsel justifiably fail to exercise a challenge for cause or peremptory strike against a venireman who deemed himself incapable of serving on the jury in a fair and impartial manner."); *Jackson v. State*, 877 S.W.2d 768 (Tex. Crim. App. 1994) (The record in the instant case is also silent as to why appellant's trial counsel failed to challenge venire member Supinski. We could speculate as to why appellant's trial counsel decided not to challenge or strike Supinski, as we did in *Delrio*, but there is no need to do so…To hold trial counsel's decision not to strike or challenge venire member Supinski in the instant case as ineffective

assistance would also call for speculation. The record in the instant case lends no support for such holding."); *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008) ("If it is permissible for trial counsel to retain a juror who is *actually* biased for strategic or tactical reasons, then *a fortiori*, trial counsel must be permitted to make a strategic or tactical decision to retain a juror who is only *presumably* biased by virtue of her status as an assistant district attorney."); *Notias v. State*, 491 S.W.3d 371 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (apply *Delrio* and holding that with a record that was "otherwise silent regarding the motivations of counsel for not challenging or striking" a venireperson indicated that he could not follow the law regarding not holding it against a defendant who does not testify); and *Jackson v. State*, 617 S.W.3d 916 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (same).

Having said that, Appellant contends that trial counsel's failure to preserve her challenge for cause regarding Juror Number 2 constituted deficient performance and that his case is distinguishable from *Delrio* and the other cited cases, as the record is not silent as to trial counsel's belief that Juror Number 2 stated that he could not consider the minimum range of punishment for the felony offense of murder; 5 years. (2 R.R. at 147).

Both parties and the trial court addressed the range of punishment. (2 R.R. at 42-44, 84-86).[12] While the State and the trial court focused on the range of punishment should both enhancement allegations be proven true, Appellant's trial counsel also attempted to address the range of punishment for the unenhanced range of punishment for murder. (2 R.R. at 146-150). See TEX. PEN. CODE §§ 12.32 (punishment range for first degree felony is minimum of 5 years and no more than 99 years or life and a potential fine of up to $10,000); 19.02(c) (murder is a first degree felony). Appellant's trial counsel told the venire panel:

> All right. We're going to talk about punishment. Punishment is kind of like insurance on your car. You hope you never have to use it, but you have to have it. We've got to talk about punishment. We hope we're not going to get there, but this is our only chance to talk to you. Mr. Miles is charged with a first-degree felony, 5 to 99 years or life in a certain circumstance. I need to know -- I know that we've all -- you said you can consider life, but I need to know if you could consider the lowest amount of five years prison for someone who has been convicted of murder, in the appropriate case. We're going to go row by row. And how about we'll do it this way: Anyone who could not consider the minimum?

---

[12] Both the trial court and the State indicated that Appellant was facing between 25 to 99 years or life and the possibility of a $10,000 fine. (2 R.R. at 42, 84). However, as the punishment phase charge correctly indicated, should a jury find both enhancement paragraphs to be true, Appellant could not be assessed a fine as a habitual offender. (C.R. at 453). See TEX. PEN. CODE § 12.42(d). Appellant was not assessed a fine by the jury. (C.R. at 457).

Okay. We're going to go row by row.

(2 R.R. at 145-146)

After a venireperson commented on the State only referencing 25 years to 99 years, the trial court provided the following explanation for the jury:

> They know the answer to this question; but in punishment in this case, if we get to punishment and the State proves additional elements that will -- as charged, it is now a 25 to life case. It doesn't mean those things are true or not, but the State has the burden of proving them at punishment.
>
> …
>
> And if they do not, it would be a five to life case.

(2 R.R. at 146-147)

Immediately thereafter, trial counsel asked the panel "Is there anyone, in the appropriate case, that could not consider the minimum of five on a murder charge?" (2 R.R. at 147). Juror number 2 answered "no." (2 R.R. at 147). Trial counsel immediately challenged this juror for cause and the trial court denied it. (2 R.R. at 147). After asking this particular juror again, the juror said "no." (2 R.R. at 147-148). The trial court again denied trial counsel's challenge for cause and the trial court called the parties for a

bench conference. (2 R.R. at 148). At the bench conference, the following exchange occurred:

> [Trial Court]: I'm of the school of thought that that's a commitment question. Can you make a specific set of facts? If the State does not prove up the enhancement paragraphs, then can you give him the five, the minimum? So I –
>
> [Trial Counsel]: I'm sorry, Judge, can you repeat that?
>
> [Trial Court]: Yeah, I think it's a commitment question. You're committing him to a specific set of facts. He's alleged to be 25 to life. He's been indicted by a grand jury. At this point, you're alleging if they did not -- if you do not allege specific -- you're committing to a specific set of facts. If you find those two enhancement paragraphs not true, then can you give him five? So it's not the way you're asking it. It's can you follow the law. I respect your opinion, I respect that you probably disagree with me, but I just want to –[13]
>
> [Trial Counsel]: Okay.
>
> [Trial Court]: I didn't want to –

---

[13] The trial court's apparent concern about trial counsel asking about the unenhanced range of punishment of murder as being an improper commitment question is without merit. The Texas Court of Criminal Appeals has consistently determined that both the State and the defense have the right to inform the jury of the full range of punishment applicable to an offense, including ranges that are enhanced or unenhanced. See e.g. *Martinez v. State*, 588 S.W.2d 954, 956 (Tex. Crim. App. [Panel Op.] 1979). It is only when "counsel veers into impermissible commitment questions when he attempts to commit a veniremember to consider the minimum sentence based on specific evidentiary facts." *Cardenas*, 325 S.W.3d at 184. "For example, a party may ask the potential juror if he could consider the minimum of five years' imprisonment in a murder case, but he may not ask if the juror could consider five years in prison in a case in which the State alleged that the defendant "tortured, garroted, poisoned, and pickled" the victim." *Id*. As a result, trial counsel's question ("Is there anyone, in the appropriate case, that could not consider the minimum of five on a murder charge?") was not an improper commitment question.

[Trial Counsel]: Thank You.

[Trial Court]: Yes, ma'am.

[Trial Counsel]: Because I would've tortured every scenario.

[Trial Court]: It's just -- you and I just -- and maybe there's not a clear answer. We just kind of maybe have a different interpretation of the law, but that's just where I'm at.

[Trial Counsel]: Thank you for not torturing me, trying to change --

[Trial Court]: Oh, yeah, of --

[Trial Counsel]: -- every little --

[Trial Court]: -- course. All right.

(2 R.R. at 148-149).

After this exchange, trial counsel moved onto another topic and did not broach the subject of punishment during her remaining voir dire. (2 R.R. at 149-161). In addition, trial counsel did not further attempt to challenge juror number 2 for cause despite his negative response as to whether he could consider the 5-year minimum range of punishment. "To preserve error for a trial court's erroneous denial of a challenge for cause, appellant must show that: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his request for

additional strikes was denied; and (5) an objectionable juror sat on the jury."). *Davis*, 329 S.W.3d at 807. Although trial counsel satisfied the first requirement, she did not use a peremptory challenge on the complained-of-venire member and did not request additional strikes. As a result, any potential issue regarding the denial of trial counsel's challenge for cause against Juror Number 2 is not preserved for appellate review. *Id*. See also TEX. R. APP. P. 33.1(a).

While a motion for new trial was not filed, this is not a case where trial counsel's motivations were unknown. On two separate occasions, trial counsel expressed his reservations regarding Juror No. 2 after that juror indicated that they could not consider the 5-year minimum range of punishment. (2 R.R. at 147-148). And it cannot be said that there was some strategic reason trial counsel kept him on the jury, as Appellant's trial counsel asserted a challenge for cause against Juror Number 2. As such, there is no scenario under which trial counsel's failure to challenge Juror Number 2 for cause could be considered "sound trial strategy." Thus, trial counsel's failure to challenge Juror Number 2 for cause was deficient performance, as there was no reasonable strategy to not challenge Juror Number 2, who demonstrated an actual bias in the case when he indicated

that he could not consider the potential minimum sentence of 5-years for murder, something that was within the applicable range of punishment.

2. Appellant was prejudiced by trial counsel's deficient performance

"[T]o show prejudice, the appellant 'must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different.'" *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009), citing *Strickland*, 466 U.S. at 694. "Reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

"It is fundamental to our system of jurisprudence that an accused is entitled to an impartial jury composed of people who have not prejudged the merits of the case." *Alaniz v. State*, 937 S.W.2d 593, 596 (Tex. App.—San Antonio 1996, no pet.), citing *Shaver v. State*, 162 Tex. Crim. 15, 280 S.W.2d 740, 742 (Tex. Crim. App. 1955) and TEX. CONST. ART. 1, § 10. "The presence of one biased juror destroys the impartiality of the entire jury and renders it partial." *Id.* See also *Delrio*, 840 S.W.2d at 445 ("[A] single partial juror will vitiate a conviction.").

Juror Number 2 demonstrated an inability to consider the minimum range of punishment for the offense of murder and he sat on the jury. (2 R.R. at 162; C.R. at 425. A juror, who by their own admission cannot be fair and impartial in a case like Appellant's, rendered the outcome "unreliable" under *Strickland*. *Delrio*, 840 S.W.2d at 445 ("[A] single partial juror will vitiate a conviction."). Prior to the beginning of voir dire, Appellant indicated to the trial court that the enhancement allegations were not true. (2 R.R. at 7). As a result, trial counsel's deficient performance in failing to properly preserve her challenge for cause against Juror Number 2 prejudiced the Appellant.

3. The trial court's judgment should be modified to delete the special finding "APPEAL WAIVED, NO PERMISSION TO APPEAL GRANTED."

"An appellate court has the power to correct a trial court judgment 'to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.'" *Morris v. State*, 496 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), quoting *Nolan v. State*, 39 S.W.3d 697 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the

judgment appears in the record." *Id.*, citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd).

The judgment contains the following language:

> Furthermore, the following special findings or orders apply:
> APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED.

(C.R. at 481).

However, nothing in the appellate record indicates that Appellant waived his right to appeal. On the contrary, the record shows that Appellant's case was not a plea bargained case and that he disputed the State's allegations in a contested trial. In addition, the trial court's certification of defendant's right of appeal indicting that Appellant case was "not a plea-bargain case, and the defendant has the right of appeal" is supported by the record. (C.R. at 488). As a result, Appellant requests that this Court to correct and reform the trial court judgment to delete the notation "Appeal Waived. No Permission to Appeal Granted." See *Morris*, 496 S.W.3d at 836.

PRAYER

Appellant, Tracy Miles, prays that this Court abate the case and remand it to the trial court with instructions to pronounce sentence in accordance with Article 42.03. In addition, Appellant, prays that this Court reverse the trial court's judgment and remand this case back to the trial court for a new trial. Alternatively, Appellant prays that this Court modify the trial court's judgment to remove the special finding "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on Jessica Caird of the Harris County District Attorney's Office on March 28, 2025, to the email address on file with the Texas E-filing system.

/s/ Nicholas Mensch
Nicholas Mensch
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