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FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
CLERK OF THE COURT

No. 14-24-00870-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
Clerk of The Court

GUSTAVO VILLASENOR
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1729152
From the 184th District Court of Harris County, Texas
Hon. James Anderson, Judge Presiding

BRIEF FOR THE APPELLANT

Oral Argument Not Requested

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PRESIDING JUDGE:	Hon. DaSean Jones 180th District Court Harris County, Texas 1201 Franklin St. Houston, Texas 77002

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STATEMENT OF THE CASE

On January 27, 2022, Gustavo Villasenor (Appellant) was charged with Continuous Sexual Assault of a Child (a first-degree felony). (C.R. 52).[1] Mr. Villasenor pled not guilty and proceeded to jury trial. A jury found him guilty of the charged offense and the trial court sentenced him to thirty years in the Texas Department of Criminal Justice – Correctional Institutions Division and a fine of $100. (C.R. 443-45). The trial court certified Appellant's right of appeal and he timely filed notice of appeal. (C.R. 447-51).

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

ISSUES PRESENTED

Issue I: The trial court erred in admitting Dr. Whitney Crowson's testimony under Rule 702 of the Texas Rules of Evidence because it did not meet the relevance threshold and constituted improper bolstering.

Issue II: If the issue regarding 702 bolstering and relevance is deemed unpreserved, then the failure to preserve was ineffective assistance of counsel under the Sixth Amendment.

[1] The Clerk's Record will be cited as "C.R." and the Reporter's Record will be cited as "R.R." preceded by the volume number.

STATEMENT OF FACTS

J.A., the complainant, accused Gustavo Villasenor, the Appellant, of sexually abusing her multiple times over the course of several years. (4R.R. 41-111).

Mr. Villasenor is the complainant's uncle on her father's side. The complainant testified she disclosed these alleged acts to her school therapist. (4R.R. 115-18). She then disclosed to the same therapist that her stepfather had sexually assaulted her. (4R.R. 120-23). Evidence was presented that the complainant had been sexually assaulted by a different uncle (her mother's brother) at a much younger age—in that incident, her paternal grandmother had found blood in the complainant's underwear and alerted the complainant's mother. (5R.R. 93-97).

The state called Dr. Whitney Crowson to testify not about the complainant, but about the dynamics and psychology of child sexual abuse generally. She did not know anything about this case or the complainant and had not reviewed any records. In a 702 hearing outside the presence of the jury, Dr. Crowson testified she is a clinical psychologist employed at the Harris County Children's Assessment Center. (5R.R. 7). At the Center, Dr. Crowson provides services only "if there are allegations of child sexual abuse"; she testified, "so all of [the children there] have either been directly or indirectly affected." (5R.R. 9). Her expertise is "[t]rauma with a specific focus in childhood trauma, sexual abuse." (5R.R. 10).

On cross-examination, Dr. Crowson admitted that she had not reviewed any records in this case. (5R.R. 12). She had never met the complainant. (5R.R. 13-14). She

was admittedly not there to offer "opinions on this complainant or what she said." (5R.R. 14). Rather, she was only there "to talk about trauma in general, the dynamics of sexual abuse, and any [] of the . . . topics that are under that umbrella." (5R.R. 14). Dr. Crowson continued that she was there to "clarify and explain any dynamics of child sexual abuse, signs, symptoms . . . just all the different phenomenological aspects of it to the jury. . . ." (5R.R. 17).

Dr. Crowson did not intend to testify regarding any facts of this case or anything to do with the complaining witness. (5R.R. 17-18). She admitted that different people will experience and process the same thing or event differently, and that is why there is a need for clinical judgment; Dr. Crowson stated, "If I'm going to diagnose her, absolutely I would need to meet with her, evaluate her, but that's not what I'm doing here." (5R.R. 19-20).

The trial court overruled defense counsel's objections under 702, for the sole reason that she was "clearly qualified as an expert" and stated it would allow her to "speak in general terms about the process of sexual abuse to children, their perception, their reaction, their processing of the thing." (5R.R. 25).

Dr. Crowson testified that "at the CAC, you're only able to receive services there if there have been allegations of sexual abuse, so all of the children there have either directly or indirectly been affected by sexual abuse." (5R.R. 31). She stated that she did not know the complainant and had never treated her, and that somehow this lack of

knowledge "helps to reduce my bias and help me to remain objective" while she spoke in generalities about "the dynamics of sexual abuse and trauma. . . ." (5R.R. 34).

Dr. Crowson explained that when assessing symptoms of child abuse, one would look for "significant changes" or regressions in behavior. (5R.R. 35). She listed some categories of symptoms, like intrusion (intrusive thoughts, etc.), avoidance, negative changes in mood, and "disruptions" (like sleep disruptions or poor concentration). (5R.R. 36).

She then testified that kids are most commonly abused by people they know because of easier access and trust. (5R.R. 36-37). She continued that outcries (disclosures of abuse) can take place shortly after the abuse but "it is much more common for it to be delayed." (5R.R. 37). Dr. Crowson listed numerous reasons that an outcry might be delayed—for example, the child could be confused, afraid, ashamed, and/or embarrassed. (5R.R. 37-38). She also agreed with the state that "a progression of abuse, from touching to a more serious abuse, [could] have an effect on the timing of an outcry." (5R.R. 38). She added that to a child, "subtle violations" becoming more serious "could cause the child to either become desensitized to what's happening or they continue to cope in silence just hoping that it will stop, but still trying to deal with it alone." (5R.R. 38-39). Guilt for failing to say something sooner could "extend the silence," or the child could fear more harm. (5R.R. 39).

Dr. Crowson explained there are different stages to disclosure of sexual abuse: "predisclosure, partial disclosure, full or active disclosure, recantation and redisclosure."

(5R.R. 39). A child may fail to disclose because they "fear the consequences," and to cope they might start misbehaving. (5R.R. 40). She added that if the alleged abuse happened while other adults were around, the child might assume they knew and failed to do anything about the abuse, "so what would be the point of telling them if they don't care." (5R.R. 42-43).

Crowson testified she had seen children testify about abuse; some were "very emotional" and some were "seemingly checked out." (5R.R. 43). She added that testifying can be "very anxiety provoking" for children and that one might observe "unusual" behaviors like "ticks" or they might even laugh "because it's just the energy that's inside them, it has to go somewhere, and so it can be channeled through several different behaviors, but the behavior on the stand should not define who they are or cause someone to judge them, because of the way they act on the stand." (5R.R. 44).

Dr. Crowson stated that when a child includes sensory details in their testimony about their alleged abuse, those sensory details "help to legitimize the allegations." (5R.R. 45). But a disclosure can also "lack sensory details" if, for example, the child was not as sexually mature so did not know what details were relevant for memory's purpose. (5R.R. 45-46). Memory can fade over time, or it can become "more vivid." (5R.R. 46). A child might remember things in fragments rather than in chronological order. (5R.R. 47). Additionally, if a similar event occurs multiple times and has "overlapping details" a child might not be able to distinguish "between each one." (5R.R. 48).

According to Dr. Crowson, when a child makes a partial disclosure rather than a full disclosure, it does not indicate that the child is being inconsistent; sometimes a child may "disclose additional abuse when they disclose to different people over time" and children do not provide full disclosures every time they tell a different adult. (5R.R. 51-52). This is because expecting them to do so would be unrealistic and "unfair for you to pressure them into telling you all the details every single time." Thus, differences in a child's multiple disclosures are "common." (5R.R. 52-53). She opined that it would be unusual and appear "rehearsed" if there were no differences between disclosures. (5R.R. 53). She went as far as to state that if there *are* inconsistencies between a child's disclosures—for example, with the number of alleged abusive incidents—the inconsistency would indicate the child is "actually just trying to be more honest, because in the very beginning they might remember more times but then as time goes on maybe they can only clearly remember a few." (5R.R. 54).

Dr. Crowson does not consider "little stuff" like the dates of the alleged abuse to be "as important." (5R.R. 54). For children, events like police investigations, medical exams, forensic interviews, talking to prosecutors, waiting years for trial, and testifying about their alleged abuse is scary, distressing, violating, frustrating, and nerve-wracking. (5R.R. 55-56). Dr. Crowson opined that because of this, "[t]he easiest thing would be to give up and say it didn't happen, just take everything back so that they can disengage from the process and move on with their lives." (5R.R. 57). On redirect examination,

Dr. Crowson testified a child would be able to "disentangle" memories associated with abuse by more than one individual. (5R.R. 71-72).

SUMMARY OF THE ARGUMENT

The trial court erred in allowing Dr. Whitney Crowson to testify. Her testimony on the scientific principles she espoused was not sufficiently tied to the facts of the case; it therefore had no probative value, falling short of the relevance bar under Rule 702. The sole purpose of her testimony was to bolster the complainant's testimony which is improper under the same rule. Dr. Crowson's testimony was harmful under 44.2(b).

If this Court determines all or part of the Rule 702 issue is unpreserved, then trial counsel rendered ineffective assistance of counsel in failing to properly preserve it. It could not have been a reasonable strategic decision because the record is clear trial counsel was adamant it was inadmissible, and the expert testimony was of no benefit to the defense. There was prejudice because it would have been error for the trial court to continue to overrule the 702-based objections to relevance and bolstering, the merits of which are briefed in Issue I.

ARGUMENT

Issue I: The trial court erred in admitting Dr. Whitney Crowson's testimony under Rule 702 of the Texas Rules of Evidence because it did not meet the relevance threshold and constituted improper bolstering.

The State called Dr. Whitney Crowson to testify regarding the dynamics of child sexual abuse. (5R.R. 5). The trial court conducted a 702 hearing outside the presence of the jury.

Crowson did not review anything for this case—rather, she was there to "talk about trauma in general, the dynamics of sexual abuse," etc. (5R.R. 14). She was not there to talk about any evaluation, or to talk about J.A., or anything forensic. (5R.R. 16). Clinical judgment is because "two people experience the same event but they have different histories" and "therefore they process it differently." (5R.R. 19).

Defense counsel objected to the testimony because the "State is calling her for the purpose of improper bolstering." (5R.R. 17). He argued Dr. Crowson "doesn't even have the knowledge to even opine as to [] the specifics of this case, she's only talking about generalities." (5R.R. 17). He highlighted that Dr. Crowson "made very clear she's not here to testify about [the complainant]. She's not here to testify about the facts of the case. She's not here to – she has not reviewed the records. She's not interviewed the complaining witness." (5R.R. 24).

A. Applicable Law and Standard of Review

Rule 702 of the Texas Rules of Evidence allows an expert witness to testify "in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. For an expert's testimony to be admissible, it must be reliable and relevant. *Wolfe v. State*, 509 S.W.3d 325, 335 (Tex. Crim. App. 2017) (citing *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992) (en banc) and *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011)).

Under the first prong—reliability—the proponent of the evidence must demonstrate a valid underlying theory, a valid technique applying that theory, and that the technique was "properly applied on the occasion in question." *Wolfe*, 509 S.W.3d at 336 (citing *Kelly*, 824 S.W.2d at 573).

As for the second prong, relevance, the "expert must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of his testimony." *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996). "The question under Rule 702 is not whether there are *some* facts in the case that the expert failed to take into account, but whether the expert's testimony took into account *enough* of the pertinent facts to be of assistance to the trier of fact on a fact in issue." *Id.* at 556 (emphasis in original).

"[E]xpert testimony which *decides* an ultimate fact for the jury, such as 'a direct opinion on the truthfulness of the child,' crosses the line and is not admissible" under

the rule. *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993) (en banc) (emphasis in original). "Bolstering" is when the "sole purpose" of a piece of evidence "is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing 'to make the existence of [a] fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" *Cohn*, 849 S.W.2d at 819-20 (quoting *Sledge v. State*, 686 S.W.2d 127, 129 (Tex. Crim. App. 1984) and citing TEX. R. EVID. 401).

This Court reviews "a trial court's ruling under the Rules of Evidence for an abuse of discretion." *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009). A trial court abuses its discretion if the ruling falls outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). A court abuses its discretion when it acts without reference to any guiding rules or principles. *Id.*

B. Analysis

The trial court erred in allowing Dr. Crowson to testify because her testimony did not meet the relevance threshold under Rule 702. Additionally, the sole purpose of Dr. Crowson's testimony was improper bolstering of the complainant's testimony.

In a 702 hearing outside the presence of the jury, Dr. Whitney Crowson testified she is a psychologist employed at the Harris County Children's Assessment Center. (5R.R. 7). At the Center, Dr. Crowson provides services only "if there are allegations of child sexual abuse"; she testified, "so all of [the children there] have either been directly

or indirectly affected." (5R.R. 9). Her expertise is "[t]rauma with a specific focus in childhood trauma, sexual abuse." (5R.R. 10).

On cross-examination, Dr. Crowson admitted that she had not reviewed any records in this case. (5R.R. 12). She had never met the complainant. (5R.R. 13-14). She was admittedly not there to offer "opinions on this complainant or what she said." (5R.R. 14). Rather, she was only there "to talk about trauma in general, the dynamics of sexual abuse, and any [] of the . . . topics that are under that umbrella." (5R.R. 14). Dr. Crowson continued that she was there to "clarify and explain any dynamics of child sexual abuse, signs, symptoms . . . just all the different phenomenological aspects of it to the jury. . . ." (5R.R. 17).

Dr. Crowson admitted that different people will experience and process the same thing or event differently, and that is why there is a need for clinical judgment; Dr. Crowson stated, "If I'm going to diagnose her, absolutely I would need to meet with her, evaluate her, but that's not what I'm doing here." (5R.R. 19-20). In objecting to defense counsel's question on cross-examination in which defense counsel began by stating, "So now let's talk about that on this case," the state said, "Objection, Judge, she is not here to testify on this case." (5R.R. 21).

The trial court overruled defense counsel's objections under 702, for the sole reason that she was "clearly qualified as an expert" and stated it would allow her to "speak in general terms about the process of sexual abuse to children, their perception, their reaction, their processing of the thing. We know she didn't meet our complainant

so she may not draw any conclusions about our complainant, obviously. . . ." (5R.R. 25).

Dr. Crowson's testimony before the jury contained some alarming statements. After repeating her qualifications, she testified that "at the CAC, you're only able to receive services there if there have been allegations of sexual abuse, so all of the children there have either directly or indirectly been affected by sexual abuse." (5R.R. 31). This implies the legitimacy of those children's allegations. She stated that she did not know the complainant and had never treated her, and that somehow this lack of knowledge "helps to reduce" her bias and "remain objective" while she spoke in generalities about "the dynamics of sexual abuse and trauma. . . ." (5R.R. 34).

Dr. Crowson explained that when assessing symptoms of child abuse, one would look for "significant changes" or regressions in behavior. (5R.R. 35). She listed some categories of symptoms, like intrusion (intrusive thoughts, etc.), avoidance, negative changes in mood, and "disruptions" (like sleep disruptions or poor concentration). (5R.R. 36).

Crowson testified that kids are most commonly abused by people they know because of easier access and trust. (5R.R. 36-37). She continued that outcries (disclosures of abuse) can take place shortly after the abuse but "it is much more common for it to be delayed." (5R.R. 37). Dr. Crowson listed numerous reasons that an outcry might be delayed, like that the child could be confused, afraid, ashamed, and/or embarrassed. (5R.R. 37-38). She also agreed with the state that "a progression

of abuse, from touching to a more serious abuse, [could] have an effect on the timing of an outcry." (5R.R. 38). She added that to a child, "subtle violations" becoming more serious "could cause the child to either become desensitized to what's happening or they continue to cope in silence just hoping that it will stop, but still trying to deal with it alone." (5R.R. 38-39). These claims all mirrored elements of the complainant's testimony. (4R.R. 41-111, 115-23) (detailing alleged abuse by a family member; that she did not disclose these events to an adult immediately; and that the abuse escalated from more subtle to more serious). Dr. Crowson added that guilt for failing to say something sooner could "extend the silence," or the child could fear more harm. (5R.R. 39).

Dr. Crowson explained there are different stages to disclosure of sexual abuse: "predisclosure, partial disclosure, full or active disclosure, recantation and redisclosure." (5R.R. 39). A child may fail to disclose because they "fear the consequences," and to cope they might start misbehaving. (5R.R. 40). She added that if the alleged abuse happened while other adults were around, the child might assume they knew and failed to do anything about the abuse, "so what would be the point of telling them if they don't care." (5R.R. 42-43). The comment about a delay in an outcry being caused by there having been other adults in the room also mirrored details testified to by the complainant. (4R.R. 95-100).

Alongside these general claims that had the effect of justifying certain elements of the complainant's claims despite not having made any clinical judgments about the complainant, Dr. Crowson made outright comments about the truthfulness of the

complainant. Dr. Crowson testified she had seen children testify about abuse; some were "very emotional" and some were "seemingly checked out." (5R.R. 43). She added that testifying can be "very anxiety provoking" for children and that one might observe "unusual" behaviors like "ticks" or they might even laugh "because it's just the energy that's inside them, it has to go somewhere, and so it can be channeled through several different behaviors, but the behavior on the stand should not define who they are or cause someone to judge them, because of the way they act on the stand." (5R.R. 44).

Dr. Crowson then stated that when a child includes sensory details in their testimony about their alleged abuse, those sensory details "help to legitimize the allegations." (5R.R. 45). This is a direct comment on the complainant's truthfulness given that she included many sensory details. (4R.R. 42, 45, 47-48, 53-55, 64-66, 82-83, 90, 94-100, 106-08). But, according to Dr. Crowson, a legitimate disclosure can also "lack sensory details" if, for example, the child was not as sexually mature so did not know what details were relevant for memory's purpose. (5R.R. 45-46). Memory can fade over time, or it can become "more vivid." (5R.R. 46). A child might remember things in fragments rather than in chronological order. (5R.R. 47). Additionally, if a similar event occurs multiple times and has "overlapping details" a child might not be able to distinguish "between each one." (5R.R. 48).

Dr. Crowson also testified that when a child makes a partial disclosure rather than a full disclosure, it does not indicate that the child is being inconsistent, and sometimes a child may "disclose additional abuse when they disclose to different people

over time[.]" (5R.R. 51-52). She added children do not provide full disclosures every time they tell a different adult. (5R.R. 52). Because expecting them to do so would be unrealistic and "unfair for you to pressure them into telling you all the details every single time," then, differences in a child's multiple disclosures are "common." (5R.R. 52-53). She opined that it would be unusual and appear "rehearsed" if there were no differences between disclosures. (5R.R. 53). She went as far as to state that if there *are* inconsistencies between a child's disclosures like, for example, with the number of alleged abusive incidents, the inconsistency would indicate the child is "actually just trying to be more honest, because in the very beginning they might remember more times but then as time goes on maybe they can only clearly remember a few." (5R.R. 54). This had a bolstering effect given that the complainant's alleged disclosures were partial or inconsistent. (3R.R. 79, 81, 86-88, 131-32, 136, 186-99).

Crowson added that "little stuff" like the dates of the alleged abuse are "not as important." (5R.R. 54). For children, events like police investigations, medical exams, forensic interviews, talking to prosecutors, waiting years for trial, and testifying about their alleged abuse is scary, distressing, violating, frustrating, and nerve-wracking. (5R.R. 55-56). Dr. Crowson opined that because of this, "[t]he easiest thing would be to give up and say it didn't happen, just take everything back so that they can disengage from the process and move on with their lives." (5R.R. 57). On redirect examination, Dr. Crowson testified a child would be able to "disentangle" memories associated with abuse by more than one individual. (5R.R. 71-72).

This expert testimony of a doctor who knew nothing about the complainant or her situation or anything to do with the case whatsoever was designed to justify what the jury could see as potential weaknesses in the complainant's testimony and boost her credibility. (5R.R. 36-43, 45-53). This crosses the line from "assisting the trier of fact" in understanding the evidence because it replaces the jury in determining a credibility issue. *See State v. Moran*, 728 P.2d 248, 252-55 (Ariz. 1986) (explaining expert opinions cannot "adduce" credibility directly or indirectly).

Dr. Crowson opined on the truthfulness of the complainant both indirectly and directly multiple times. For example, she testified that the jury should not "judge" the child based on her demeanor (even though that is literally their job) while testifying, because if she was emotional that would be appropriate and consistent with abuse; if she displayed odd behaviors, that was also appropriate for a victim of abuse; and that if she was emotionless, that was also appropriate behavior and consistent with having been abused. (5R.R. 43-44). She went as far as to testify that if there are differences or inconsistencies between multiple outcries, that this indicates a child is trying to be "*more* truthful." (5R.R. 54). These are direct comments on the credibility of the complainant.

Prior to this, Dr. Crowson made other direct comments on the credibility of the complainant—that children who are referred to the CAC are "directly or indirectly affected by child abuse." *See Yount*, 872 S.W.2d at 711 (explaining expert's testimony as to the credibility of a class of people is not permitted under Rule 702 and citing several out-of-state cases with similar holdings) (citations omitted). Dr. Crowson also testified

that in her experience, if she thought a case would be appropriate for her to testify for the defense rather than the state, that the state would usually dismiss that case. (5R.R. 31, 59).

The sole purpose of this testimony was to boost the complainant's credibility; that is the definition of improper bolstering. *Yount*, 872 S.W.2d at 707-708 (trial court erred in admitting expert witness testimony from a pediatrician that she had "seen very few cases where the child was actually not telling the truth"). Dr. Crowson's testimony was rife with statements that communicated the jury should believe the complainant and that she was being truthful, supplanting the jury's prerogative to determine credibility. *See Duckett v. State*, 797 S.W.2d 906, 920 (Tex. Crim. App. 1990) (en banc), *scope clarified by Cohn*, 849 S.W.2d at 819 (holding an expert's opinion can only assist rather "replace" the jury on credibility determinations); *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011) (holding psychologist's testimony that people like the complainant can be painfully honest was inadmissible).

Regarding relevance under Rule 702, Dr. Crowson did not tie any of her abstract testimony to the facts of the case, and she could not have because she did not know anything about the case and had never spoken to the complainant or reviewed her records. Sometimes, expert testimony can become relevant if it is sufficiently tied to the case via "detailed" hypotheticals "that mirror[]" the facts of the underlying case. *Tillman*, 354 S.W.3d at 438-39. Here, the state asked a couple of bare bones hypothetical questions like how an adult being in the room during an instance of abuse would be a

"barrier to disclosure" and if a child is lying when there are inconsistencies in their disclosures. (5R.R. 42, 54). Her testimony was misleading at best because her expertise is clinical, which means it must be applied to specific persons to have any meaning whatsoever. (5R.R. 19, 70). Here, the witness knew nothing about the case or the complainant to be able to comment on whether *her* behavior and reactions were consistent with abuse. *Jordan*, 928 S.W.2d at 555.

In conclusion, Dr. Crowson's testimony was irrelevant under 702 as it was not sufficiently tied to the case and even if it was sufficiently tied to the facts, it constituted improper bolstering. *See Schutz v. State*, 957 S.W.2d 52, 73-74 (holding expert's (Tex. Crim. App. 1997) (en banc) (expert's comments indicating the truthfulness of the complainant's allegations did not assist the jury in determining the facts and were inadmissible).

C. Harm

Errors in the admission of expert testimony are subject to a non-constitutional harm analysis under TEX. R. APP. P. 44.2(b). *E.g. Barshaw*, 342 S.W.3d at 93. "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

"Put another way, if the reviewing court has a grave doubt that the result was free from the substantial influence of the error, then it must treat the error as if it did. Grave doubt means that in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error. Thus, in case of grave doubt as to harmlessness the [Appellant] must win." *Burnett v. State*, 88 S.W.3d 633, 638-639 (Tex. Crim. App. 2002) (internal quotations omitted).

When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001). "In determining whether the error was harmless, the test is not whether a conviction could have been had without the improperly admitted evidence, but, rather, whether there is a reasonable possibility that the evidence might have contributed to the conviction or affected the punishment." *Alexander v. State*, 740 S.W.2d 749, 765 (Tex. Crim. App. 1987). "Thus, if there is a reasonable possibility that the evidence might have contributed to either the conviction or punishment assessed, then the error in admission is not harmless error." *Id.*

This Court may consider all physical evidence and testimony admitted to the jury, the nature of that evidence, "the character of the alleged error and how it might be considered in connection with other evidence in the case," and "jury instructions, the State's theory and any defensive theories, closing arguments and even voir dire, if applicable." *Motilla*, 78 S.W.3d at 355-56.

Since there was no physical evidence of abuse and only statements from the complainant (and statements about her statements), her credibility was the foundation of this case. Crowson's testimony communicated that essentially anything the complainant did or said would have been appropriate for a child who was telling the truth about sexual abuse allegations. She outright stated that certain things (like including sensory details or having inconsistencies between disclosures) would indicate a child is being "more truthful" or that their claims are legitimate. (5R.R. 45, 54). *See Long v. State*, No. 12-07-00256-CR, 2008 WL 5050099, *8 (Tex. App.—Tyler, Nov. 26, 2008, no pet.) (mem. op. not designated for publication) (reversing and remanding for a new trial because expert testimony that had the effect of boosting the complainant's credibility was not harmless).

Furthermore, though the complainant's testimony was disturbing and very detailed, the defense's case was strong. First, defense counsel elicited a potential motive from the complainant's mother to have the complainant make these allegations—she had obtained the benefit of a U-visa as a result of her daughter's allegations, allowing her to work and stay within the country without fear of deportation. (3R.R. 72-75). The evidence also showed the complainant was assaulted by her mother's brother *and* by her mother's husband. (4R.R. 120-23; 5R.R. 93-97). These circumstances altogether provided motivation for the complainant's mother to have influenced her to make the allegations but to shift blame onto someone with whom she (the mother) was not close.

Moreover, the defense called three separate witnesses to the stand who testified there would have been no opportunity for Mr. Villasenor to sexually assault the complainant because he was never left alone with her, contrary to what the complainant had testified. (5R.R. 98-99, 113, 131, 135, 142, 147-48, 152-54, 159).

Without Dr. Crowson's testimony to tip the scales, the jury likely would have had reasonable doubt as to whether Mr. Villasenor was the perpetrator of the alleged abuse of the complainant. This error was harmful.

Issue II: If the issue regarding 702 bolstering and relevance is deemed unpreserved, then the failure to preserve was ineffective assistance of counsel under the Sixth Amendment.

A. Applicable Law and Standard of Review

If this Court determines trial counsel failed to properly preserve the error briefed in issue I, then he was ineffective in that failure. U.S. CONST. amend. VI; TEX. CONST. art I, § 10. To prevail on a claim of ineffective assistance of counsel under the *Strickland* standard, the defendant must show that (1) counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The first prong of Strickland requires the defendant to prove objectively, by a preponderance of the evidence, that his counsel's representation fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The performance prong asks whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. It "is necessarily linked to the practice and expectations of the legal community"—that is, whether the attorney's action or inaction was reasonable "under prevailing professional norms." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014), quoting *Strickland*, 466 U.S. at 688; *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Generally, courts ask whether an action or failure could be attributed to a reasonable strategic decision and whether there is record of an attorney's explanation for the action or failure.

Strickland, 466 U.S. at 689. Courts lend considerable deference to such possible strategic choices. *Id.*

The "prejudice" prong "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 668. A court can find the result of a trial unreliable due to counsel's errors "even if [they] cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. The standard, rather, is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To show prejudice in a claim of ineffective assistance based on a failure to object (or properly preserve a request or objection), one must show the trial court "would have committed error in overruling such an objection." *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (en banc).

Generally, "a direct appeal proves an inadequate vehicle for raising an ineffective assistance claim" because often, the cold record is not developed to "reflect the motives behind trial counsel's actions." *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). A court will not find deficient performance unless the challenged conduct is "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Andrews v. State*, 159 S.W.3d 98, 102-03 (Tex. Crim. App. 2005) (finding deficient performance on direct appeal when counsel failed to

object to the State's detrimental misstatement of the law despite not being able to ascertain counsel's subjective motivation for failing to do so because there was no conceivable reason for the failure to object).

B. Analysis

Here, if this Court determines trial counsel failed to preserve his objection to the testimony of Dr. Whitney Crowson, or the parts of her testimony that constituted improper bolstering under 702, it is obvious from the cold record that it was not a strategic decision. Trial counsel was adamant that Crowson's testimony was inadmissible. (5R.R. 7-14, 17). There was nothing in Dr. Crowson's testimony that was beneficial to the defense's theory and it was highly prejudicial, making it objectively unreasonable to fail to preserve the issue. *See Ex parte Bryant*, 448 S.W.3d 29, 40-41, 45 (Tex. Crim. App. 2014) (holding that while it is not per se ineffective to fail to object to evidence of, e.g., a polygraph examination, the context in *Bryant* showed there was no reasonable strategic decision in defense counsel's failure and that it prejudiced the defendant). Especially so since the credibility of the complainant's claim that it was Mr. Villasenor who perpetrated the abuse against her was the central issue at trial.

There was prejudice here because it was (or would have been) error for the trial court to overrule defense counsel's 702 objections. The argument that this is/would have been error is fully briefed in Issue I of this brief and is incorporated by reference here, including the harm analysis. *Supra*, pp. 8-21. *Vaughn*, 931 S.W.2d at 566.

Therefore, even if this Court determines defense counsel failed to preserve the 702 issue with regard to Dr. Crowson's testimony, it should reverse and remand for a new trial due to ineffective assistance of counsel.

PRAYER

Appellant, Gustavo Villasenor, prays that this Court reverse the lower court's judgment and remand this case for a new trial. Mr. Villasenor 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 to the Harris County District Attorney's Office on or before June 2, 2025.

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CERTIFICATE OF COMPLIANCE

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