No. 14-24-00261-CR

In the
Court of Appeals
for the
Fourteenth District of Texas

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1653831

MAXIMILIANO BELTRAN VASQUEZ V. THE STATE OF TEXAS

APPELLANT'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 38.1(e), Appellant does not request oral argument. The case can be decided on the briefs.

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1(a), a complete list of the names of all interested parties is provided below.

Trial Judge:	Honorable Lori Chambers Gray, Presiding
Appellant:	Maximiliano Beltran Vasquez
Counsel for Appellant at Trial:	Herman Martinez 2617 Canal Street Houston, Texas 77003
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Counsel for the State at Trial:	Jayelle Lozoya Rachel Barlow Harris County District Attorney's Office 1201 Franklin Street, Suite 600 Houston, Texas 77002
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STATEMENT OF THE CASE

Appellant Maximiliano Beltran Vasquez was charged by indictment with one count of Aggravated Sexual Assault of a Child Under 14 Years of Age. Specifically, he was charged with causing the sexual organ of his stepdaughter A.P., a person younger than fourteen years of age, to contact his sexual organ. (CR 162.) Appellant pled not guilty and proceeded to trial, represented by trial counsel. After trial, Appellant was found guilty and sentenced to 25 years' imprisonment in the Texas Department of Criminal Justice, Corrections Division. (CR 262.) Appellant's sentence was imposed in the trial court on March 20, 2024.

On March 28, 2024, Appellant timely filed his Notice of Appeal. (CR 274.)

On April 19, 2024, Appellant timely filed a Motion for New Trial through undersigned appellate counsel. (CR 293-311; 2 Supp. RR D's Ex. 1.) The trial court ultimately denied the motion on May 23, 2024. (CR 313.)

ISSUES PRESENTED

First Issue: The trial court erred by admitting evidence that Appellant committed a separate offense against Ashleigh Schmoldt.

Second Issue: The trial court erred by allowing evidence concerning polygraph tests and the fact that Appellant did not take a polygraph test.

Third Issue: Appellant's trial counsel rendered ineffective assistance of counsel.

STATEMENT OF FACTS

Appellant Maximiliano Beltran Vasquez was a hardworking family man. When his daughters A.P. and K.V. were in elementary school, he was working two jobs and living with his wife Graciela Polio and his children. (3 RR 34-36.) Appellant would install and repair granite in the mornings, and in the afternoon, he worked at the car dealership that he and his wife ran together. (3 RR 113; 5 RR 49-50.) Appellant also supported his parents who lived in his home. (3 RR 35.)

All the adults in the household worked together to take care of day-to-day family responsibilities. Every morning, Appellant got up early and cooked breakfast for everyone. (3 RR 83, 113-14, 174-75.) His wife usually prepared the girls for school and sometimes took them to school. (3 RR 114-15.) Appellant's mother often took the girls to the school bus stop and sometimes stepped in to prepare the girls for school when the children's mother was unavailable. (3 RR 85, 115.) Appellant's mother also cared for the girls in the afternoons after school.

Appellant enjoyed spending quality time with his family. Every summer, the family took a trip to Disney World. (3 RR 70-71.) They hosted birthday parties for the girls. (3 RR 19-20, 155; 4 RR 51.) On Friday and Saturday nights, the girls would come into their parents' bedroom for movie nights, and sleep on an air mattress on the floor in their parents' room. (3 RR 112, 173.)

Although A.P. was not Appellant's biological daughter, he had known her since she was one-year old, she believed he was her father, and he treated her as his daughter. (3 RR 30.) When Appellant and his wife married, his wife was already pregnant with K.V., and the couple later had two additional children, making them parents to three girls and one boy. (3 RR 25; 5 RR 47.)

In 2018, the couple experienced marital problems, in part because of stress surrounding their status in the United States. (3 RR 129-30; 4 RR 206-08; 5 RR 54.) Appellant and his wife were both legally in the United States on Temporary Protected Status from El Salvador. (3 RR 133-34; 5 RR 54.) However, in 2018, U.S. Government officials announced that they were ending Temporary Protected Status for Salvadorans. (3 RR 129; 4 RR 206; *see also* Miriam Jordan, "Trump Administration Says that Nearly 200,000 Salvadorans Must Leave," The New York Times, (Jan. 8, 2018), https://www.nytimes.com/2018/01/08/salvadorans-tps-end.html.) Ultimately, Salvadorans were not forced to leave the country, but uncertainty concerning their status troubled Appellant and his wife. (3 RR 129-30; 4 RR 207, 211; 5 RR 54.) They disagreed about how to handle the situation. Appellant seriously considered leaving the United States. (4 RR 207; 5 RR 54, 56.) His wife, who had been in the U.S. since she was a young child, was adamant about staying in the U.S. (4 RR 207-08.)

One night in 2018, Appellant and his wife were having dinner with Appellant's boss Josue Solis and his wife when the topic arose in conversation. (4 RR 205-08, 211.) Appellant expressed his willingness to leave the United States, and his wife expressed her adamant desire to remain in the United States. (4 RR 207-08.) When Solis asked her if there was any way she could remain in the U.S., she responded that a U Visa was the only way. (5 RR 105.) She explained that U Visas were only granted in certain circumstances where individuals were mistreated, raped, or beaten. (5 RR 105-06.)

On July 18, 2019, right before the family's planned trip to Disney World, Appellant arrived at his car dealership to discover several car titles were missing. (5 RR 59-60.) He attempted to call his wife, but she did not answer his calls until the late afternoon. (5 RR 64.) Appellant later learned his wife had transferred car titles to her family members.

When Appellant left the dealership and arrived home, his children and his wife were not there. (5 RR 64.) He discovered a significant amount of cash was missing from the home. (5 RR 64-65.) About an hour after his arrival at home, his wife arrived with police, and Appellant learned he was being accused of sexual assault. (5 RR 64-65.) Appellant spoke with the investigator and denied all the allegations against him. (2 RR 97-98.)

While Appellant dealt with the legal ramifications of being accused of sexual assault of a child, his wife, Ms. Polio, took the children to Disney World without him. (3 RR 70-71.)

Ms. Polio refused to return the investigator's phone calls for months after initial meetings. (2 RR 72-74.) After approximately three months without a return phone call from Ms. Polio, Investigator Deana Felan went to her home to follow up. (2 RR 72-74.) When Investigator Felan arrived at her home, she discovered that Ms. Polio had not taken A.P. to therapy or had any additional conversations herself with A.P. about her allegations. (2 RR 72-76.) When Ms. Polio finally did arrange for A.P. to see a therapist, A.P. only met with the therapist once in person. (4 RR 143.) All other sessions were conducted over the phone. (4 RR 143.)

In the Fall of 2019, Ms. Polio filed divorce proceedings against Appellant.

During the guilt-innocence phase of the criminal trial, many individuals testified in support of Appellant: his mother, his father, his aunt, and his boss. Appellant also testified on his own behalf. Of particular note was the testimony of V.M., one of A.P.'s good friends. V.M. testified that while she was shopping with A.P. at the mall, A.P. confided in V.M. that A.P.'s allegations against Appellant were lies. (4 RR 182.)

The State's case was centered on the statements of A.P. In addition, the State introduced evidence concerning a past case involving Ashleigh Schmoldt, which the State had previously determined it could not prove beyond a reasonable doubt.

Astoundingly, both the State and defense counsel put on evidence concerning polygraph testing, both (1) the Appellant's refusal to take a polygraph test in this case, and (2) a polygraph test taken in the past case involving Appellant and then complainant Ashleigh Schmoldt, who served as a witness in this case.

The jury found Appellant guilty of Aggravated Assault of a Child. (CR 255.)

In the punishment phase of trial, trial counsel did not call any witnesses to testify on Appellant's behalf, despite the availability and willingness of witnesses to testify on his behalf. The trial court sentenced Appellant to 25 years in prison. (6 RR 42; CR 262.)

Because of material errors made by and before the trial court, Appellant filed a motion for new trial, asserting: (1) the court materially erred in a manner injurious to Appellant's rights by permitting questioning and admitting evidence concerning polygraph tests; (2) trial counsel provided ineffective assistance; and (3) the court abused its discretion by admitting extraneous evidence during the guilt/innocence phase of Appellant's trial. (CR 293-311; 2 Supp. RR D's Ex. 1.)

At a hearing on the Motion for New Trial, the motion, which was verified by affidavit (CR 311), was entered into evidence. (2 Supp. RR D's Ex. 1.) An affidavit

of Appellant's trial counsel responding to the assertion of ineffective assistance was also entered into evidence. (2 Supp. RR D's Ex. 2.) After hearing the evidence and arguments of counsel, the trial court denied the Motion. (CR 313; 1 Supp. RR 22.)

SUMMARY OF THE ARGUMENT

Appellant's trial was rendered unfair by the improper admission of evidence concerning Ashleigh Schmoldt, the improper admission of polygraph evidence, and ineffective assistance of counsel.

The trial court erred by admitting extraneous evidence that Appellant committed a separate offense against a different child, Ashleigh Schmoldt, under Texas Code of Criminal Procedure art 38.37 §2. Admission of this evidence was error because the State had previously concluded that it could not prove the offense beyond a reasonable doubt and no additional evidence of the offense was developed.

The trial court further erred by allowing multiple instances of testimony concerning the results of Appellant's polygraph test in Ashleigh Schmoldt's case and Appellant's failure to take a polygraph regarding A.P.'s allegations. Well-established case law makes clear that polygraph evidence is never admissible for the State or the defense, even if the parties agree to the admission of the evidence.

Finally, Appellant was harmed by the ineffective assistance provided by trial counsel. Trial counsel not only failed to object to polygraph evidence, he adduced additional improper polygraph evidence. Trial counsel also failed to object to repeated prosecutorial misconduct. The individual or cumulative effect of these and other errors establish that Appellant was denied a fair trial. Justice demands the Court vacate the trial court's judgment and order a new trial.

ARGUMENT

I. The trial court erred by admitting evidence that Appellant committed a separate offense against Ashleigh Schmoldt.

First, the trial court abused its discretion by admitting extraneous evidence under Texas Code of Criminal Procedure art 38.37 §2 during the guilt/innocence phase of Appellant's trial. Specifically, the trial court erred by admitting evidence that Appellant committed a similar but separate offense against a different child, Ashleigh Schmoldt.

The Harris County District Attorney's Office had previously investigated Ms. Schmoldt's allegations and determined it could not prove the alleged offense beyond a reasonable doubt. It was undisputed that the prosecutor noted on the dismissal that Harris County could not prove the case beyond a reasonable doubt. (*See* 3 RR 91-101; 4 RR 7-15, 29, 55-61.) Appellant's trial counsel admitted a copy of the dismissal into evidence. (4 RR 35-36, 61, 88-90; 7 RR D's Ex. 1, 4, 7, 8.)

In a preliminary 38.37 hearing in this case, outside the presence of the jury, Ms. Schmoldt testified at length regarding her allegations that Appellant sexually assaulted her (4 RR 15-36), but she admitted her case was dismissed because there were inconsistencies in her account of events. (4 RR 29-30.) Appellant's trial counsel admitted a copy of the dismissal in the 38.37 hearing. (4 RR 35-36; 7 RR D's Ex. 1, 4.) The dismissal included a handwritten explanation, "PC Exists but cannot prove BARD [Beyond a Reasonable Doubt]." (7 RR D's Ex. 1, 4.)

Nonetheless, after the hearing, the trial court erroneously concluded that under 38.37, Ms. Schmoldt could testify regarding her allegations against Appellant before the jury in the guilt innocence phase of trial. (4 RR 60.) Ms. Schmoldt, like A.P., testifed that Appellant had assaulted her in his bedroom when she was a young girl. (4 RR 65, 77-78; *see generally* 4 RR 63-104.)

Under Section 2 of Article 38.37 of the Texas Code of Criminal Procedure, when a defendant is on trial for aggravated sexual assault of a child, evidence that he has committed a separate offense against a different child can be admissible in the guilt/innocence phase of trial.[1] Tex. Code Crim. Proc. art. 38.37 §2. However, for that evidence to be admissible, the trial court must find, in a hearing conducted outside the presence of the jury, "that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt." *Id.* Extraneous-misconduct evidence must be proven beyond a reasonable doubt and by competent evidence. *Valadez v. State*, 663 S.W.3d 133, 142 (Tex. Crim. App. 2022). A trial court's decision to admit evidence is reviewed on appeal for abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion if its

[1] The State also moved for admission of the extraneous offense under Texas Rule of Evidence 404(b), (4 RR 55-56), but the trial court admitted evidence of the extraneous offense pursuant to Section 2 of Article 38.37 of the Texas Code of Criminal Procedure. (4 RR 60.)

decision lies outside the zone within which reasonable people might disagree. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008).

In this case, the evidence presented by the State during the 38.37 hearing did not exceed what was known by the Harris County District Attorney's Office when it decided it to dismiss Ms. Schmoldt's case. Indeed, it was undisputed that the State had not developed any additional facts since the time it determined it could not prove her allegations beyond a reasonable doubt. (*See* 4 RR 91-101; *see also* 4 RR 7-15, 29, 55-61.) Ms. Schmoldt testifed, "[n]o facts have changed." (4 RR 90.)

In support of its argument that evidence of Ms. Schmoldt's allegations should be admitted, the State cited *Castillo v. State*, 573 S.W.3d 869 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd), and *McCombs v. State*, 562 S.W.3d 748 (Tex. App.—Houston [14th Dist.] 2018, no pet.), to show "how dismissal does not affect the Court's determination into the admissibility of the evidence." (4 RR 56-57.) These cases are easily distinguished.

McCombs v. State did not involve the trial court's application of Article 38.37 of the Texas Code of Criminal Procedure; Appellant did not complain on appeal that the trial court erred in applying 38.37 §2. 562 S.W.3d at 765. Rather, appellant in that case argued that the trial court's ruling violated Texas Rule of Evidence 403. *Id.* at 766. Moreover, that case did not involve any affirmative determination by the State that it could not prove the extraneous offense beyond a reasonable doubt.

Castillo v. State also did not involve any affirmative determination by the State that it could not prove the extraneous offense beyond a reasonable doubt. To the contrary, the extraneous offense in *Castillo* involved a plea agreement, where the defendant pleaded guilty to injury to a child after being charged with both indecency with a child and injury to a child. 573 S.W. at 880.

One of the cases cited by *Castillo*, *Bradshaw v. State*, is instructive. *See id.* In *Bradshaw v. State*, the Texarkana Court of Appeals held that the trial court did not err by admitting extraneous evidence of a no-billed offense pursuant to Article 38.37 when the State presented additional evidence of the extraneous offense. *See* 466 S.W.3d 876, 877 (Tex. App.—Texarkana 2015, pet. ref'd) ("because there was more evidence available to this trial court than to the grand jury, we disagree [that the evidence was not adequate to support a jury finding that, beyond a reasonable doubt, he committed the separate offense]").

By contrast, in this case, the evidence presented by the State during the 38.37 hearing did not exceed what was known by the Harris County District Attorney's Office when it decided it to dismiss Ms. Schmoldt's case because it could not prove her allegations beyond a reasonable doubt. Indeed, it was undisputed that the State had not developed any additional facts. (*See* 4 RR 91-101; *see also* 4 RR 7-15, 29, 55-61.) Ms. Schmoldt testifed, "[n]o facts have changed." (4 RR 90.) Ms. Schmoldt

testifed that she asked the State to refile her case year after year, at least six times, but it was never refiled. (4 RR 100-03.)

This case is akin to *Anguiano v. State*, No. 05-22-00680, 2024 Tex. App. LEXIS 1589, at *17 (Tex. App.—Dallas Mar. 1, 2024, no pet.) (mem. op.). In *Anguiano*, the court held the trial court erred in admitting evidence of extraneous misconduct where the alleged extraneous misconduct was the subject of a dismissed case, and it was unknown why the case was dismissed. *Id.* at *12, 17. Because of the State's failure to develop and present additional evidence supporting Schmoldt's allegations, the trial court's decision to allow the jury to hear testimony concerning the extraneous offense constituted an abuse of discretion. *Id.* at *17 ("the trial court erred in admitting evidence of extraneous misconduct without competent evidence to prove appellant's commission of same beyond a reasonable doubt").

Likewise, the trial court here abused its discretion by admitting extraneous evidence of Ashleigh Schmoldt's allegations under Texas Code of Criminal Procedure art 38.37 §2. This error was substantial and injurious in its effect or influence on the verdict in this case. Ms. Schmoldt's testimony showed conformity with A.P.'s allegations, which were otherwise weak because there was no physical evidence, no corroboration, evidence existed that they were false, and evidence existed that there was a motive for the fabrication of the allegations. If the Court

had excluded Ms. Schmoldt's testimony, there is a significant likelihood there would have been a different result in this case.

II. The trial court erred by admitting evidence regarding polygraph tests from the Ashleigh Schmoldt case and Appellant's failure to take a polygraph test in this case.

The trial court further erred by repeatedly permitting questioning regarding polygraph tests and admitting evidence concerning polygraph tests. Inexplicably, the trial court allowed extensive questioning and testimony surrounding polygraph tests during trial.

Testimony was elicited by both the State and defense counsel surrounding polygraph testing. On direct examination, the State's first witness, Investigator Felan, testified that she asked to speak to Appellant's trial counsel for a polygraph examination, but Appellant never came in for an interview:

> Q. [D]id you continue an investigation?
>
> A. I did.
>
> Q. And at this point, what type of investigation was that?
>
> A. I did ask to speak to Mr. Vasquez's attorney for a polygraph examination; and I did speak to another witness . . . .
>
> Q. And did the defendant ever come into—did the defendant ever come into give a formal interview with you?
>
> A. No.
>
> Q. Was that opportunity to get a formal interview provided?
>
> A. Yes.

(2 RR 61.) Appellant's trial counsel did not object, ask that the testimony be stricken, request an instruction to disregard, or move for a mistrial.

Instead, on cross-examination, trial counsel asked Investigator Felan questions allowing her to elaborate:

Q. Okay. So it was apparent to you that English was not his first language.

A. It's apparent.

Q. And you would agree, based on your training and experience, that a polygraph is not admissible in evidence.

A. Absolutely.

Q. And so even if he were to pass the polygraph, you could still charge him with a crime?

A. Yes.

Q. So really, the polygraph would not have determined anything in this case for you.

A. It's a tool.

Q. Would you have continued with the investigation had he passed the polygraph?

A. Absolutely.

(2 RR 69.)

Then, in the cross-examination of Ashleigh Schmoldt, Appellant's trial counsel attempted to ask about a polygraph test in her case, but the State objected, and the Court instructed the jury to disregard:

Q. Didn't prosecutor Smith tell you—

State: Objection; hearsay.

Q. It's an effect that it had on the listener. It's not offered for the truth of the matter.

Court: I'll hear the question. I don't know.

Q. Isn't it true prosecutor Smith told you [Appellant] passed a lie detector test and that's why she dismissed the case?

State: Objection. Factually wrong and inadmissible. And we'd instruct the jury to disregard anything on polygraph administration.

Court: I will and I'll instruct the jury to disregard any—that last statement, that entire last statement. That last question by the defense.

(4 RR 94-95.)

In the defense's case-in-chief, Appellant took the stand. Appellant's trial counsel then questioned Appellant concerning the polygraph test in the past case involving Ashleigh Schmoldt:

Q. I'm gonna talk now about Ashleigh Schmoldt's case.

A. Okay.

. . .

Q. Were the charges dismissed before we got to trial?

A. That is correct.

Q. What occurred before the case was dismissed?

State. Objection, Your Honor; vague.

Q. May we approach, Your Honor?

Court. You may.

(Conversation at the bench.)

Q. Your Honor, he took a polygraph test. The agreement between the prosecutor and us was that he took a polygraph test and they would dismiss the charges. I want to get into that now because they've made that—the prosecutors' dismissal of the case, the issue in this case. So we want to address that with the, with the understanding that they were gonna dismiss the case after they talked to Ashleigh Schmoldt and he passed a polygraph, which he did. So we can have that outside the hearing, if you want, but that has been an issue and now that goes to—

State. Again, defense mentioned the motion to dismiss, not us. He cannot speak to what another prosecutor was thinking or did. He can talk about

he volunteered for one and gave one and the case was subsequently dismissed. It's not that that was occurred (sic)—thought at the time to dismiss it after a polygraph.

Q. As long as I can get into it, I'm fine.

Court. Okay.

(Open court.)

Q. Before—at the last court setting and before the case is dismissed, were you asked to do anything in the Ashleigh Schmoldt case?

A. Yes. I took a lie test.

Q. And what—when you mean a lie test, you mean a lie detector test?

A. Correct.

Q. And after you took that lie detector test, was the case dismissed?

A. Correct.

(5 RR 70-72.)

This led the State to question Appellant on cross-examination about why he did not take a polygraph test in this case:

Q. Okay. You knew that I had the power to dismiss this case if you provided me the golden evidence, right?

A. I didn't have that knowledge at that point in time.

Q. Well, that's not true, right? Because you're very familiar, when defense asked you about what happened in your other case with Ashleigh Schmoldt, right?

A. Everything I've done has been through my attorney. I have never come over here to drop off any evidence or anything like that.

Q. Okay. But when you were being questioned by defense, he asked you about the prosecutor giving you the opportunity to take a lie detector test and that's why the case got dismissed. Isn't that what he asked you?

Defense. Objection, Your Honor. That's improper impeachment and mischaracterization of the testimony.

Q. Your Honor, the jury will remember what was testified. That's their job to do here.

Court. Overruled.

Defense. It's improper impeachment, Your Honor.

Court. I'll allow.

Q. So you knew if you provided evidence, your case could go away, right? You knew that, at least?

. . .

Q. And when defense asked you about—you were here when defense asked about whether a lie detector test was offered to you in this case, right?

A. Yes, that's right.

Q. And you didn't give one. Mr. Vasquez, did you give one; yes or no?

A. No.

Q. Okay.

(5 RR 87-88.)

On re-direct, Appellant's trial counsel attempted unsuccessfully to rehabilitate Appellant regarding the reason he did not take a polygraph test in this case:

Q. In this case or in your previous case, did you ever have any communication with the prosecutor?

A. No.

Q. And in the previous case, was it represented to you, through me, that the prosecutor would dismiss the charges if you passed a lie detector test?

A. Right.

Q. Did you ever get that opportunity in this case?

A. Yes.

Q. Did any prosecutor in this case say, if you take a lie detector—

State. Objection. Hearsay, Your Honor

Court. Sustained.

Q. Or were any offers made to you outside of going to trial in this case?

State. Objection, Your Honor. That's a misstatement, if he wants to talk about offers.

Court. Sustained.

(5 RR 97.)

Texas law is clear that in criminal trials, polygraph evidence is not admissible by the State or the defense. *Long v. State*, 10 S.W.3d 389, 398 (Tex. App.—Texarkana 2000, pet. ref'd) (citing *Robinson v. State*, 550 S.W.2d 54, 59 (Tex. Crim. App. 1977) and *Romero v. State*, 493 S.W.29 206 (Tex. Crim. App. 1979) (lie detector tests not admissible, even by stipulation)). The court should not allow evidence regarding a polygraph test even in the absence of an objection. *Jones v. State*, 680 S.W.2d 499, 502 (Tex. App.—Austin 1983, no pet.) ("Even in the absence of objections, the trial court should not have allowed evidence regarding the polygraph exam before the jury.") (citing *Crawford v. State*, 617 S.W.2d 925 (Tex. Crim. App. 1980)).

This is because "the reliability of such tests remains unproven and jurors could attach undue credibility to a test that purports to sort truth from fiction," undermining the role of the jury. *Ex Parte Bryant*, 448 S.W.3d 29, 40 (Tex. Crim. App. 2014) (citing *Leonard v. State*, 385 S.W.3d 570, 577-81 (Tex. Crim. App. 2012) (op. on reh'g)).

For the same reason, evidence regarding a defendant's refusal to take a polygraph test is also inadmissible. *Kugler v. State*, 902 S.W.2d 594, 595 (Tex.

App.—Houston 1995, pet. ref'd) (unresponsive answer from detective that defendant refused offer to take polygraph test could not be cured by instruction to disregard); *see also Odom v. State*, No. 9-14-00070-CR, 2014 Tex. App. LEXIS 11828, at *1, *11-19 (Tex. App.—Beaumont Nov. 18, 2014, pet. ref'd) (mem. op.) (trial court abused its discretion by allowing prosecutor to elicit testimony that defendant did not take a polygraph).

In this case, the State's purpose for asking whether Appellant took a polygraph test was to imply the result, that Appellant would have failed the test had it been taken. Although Appellant's refusal was initially elicited through a nonresponsive answer of the investigator, the prosecutor ultimately asked questions specifically intended to elicit the answer given; this shows that the prosecutor was acting in bad faith. *Cf. Kugler*, 902 S.W.2d at 596 (The references "were not necessarily responsive to the prosecutor's direct questions" and therefore did not show "the prosecutor was acting in bad faith or directly attempting to elicit the polygraph information."). Moreover, the persuasive effect of Appellant's refusal to take a polygraph test in this case was heightened "because the offer of the polygraph exam and [Appellant's] refusal to take the test were mentioned a second time." *Id.* at 597. "We question whether repeatedly referencing the forbidden subject of polygraphs and lie detector examinations . . . advances that noble obligation [of prosecutors to

always consider their statutory mandate to 'see that justice is done']." *Bryant*, 448 S.W.3d at 31 n.16 (quoting the lower court in that case).

"The danger of unfair prejudice regarding evidence of polygraphs is particularly acute when [as here] the evidence before the jury contain[ed] no testimony about the accuracy (or inaccuracy) of polygraphs." *Odom*, 2014 Tex. App. LEXIS 11828, at *18. Here, the jury was given no guidance about the limited purpose for which the evidence was offered, and there was no evidence before the jury discussing the reliability (or unreliability) of polygraphs. "[T]he potential the evidence has to impress juries in an irrational and indelible manner in [Appellant's] case was very high given the fact that he chose to testify during the guilt phase of his trial." *Id.* "[T]he danger of admitting the evidence includes the risk that the jury would rely largely if not entirely on [Appellant's] refusal to take the test when evaluating the credibility of his testimony." *Id.*

In the hearing on the Motion for New Trial, the State asserted the jury was "given an instruction" through the State's witness limiting the use of polygraph evidence (1 Supp. RR 13), but the jury is instructed by the court, not witnesses. The trial court provided no curative instruction or guidance to the jury. Moreover, after polygraph evidence was adduced in five separate instances, including twice by the prosecution, its unlikely any amount of instruction could have removed the effect of the testimony from the jury's minds.

In the hearing on the Motion for New Trial, the State also cited to *Monsivais v. State*, No. 04-19-00829-CR, 2021 WL 2668837 (Tex. App.—San Antonio June 30, 2021, no pet.) (mem. op.) in support of their argument regarding polygraph evidence. Presumably, the State was citing to this case for the proposition that a limited exception exists to the rule that evidence concerning a polygraph is inadmissible. *See id.* at *15. That is, polygraph evidence may be properly admitted when one party "open[s] the door" for the other party to introduce polygraph evidence. *Id.* (citing *Lucas v. State*, 479 S.W. 2d 314, 315 (Tex. Crim. App. 1972). The *Monsivais* court explained:

> In *Lucas*, the defendant testified that he took a polygraph test and that the test results showed he did not commit the offense charged. Thereafter, the trial court allowed the State to counter the defendant's testimony with evidence indicating the defendant did not pass the polygraph test. On appeal, the defendant complained it was error for the trial court to admit the State's evidence about him failing to pass the polygraph exam. The Texas Court of Criminal Appeals concluded that "under the particular facts of this case the [defendant] 'opened the door' for the [S]tate to introduce the complained of testimony" and, therefore, the trial court did not err by admitting the State's polygraph evidence.

Id. at *16 (citations omitted).

This case does not fall under the exception recognized in *Lucas*. Appellant did not open the door to the admission of evidence concerning whether he took a polygraph on A.P.'s allegations. The State first raised Appellant's failure to take a polygraph on A.P.'s allegations in its case-in-chief while questioning Investigator Felan. (2 RR 61.) The State directly raised Appellant's failure to take a polygraph

on A.P.'s allegations a second time while questioning Appellant. (5 RR 87-88.) Appellant's trial counsel only asked questions regarding the lack of a polygraph on those allegations in an effort to respond to the State's questioning. *See supra* pp. 12-17. While Appellant's trial counsel did raise evidence concerning the polygraph Appellant took on Ashleigh Schmoldt's allegations, he did not create a false impression about the results of his polygraph test, as the defendant in *Lucas* did, and this was a completely separate case. The trial court erred by allowing polygraph evidence in general, and the trial court's error was especially egregious with respect to the admission of evidence that Appellant was offered, but did not take, a polygraph test on A.P.'s allegations. The State presented more than a nonresponsive answer mentioning a polygraph; the prosecutor deliberately and intentionally elicited evidence that Appellant was offered, but did not take, a polygraph test in this case. (5 RR 87-88.)

This error had a substantial and injurious effect or influence in determining the jury's verdict. With the exception of A.P.'s testimony, the State's evidence against Appellant was largely circumstantial. There was no physical evidence, and the testimony regarding physical details was not particularly persuasive. For example, A.P. did not recall penetration causing any pain (4 RR 140), and she did not see anything come out of Appellant's penis. (3 RR 208.) One of A.P.'s best friends (4 RR 131) testified A.P.'s allegations against Appellant were not truthful.

(4 RR 182.) Although Ashleigh Schmoldt testified regarding her allegations to show conformity, her case was dismissed, and the prosecutor on the case noted it could not be proven beyond a reasonable doubt. *See supra* pp. 7-11.

Appellant's failure to take a polygraph significantly influenced the jury's evaluation of Appellant's credibility and Appellant's guilt. "The jurors, being lay persons, no doubt felt that the evidence of a lie detector test would reveal the truth and that [Appellant] was attempting to suppress the truth from them by" failing to take the polygraph test. *Nichols v. State*, 378 S.W.2d 335, 337 (Tex. Crim. App. 1964). The feeling was no doubt exacerbated by the evidence that Appellant had taken a polygraph test in the previous case. Because A.P. was the only witness who could provide personal knowledge of the alleged assault, the evidence of Appellant's failure to submit to a polygraph exam effectively bolstered her testimony. *See Kugler*, 902 S.W.2d at 597 (finding harm where polygraph evidence bolstered complainant's testimony); *Nichols*, 378 S.W.2d at 337-38 (same). The court's error in admitting the testimony about the polygraph was harmful.

III. Trial counsel rendered ineffective assistance of counsel.

The errors of the trial court were compounded by trial counsel's failure to provide effective assistance of counsel. Trial counsel was ineffective in several respects. Most significantly, trial counsel introduced evidence regarding polygraph tests, failed to object to the State's introduction of evidence regarding polygraph

tests, and failed to move for a mistrial based on admission of evidence concerning polygraph tests. Trial counsel likewise failed to object to repeated improper questioning and argument by the prosecutors in this case.

To obtain a reversal on a claim for ineffective assistance of counsel, an appellant must show that (1) trial counsel's performance fell below the objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). To satisfy the first prong, an appellant must prove by a preponderance of the evidence that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Lopez*, 343 S.W.3d at 142. The totality of the circumstances are considered to determine whether counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). To satisfy the second *Strickland* prong, an appellant must show a reasonable probability that, but for trial counsel's deficient actions, the result of the proceeding would have been different. *Lopez*, 343 S.W.3d at 142. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A. Polygraph Evidence

In the instant case, trial counsel never objected to the inadmissible polygraph evidence introduced by the State, nor did he move for a mistrial. Appellant's trial

counsel should have objected to all references the State elicited regarding polygraph tests in order to preserve error for review. *See Long*, 10 S.W.3d at 399. Had counsel properly objected to the testimony regarding the polygraph test and moved for a mistrial, Appellant would have been entitled to a mistrial. *See id.*

Instead, trial counsel elicited polygraph evidence relating to Ashleigh Schmoldt's case, which attributed credibility to polygraph testing. In the affidavit trial counsel submitted in response to the Motion for New Trial, counsel admitted he was relying on the polygraph "to provid[e] some measure of credibility to Mr. Vasquez's testimony in denying the allegations." (CR 287 ¶ 38; 2 Supp. RR D's Ex. 2 ¶ 38.) Trial counsel was effectively encouraging the jury to attribute undue importance to polygraph evidence.

Trial counsel described this evidence as a "double-edged sword." (CR 287 ¶ 32; 2 Supp. RR D's Ex. 2 ¶ 32.) Trial counsel believed he would have to accept "the good with the bad" (CR 287 ¶ 39; 2 Supp. RR D's Ex. 2 ¶ 39) so he did not object to, or effectively mitigate, the testimony elicited by the State concerning the reason he did not take a polygraph test regarding A.P.'s allegations. Trial counsel's actions improperly emphasized the importance of, and drew attention to, the polygraph evidence. *See Bryant*, 448 S.W.3d at 28 (strategy underlying a failure to object to polygraph evidence "loses its efficacy and becomes less reasonable when, as in this

case, opposing counsel repeatedly draws the jury's attention to the objectionable evidence").

In his affidavit, trial counsel acknowledged that the introduction of polygraph evidence was "somewhat unorthodox" but that his research "suggested" it was not "categorically inadmissible." (CR 287 ¶ 32; 2 Supp. RR D's Ex. 2 ¶ 32.) As explained above, this is inaccurate. In fact, polygraph evidence is exactly that—categorically inadmissible; the Court of Criminal Appeals has consistently ruled that because such tests are not sufficiently reliable, polygraph evidence is inadmissible at trial. *See, e.g.*, *Nethery v. State*, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985) ("It has long been the rule in this State that the results of a polygraph test are inadmissible for all purposes. Even if the State and the defendant agree and stipulate to use the results of a polygraph at trial, we have held the testimony to be inadmissible."); *Romero*, 493 S.W.29 206; *Robinson*, 550 S.W.2d at 59.

Case law is clear that "the introduction of polygraph evidence almost always falls below an objective standard of reasonableness because most attorneys will have no reasonable strategy in allowing the introduction of such evidence." *Bryant*, 448 S.W.3d at 26-27. That is the case here. Trial counsel had no reasonable strategy in eliciting and allowing additional evidence regarding polygraph testing. Trial counsel could not, and failed to, effectuate a reasonable strategy to draw attention to polygraph results with respect to Ashleigh Schmoldt and at the same time downplay

Appellant's failure to take a polygraph with respect to the charge then pending against Appellant. Trial's counsel's strategy was not only unorthodox, it was unreasonable; it fell below an objective standard of reasonableness.

B. Prosecutorial Misconduct

Furthermore, although the State engaged in multiple instances of improper questioning and argument, trial counsel failed to object or otherwise address prosecutorial misconduct. In his affidavit, trial counsel stated he did not observe any prosecutorial misconduct. (CR 288 ¶ 40(D); 2 Supp. RR D's Ex. 2 ¶ 40(D).)

Proper jury argument generally falls within one of four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement. *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019) (quotation omitted). Arguments that go beyond these areas often place before the jury unsworn testimony of the prosecutor. *Id.* at 239-40. Improper references to information outside the record are generally designed to arouse the passion and prejudice of the jury, but jury argument should not be overly inflammatory. *Id.* at 240. The State "may strike hard blows" but it must not "strike foul ones." *Id.* at 241 (quotation omitted). Argument must stick to matters that are in evidence or inferable from the evidence. *Id.* The State may not, through non-record facts, essentially testify as a witness. *Id.* In addition, arguments which suggest that only prosecutors seek to uphold truth and justice,

whereas other counsel serve less nobler pursuits constitute reversible error. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1995).

Here, in closing argument, the State asserted Appellant was lying about his different Salvadorian names despite there being absolutely no evidence that he was lying and no evidence that these different names reflected any criminal behavior or other untoward behavior: "He told you that he changed his name because [Salvadorians] just have two names, members of the jury. If that's the case, why don't his last names match his parents' names? Members of the jury, you get to consider that as to why he would be lying." (5 RR 128.)

Although evidence showed Appellant asked his daughter K.V. to reduce her verbal comments to writing in a text (5 RR 68), the State repeatedly asserted Appellant had manufactured evidence. On cross-examination, K.V. testified that the Appellant never asked her to lie about anything. (3 RR 180.) In his affidavit, trial counsel asserted Appellant admitted to the "'false text' deception" during his trial testimony. (CR 289 ¶ 45; 2 Supp. RR D's Ex. 2 ¶ 45.) However, Appellant, like K.V., testified that he never asked his daughter to lie. (5 RR 68.) And yet, in closing argument, when the State mischaracterized K.V.'s testimony: "The fact that he made his twelve year old daughter send a fake text message," (5 RR 112) trial counsel did nothing.

The State also struck foul blows regarding Angela Smith, the former prosecutor who dismissed Ashleigh Schmoldt's case. On re-direct examination of Ashleigh Schmoldt, the prosecutor engaged in the following line of questioning:

Q. Do you know who Angela Smith is?

A. I believe she was my prosecutor.

Q. Okay. And do you know what she's doing now?

A. No.

Q. Would it surprise you to know that she's a defense attorney?

A. No.

Q. Okay. Would it surprise you to know that she now represents people accused of—

Defense. That's improper question—I'm gonna object to the question. Not even in evidence. May I approach, Your Honor?

Court. Let the Court—I haven't heard the question. You all—

Q. Finish the question, Judge, is that—

Court. I don't know what the question is. Let's approach really quickly.

(Conversation at the bench.)

Q. I was going to ask her if she knew that she was currently a defense attorney who represents defendants.

Defense. That's untrue. If you look at her state bar, the state bar represents she is not actively a lawyer. She is not actively practicing law. So it's—

Court. I think that—probably leave it alone.

(4 RR 97-98.)

Although trial counsel objected, he did not request an instruction to disregard that line of questioning. And the prosecution did not leave it alone. In closing arguments, the prosecutor reminded the jury that Angela Smith was no longer a prosecutor. First, the prosecutor stated, "I anticipate defense is gonna talk a lot about

how Ashleigh's case was dismissed. You want to know what I think of that? I don't care about Angela Smith's opinion as a prosecutor. I don't care about Angela Smith's opinion as a lawyer right now. That dismissal is not a final disposition and it means nothing." (5 RR 114.) On rebuttal, the prosecutor reiterated, "I don't care who Angela Smith is. She's not at our office. You didn't hear her testify, did you?" (5 RR 127.) The prosecutor's clear intention was to suggest that an attorney like Angela Smith who left the District Attorney's office was not an attorney who was ever dedicated to upholding truth and justice.

"For many years [the Court of Criminal Appeals] has recognized arguments which attack defense counsel are manifestly improper because they serve to inflame the minds of the jury to the accused's prejudice." *See Wilson*, 938 S.W.2d at 59. The State's argument constitutes reversible error. *See id.* at 62 (capital murder conviction reversed where prosecutor cast aspersions on defense counsel for representing defendants). Trial counsel's affidavit does not address his failure to object to this misconduct.

In closing arguments, the State also improperly argued, without evidence, that Appellant's calling A.P.'s friend to testify was itself an extraneous offense. (5 RR 112.) The State also improperly asserted that A.P.'s friend was lying at the behest of the defense because she answered the prosecutor's questions surrounding details of the day A.P. told the friend that she was lying about what she alleged Appellant

did: "You know what's convenient? That she had an answer to every single question. . . . It's almost as if she met with the defense investigator that this defendant told you that he hired, and prepped that." (5 RR 114-15.)

Finally, in rebuttal at closing, the prosecutor stated, "How dare Josue Solis get up there and tell you that now that he knows about two children that have been sexually abused by him, it does not change his opinion on that man." (5 RR 129.) In trial counsel's affidavit, he states this was "a reasonable deduction from the evidence." (CR 289 ¶ 47; 2 Supp. RR D's Ex. 2 ¶ 47.) Although Josue Solis may have been aware of allegations of abuse, there was no evidence whatsoever that Josue Solis knew two children had been sexually abused by the Appellant. The assertion of such inflammatory facts not in evidence was improper.

Trial counsel was ineffective to the extent he failed to preserve error with respect to this improper questioning and argument. In addition to being outside the evidence and assertions of the prosecutor's personal opinion, these arguments were designed to improperly inflame the jury. Because these arguments improperly swayed the jury, they affected Appellant's substantial rights.

C. Additional Deficiencies

Moreover, these were not counsel's only errors. Although the case was pending for over four years, trial counsel did not file any motions except for motions in limine. Trial counsel never filed a request for discovery pursuant to 39.14. As a

result, the State did not provide him a complete copy of the file regarding Ashleigh Schmoldt's case. (4 RR 9-10.) In his affidavit, trial counsel asserts that if he had noticed any "discrepancies or 'gapes' (sic) in what was made available to the defense, [he] would have addressed this in a separate and specific motion for disclosure or production." (CR 285 ¶ 22; 2 Supp. RR D's Ex. 2 ¶ 22.) However, the record shows that trial counsel was aware that he did not have the complete file for Ashleigh Schmoldt's case (4 RR 9), and yet, he filed no motion requesting the file.

Trial counsel moved to withdraw because the introduction of evidence concerning Ashleigh Schmoldt's case made him a witness (4 RR 7, 11-14, 60-61), but he did not put on any offer of proof to indicate what he would testify to as a witness. In addition, although he was aware of the possibility that evidence concerning Ashleigh Schmoldt's case would come in, he did not familiarize another attorney with the case to take his place; as a result, the trial court's denial of his requested withdrawal in the middle of trial was within its discretion. *See King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000) (concluding trial court did not abuse its discretion in denying motion to withdraw two weeks before scheduled jury selection). Trial counsel admits that his inability to successfully withdraw from the case rendered him ineffective. (CR 286 ¶ 31; 2 Supp. RR D's Ex. 2 ¶ 31.)

Trial counsel failed to introduce evidence to corroborate Appellant's testimony regarding the time and planning necessary for his ex-wife to transfer title

to several vehicles to her family members. Appellant's ex-wife testified that the morning after A.P.'s alleged outcry, before calling the police, she spent some time transferring the titles of three vehicles to her family members. (3 RR 53-55, 136-38.) As Appellant pointed out in his testimony, it would not have been possible for his ex-wife to complete the transfers in that short time period. (5 RR 60-63.) Had defense counsel introduced some documentary evidence regarding the time and planning required to transfer car titles, this would have added significant credence to the defensive theory that his ex-wife orchestrated the allegations against him. Trial counsel failed to do so.

In his affidavit, trial counsel claimed Appellant did not bring this matter to his attention until his ex-wife testified; however, this case was pending for years before it went to trial, trial counsel claimed he thoroughly prepared for trial, and the transfer of car titles was important evidence in the case. At the very least, trial counsel could have Googled the matter to educate himself. Trial counsel asserts that COVID orders are what precluded one-day title transfers, but a Google search makes clear that under normal circumstances, title transfers take more than one day. *See, e.g.*, Texas DMV, Buying a Vehicle (last visited, Nov. 11, 2024, https://www.txdmv.gov/motorists/buying-or-selling-a-vehicle#:~:text=Please%20allow%20a%20minimum%20of,business%20days%2C%20please%20contact%20us).

Finally, defense counsel failed to present available mitigating evidence. *Lopez v. State*, 462 S.W.3d 180, 182 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (defendant prejudiced by trial counsel's failure present mitigating evidence during the punishment phase of his trial). Despite the availability and willingness of several witnesses to testify on Appellant's behalf, trial counsel did not put on any evidence of mitigation during the punishment phase of trial. Several witnesses testified as part of Appellant's case during the guilt innocence phase—his mother, his father, his aunt, and his boss testified. However, defense counsel did not have any of these witnesses testify regarding mitigation or present any other mitigation evidence.

Trial counsel claimed he decided not to put on mitigation evidence because Appellant was acting deceptively in jail phone conversations and attempted to get the witnesses to testify deceptively. (CR 289-90 ¶¶ 49-50; 2 Supp. RR D's Ex. 2 ¶¶ 49-50.) However, at punishment, the State proceeded to put on evidence of jail phone conversations through Appellant's ex-wife, and none of the calls showed that Appellant asked anyone to testify deceptively. (*See generally* 6 RR 13-31.)

D. Harm

Appellant was prejudiced by his trial counsel's deficient conduct. As explained above, other evidence of guilt at Appellant's trial was flawed. With the exception of A.P.'s testimony, the State's evidence against Appellant was largely circumstantial. There was no physical evidence, and the testimony regarding

physical details was not particularly persuasive. A.P. did not recall penetration causing any pain (4 RR 140), and she did not see anything come out of Appellant's penis. (3 RR 208.) One of A.P.'s best friends (4 RR 131) testified A.P. told her she was lying about the Appellant. (4 RR 182.) A.P.'s mother did not return the investigator's phone calls for months after the initial meetings, and A.P.'s mother did not have A.P. start therapy until months after her outcry. (2 RR 72-74.) Although Ashleigh Schmoldt testified regarding her allegations to show conformity, her case was dismissed; the prosecutor on the case noted it could not be proven beyond a reasonable doubt; and prosecutors refused to refile her case despite numerous requests. *See supra* pp. 7-11. Had trial counsel not made the numerous aforementioned errors and omissions, there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. This Court should hold that Appellant was harmed by ineffective assistance of counsel.

CONCLUSION

For all the foregoing reasons, Appellant prays that this Court vacate the verdict of the jury, reverse and remand the judgment of the trial court, and order a new trial. Appellant further prays for such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

/s/ Cherí C. Thomas

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CERTIFICATE OF SERVICE

This is to certify that on November 12, 2024, a true and correct copy of the foregoing Appellant's Brief was served on the Harris County District Attorney's office by electronic filing, which will provide notice to all parties.

/s/ Cherí C. Thomas
Cherí C. Thomas

CERTIFICATE OF COMPLIANCE

This is to certify that this document contains 8,254 words, in compliance with Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

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