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

No. 01-24-00940-CR

In the First Court of Appeals Houston, Texas

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HOUSTON, TEXAS
6/30/2025 9:50:00 AM
DEBORAH M. YOUNG
Clerk of The Court

RICHARD ALLEN GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 434th Judicial District Court
Of Fort Bend County, Texas
Cause No. 21-DCR-095255A-CR

APPELLANT'S BRIEF

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APPELLANT REQUESTS ORAL ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the Texas Rules of Appellate Procedure 9.4(g) and 38.1(e),

Appellant requests oral argument to benefit this Court for the following reasons:

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE APPELLANT'S CONVICTION.

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO IMPEACH ITS OWN WITNESS, KNOWING THE WITNESS HAD RECANTED.

THE TRIAL COURT FAILED TO GIVE A LESSER INCLUDED INSTRUCTION.

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. Rule 38.1 (a), appellant certifies that the following is a complete list of the parties to the final judgment and the names and addresses of counsel in the trial and on appeal:

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Trial Judge:
The Honorable J. Christian Becerra
Presiding Judge 434th District Court
Fort Bend County, Texas

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STATEMENT OF THE CASE

On December 19, 2023, Richard Allen Gutierrez, Appellant, was indicted for the felony offense of Continuous Sexual Abuse of a Child. (CR 1 at 7). The offenses were alleged to have been committed on or about March 13, 2010, through March 13, 2016. (CR 1 at 7). On November 20, 2024, Appellant pled not guilty to the indictment. (RR 5 at 20). On November 22, 2024, the Appellant was found guilty by the Jury. (RR 6 at 117). On November 25, 2024, the Appellant was assessed 48 (forty-eight) years, in the Texas Department of Criminal Justice-Institutional Division, by the Jury. (RR 7 at 79).

On November 27, 2024, Appellant timely filed his notice of appeal. (CR 1 at 118).

ISSUES PRESENTED

POINT OF ERROR ONE

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE APPELLANT'S CONVICTION.

POINT OF ERROR TWO

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO IMPEACH ITS OWN WITNESS, KNOWING THE WITNESS HAD RECANTED.

POINT OF ERROR THREE

THE TRIAL COURT FAILED TO GIVE A LESSER INCLUDED INSTRUCTION.

STATEMENT OF FACTS

Linda Trevino is married to Gustavo Trevino. Linda has four biological children of her own and two stepchildren, which belong to Gustavo. Linda's oldest daughter is Mary. The Appellant is the father of Mary. (RR 5 at 28-31). Linda was never married to the Appellant, but they had two children together, Richie and Mary. They split up when the children were two and three. (RR 5 at 31-32). They had an informal visitation arrangement regarding the children. (RR 5 at 33). One day around 5 p.m., while Linda and Gustavo were living in Sugar Land, Gustavo told Linda to go into Mary's room, that she shared with her stepsister, Brianna and to talk with her. Mary was sitting on her bed, while her stepsister was sitting on her bed. Mary was crying so Linda kept asking her what's wrong. (RR 5 at 36-38, 67). Mary told Linda that her dad would make her go to the restroom and he would touch her, and he would make her touch him. She remembered two times when she was younger, around seven, or eight years old. Mary said one incident occurred in Damon and then the other one occurred in Rosenberg. (RR at 42). Linda claims that she went outside and then called 911 either that day or the following day. (RR 5 at 45). Linda also claims that she spoke with an officer on the phone and then at her house, but the officer did not speak to Mary. (RR 5 at 45-46). Linda claims that she called the Appellant and told him what Mary had said and that he did not deny

it. (RR 5 at 47). She also claims that the Appellant told her not to call the cops. (RR 5 at 48).

Mary's birthday is March 13, 2004. Mary would frequently go visit and stay with the Appellant as she was growing up but primarily lived with her mother. (RR 5 at 65-68). Mary said when she was growing up, the Appellant had lived with her grandmother, or in trailer or at her grandfather's house in Damon. Mary told the prosecutors that she fabricated the truth and didn't want the case to move forward. (RR 5 at 70). Mary lied about the Appellant sexually abusing her. She was afraid and trying to get evidence because she thought that her mother and stepfather would kill the Appellant after she told her stepfather. She claims that she never told her mother, Linda. (RR 5 at 70-73). Mary said there was no conversation with her stepfather. They were talking about something else, and she started crying. Then her stepfather asked her if anyone ever hurt her. Gustavo told her that somebody had to do something. Then he started naming people. And that's when Mary said my dad and Gustavo left the room and she assumed he told her mom. (RR 5 at 73). Mary denies being sexually abused. Mary then agrees that she told a lady during her interview that her dad was sexually abusing her, however she lied during her interview. (RR 5 at 77). Mary clarified her testimony by asking the prosecutor, are you asking what actually happened, or what she had previously said. The prosecutor asked Mary what actually happened, and Mary told her nothing

happened in either room. (RR 5 80-81). When Mary was asked how it was that she was able to provide such details and become emotional if it never happened, she responded that the emotions were real but weren't toward what she was saying. (RR 5 at 89). She wanted to make sure he goes behind bars so her parents wouldn't kill him. (RR 5 at 90). Mary said by watching Dateline and You Tube videos that she was able to articulate very specific details of sexual abuse against the Appellant. (RR 5 at 89-90). Mary said that she still visits the Appellant's side of the family and has never been coerced or threatened or told what to say. (RR 5 at 97-98). Mary said that in June of 2024 she was on her way to the District Attorney's Office with her mother and told her that it didn't happen. This was the first time that she told anybody that it didn't happen because she was afraid. Mary said that she met five people from the District Attorney's Office and told them that she had lied. Mary told the jury that she was sorry for wasting their time. (RR 5 at 100-103). Mary went along with everything at the time when she spoke with the Child Advocacy Center because she was afraid the Appellant would be killed, so she thought the Appellant was safer in jail. (RR 5 at 104). Mary also said that she was depressed and would have nightmares, so she assumed that it was the Appellant that was doing these things because it was his house. (RR 5 at 105).

Fiona Remko, formerly with the Fort Bend County Children's Advocacy Center, conducted a forensic interview of Mary on March 3, 2021. (RR 5 at 123-

143). Mary was sixteen at the time of the interview. (RR 5 at 144). Remko asked Mary why she was there, to which Mary responded because my mom found out about my dad. (RR 5 at 144-145). Mary went on to tell Remko that the Appellant used to touch her more than once, beginning at age 6 in Damon and in Rosenberg. (RR 5 at 145-147). Mary told Remko that the Appellant would, on more than one occasion, lay down behind her and she would pretend to be asleep. He would take her clothes off and put what she called "his privates," which she identified later as a penis, in between her upper thighs and she could feel him moving back and forth. (RR 5 at 148). Mary told Remko this happened around ten times in Rosenberg. (RR 5 at 148-149). Mary also told Remko that the Appellant would sit on the toilet without any clothes on and he would look in a magazine. He would put his hand on her hand and make her move his penis up and down. (RR 5 at 151). Mary described another incident in Rosenberg, when the Appellant took her clothes off while they were initially laying down on the couch. She then ended up in a sitting up position and he was touching himself and then touching her in the vagina with his fingers, which hurt her. (RR 5 at 152-153). Mary told Remko that the abuse stopped when she reached puberty. Mary also described a time when the Appellant took out his penis and wanted her to put it in her mouth. (RR 5 at 155). More recently, Mary described a time sleeping in the bed with the Appellant, her head at his feet and vice versa, and she woke up to the sound of him masturbating. Mary

told Remko many times during the interview that she couldn't remember any details to which Remko would follow up with a more detailed question to try to get her to answer her questions. (RR 5 at 151).

Lieutenant Rogers, with the Rosenberg Police Department, was assigned to the Appellant's case in February 2021. (RR 5 at 185-188). Rogers initially did an interview with Linda Trevino in Sugar Land at her house and advised her to have Mary interviewed at the Child Advocacy Center. (RR 5 at 191-192). Rogers called Linda on February 16th and had to travel to her residence on February 25th because Linda never called Rogers back. Rogers was present for Mary's interview with Remko. After the interview, he contacted Linda about doing a one-party consent call which she declined. (RR 5 at 193-197). Rogers then contacted the Appellant by phone on March 29th to see if the appellant would talk with him about the case. The Appellant agreed to go and talk with Rogers at the Rosenberg Police Department, which interview lasted an hour and thirty-seven minutes. (RR 5 at 197-198). Detective Taylor Surratt was also present during the interview. The Appellant was not under arrest and told him that he could end the interview at any time. (RR 5 at 199). The Appellant told Rogers in while living in the city of Rosenberg, at least ten times, he used his daughter's body to sexually gratify himself and he also made admissions regarding acts in Brazoria County. (RR 5 at 200). The Appellant denied some of the sexual acts that had been disclosed by

Mary in her forensic interview. (RR 6 at 9). Rogers admitted that he could have done a better investigation by recovering text messages from Linda that she and the Appellant were purportedly sending back and forth and downloading her phone because Gustavo had erased numerous text messages. (RR 6 at 10, 36). Rogers also admits that he should have obtained statements from Gustavo and Brianna about Mary's statement while in her bedroom. (RR 6 at 10-11). Rogers did not locate any 911 calls ever made on this case. In addition, Rogers admits that the initial reporting of Mary's outcry was several days after she had allegedly told anyone. (RR 6 at 17). Rogers had to drive over to Linda's house unannounced because she never contacted him after his initial contact with her on February 16th, 2021. There was no reason given by Linda as to why she never contacted Rogers after he left her a message. (RR 6 at 19). Rogers admits that Linda flat-out refused to conduct a one-party consent call to the Appellant, after Rogers had asked her, in hopes of getting the Appellant to make some statement. (RR 6 at 21-22). Rogers admitted that he had not conducted his investigation, at 100 percent. (RR 6 at 26). Rogers never interviewed the Appellant's son, Richie, once the Appellant told Rogers that the reason he thought he was doing the initial interview was because Richie had touched Brianna. (RR 6 at 27). Rogers found out that Mary had lied about the allegations in June of 2024, but never attempted to interview her after she had said this. (RR 6 at 30). Rogers never asked the Appellant during his interview about

specific dates of the allegations. (RR 6 at 32). Rogers admitted he did not establish a specific year or years in which the allegations occurred. (RR 6 at 33). In addition, Rogers admitted that he never asked the Appellant if the alleged Rosenberg acts had taken place within a 30-day period or continued beyond a 30-day period. (RR 6 at 34).

SUMMARY OF THE ARGUMENT

POINT OF ERROR ONE

Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Jackson*, 443 U.S. at 314, 318 n. 11, 320. If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. See *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), *Brown v. State*, 381 S.W.3d 565, 573 (Tex. App. 2012).

ARGUMENT

POINT OF ERROR ONE: THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT THIS CONVICTION.

SUFFICIENCY

Appellant challenges the legal sufficiency of the evidence to support his conviction. The Court of Criminal Appeals has held that only one standard should be used in a criminal case to evaluate the sufficiency of the evidence to support findings that must be established beyond a reasonable doubt: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893,894-95 (Tex. Crim. App. 2010). Accordingly, the

review of the sufficiency of the evidence in this case is under a rigorous and proper application of the legal sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks*, 323 S.W.3d at 906. When reviewing the sufficiency of the evidence, it is proper to view all of the evidence in the light most favorable to the verdict to determine whether the fact finder was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). This Court will defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 902 n.19, 907. Appellant argues the evidence is legally insufficient to support his conviction. The Court of Criminal Appeals has held that only one standard should be used to evaluate the sufficiency of the evidence in a criminal case: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App.2010). Accordingly, the review of the sufficiency of the evidence in this case under a proper application of the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), legal sufficiency standard. *Brooks*, 323 S.W.3d at 905.

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence, the view is to all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. Id. at 898. *Dewberry v. State*, 4 S.W.3d 735,740 (Tex. Crim. App.1999); see also *Sharp v.*

State, 707 S.W.2d 611,614 (Tex. Crim. App. 1986) (stating the jury may choose to believe or disbelieve any portion of the testimony at trial). The duty as a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App.2007).

Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Jackson*, 443 U.S. at 314, 318 n. 11, 320. If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. See *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), *Brown v. State*, 381 S.W.3d 565, 573 (Tex. App. 2012).

Sec. 21.02. CONTINUOUS SEXUAL ABUSE OF YOUNG CHILD OR DISABLED INDIVIDUAL. (a) In this section:

(1) "Child" has the meaning assigned by Section 22.011(c).

(2) "Disabled individual" has the meaning assigned by Section 22.021(b).

(b) A person commits an offense if:

(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and

(2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is:

(A) a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense; or

(B) a disabled individual.

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

(1) aggravated kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;

(2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;

(3) sexual assault under Section 22.011;

(4) aggravated sexual assault under Section 22.021;

(5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)-(4);

(6) sexual performance by a child under Section 43.25;

(7) trafficking of persons under Section 20A.02(a)(3), (4), (7), or (8); and

(8) compelling prostitution under Section 43.05.

(d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

In this case, the State failed to prove beyond a reasonable doubt that these allegations ever happened based upon Mary's testimony. In addition, the State also

failed to prove beyond a reasonable doubt one essential element, that during a period that is 30 or more days in duration, the Appellant committed two or more acts of sexual abuse, against Mary. The State failed to prove what was alleged in the indictment beyond a reasonable doubt for the following reasons:

Mary: Mary told the prosecutors that she fabricated the truth and didn't want the case to move forward. (RR 5 at 70). Mary lied about the Appellant sexually abusing her. She was afraid and trying to get evidence because she thought that her mother and stepfather would kill the Appellant after she told her stepfather. She claims that she never told her mother, Linda. (RR 5 at 70-73). Mary said there was no conversation with her stepfather. Mary denies being sexually abused. Mary then agrees that she told a lady during her interview that her dad was sexually abusing her, however she lied during her interview. (RR 5 at 77). Mary clarified her testimony by asking the prosecutor, are you asking what actually happened, or what she had previously said. The prosecutor asked Mary what actually happened, and Mary told her nothing happened in either room. (RR 5 80-81). When Mary was asked how it was that she was able to provide such details and become emotional if it never happened, she responded that the emotions were real but weren't toward what she was saying. (RR 5 at 89). She wanted to make sure he goes behind bars so her parents wouldn't kill him. (RR 5 at 90). Mary said by watching Dateline and You Tube videos that she was able to articulate very

specific details of sexual abuse against the Appellant. (RR 5 at 89-90). Mary said that in June of 2024 she was on her way to the District Attorney's Office with her mother and told her that it didn't happen. This was the first time that she told anybody that it didn't happen because she was afraid. Mary said that she met five people from the District Attorney's Office and told them that she had lied. Mary told the jury that she was sorry for wasting their time. (RR 5 at 100-103).

Rogers: Rogers found out that Mary had lied about the allegations in June of 2024, but never attempted to interview her after she had said this. (RR 6 at 30). Rogers never asked the Appellant during his interview about specific dates of the allegations. (RR 6 at 32). *Rogers admitted he did not establish a specific year or years in which the allegations occurred*. (RR 6 at 33). In addition, *Rogers admitted that he never asked the Appellant if the alleged Rosenberg acts had taken place within a 30-day period or continued beyond a 30-day period*. (RR 6 at 34).

Remko: Mary told Remko many times during the interview that she couldn't remember any details to which Remko would follow up with a more detailed question to try to get her to answer her questions. (RR 5 at 151).

The evidence presented was clearly insufficient in that the acts alleged did not constitute the criminal offense charged.

SUMMARY OF THE ARGUMENT
POINT OF ERROR TWO

Instead, we conclude the State's knowledge that its own witness will testify unfavorably is a factor the trial court must consider when determining whether the evidence is admissible under Rule 403. Analyzing lack of surprise or injury in terms of Rule 403 is preferable not only because it comports with the plain language of Rule 607, but because it will lead to the conclusion that a trial court abuses its discretion under Rule 403 when it allows the State to admit impeachment evidence for the primary purpose of placing evidence before the jury that was otherwise inadmissible. The impeachment evidence must be excluded under Rule 403's balancing test because the State profits from the witness' testimony only if the jury misuses the evidence by considering it for its truth. Consequently, any probative value the impeachment testimony may have is substantially outweighed by its prejudicial effect. …We hold the Court of Appeals erred in failing to find the trial court abused its discretion under Rule 403 when it permitted the State to admit evidence of K.P.'s prior inconsistent statements to impeach her testimony. *Hughes v. State*, 4 S.W.3d 1, Tex.Crim.App.).

ARGUMENT

POINT OF ERROR TWO: THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO IMPEACH ITS OWN WITNESS, KNOWING THE WITNESS HAD RECANTED.

All right. Mr. Diaz? MR. DIAZ: Yes, Judge. Again, Judge, my concern is the State calling "Mary Garza" to testify solely to impeach her. It is my understanding that "Mary" has recanted, has told the State that she fabricated this.

So to call her solely for the purpose of impeaching her, that would be improper, Judge, and she wouldn't be able to testify at that point. So that's my concern. So I don't know how this is going to develop, so I just want to put the Court on notice, again, my concern. And according to the case law, the State cannot do that solely for that purpose, Judge. THE COURT: Response? MS. RAMOS: Yes, Judge. So I agree that's what the case law says that we are not allowed to do that. However, the case law further says that even in situations where the State is aware that either the witness is going to testify unfavorably for the State and/or has made a recantation prior to testimony, that alone does not weigh in favor of the Defense, and the State needs to make a showing essentially that there is another purpose other than getting otherwise inadmissible evidence before the jury for purposes of impeaching, right. So one point I want to make is that the jury is going to hear about what the victim had to say in her forensic interview once we put Fiona Remko on. So we are not dealing with a situation where we are trying to get in front of the jury evidence that would otherwise be inadmissible because that evidence has been deemed admissible pursuant to an Outcry hearing. Second of all, the -- when I anticipate I'm going to have to impeach her, if I'm going to have to impeach her, and I'm asking my very specific foundation questions that isn't it true on this day you made this statement to this interviewer. Depending on what she says. The purpose of me asking those specific questions in order to highlight that her statement to me of this

is -- that she fabricated the truth is in direct contrast to that statement to show to the jury that she is saying that she fabricated the truth and yet she was able to provide very specific details, including sensory details, during the course of her forensic interview. So the purpose of us impeaching her with statements that she made in her forensic interview are not solely to get improper evidence in front of the jury. One, that evidence is already admissible; and, two, we have a legitimate purpose, which is to contradict her recantation, Judge. MR. DIAZ: Judge. THE COURT: Yes, sir. MR. DIAZ: If I could cite a case. Hughes v. State, 4 S.W.3d 1, Texas Court of Criminal Appeals 1999. The language in that case says, "Instead, we conclude the State's knowledge that its own witness will testify unfavorably is a factor the trial court must consider when determining whether the evidence is admissible under Rule 403. Analyzing lack of surprise or injury in terms of Rule 403 is preferable not only because it comports with the plain language of Rule 607 which they also mention, Texas rules, I believe it's Rule 607, but because it will lead to the conclusion that a trial court abuses its discretion under Rule 403 when it allows the State to admit impeachment evidence for the primary purpose of placing evidence before the jury that was otherwise inadmissible. The impeachment evidence must be excluded under Rule 403's balancing test because the State profits from the witness' testimony only if the jury misuses the evidence by considering it for its truth. Consequently, any probative value the impeachment

testimony may have is substantially outweighed by its prejudicial effect. That is what we have here, Judge. So that is my concern by calling "Mary" solely to impeach her with these statements, Judge. THE COURT: Understood. And your objection is noted and overruled. (RR 5 at 60-63).

(Ramos) Q. And so in that interview, did you give that lady a lot of details regarding sexual abuse by your dad? A. Yes. Q. But your testimony is that you lied? A. Yes. Q. Okay. So let me ask you: Did your dad sexually abuse you one time or more than one time? A. No. (RR 5 at 77).

Q. So I'm asking you what actually happened. A. Oh, I'm sorry. I thought you were asking what I told her. Nothing. Q. Nothing happened in either of the rooms? A. No. Q. When you were interviewed back on March 3rd, 2021, did you tell the lady that in the Damon house, he would take you inside the bathroom, he would sit you on the toilet -- or, I'm sorry, he would sit on the toilet, he would put your hand on his penis and he would move your hand up and down? A. Yes. MR. DIAZ: Judge, I am going to object. And may we approach? THE COURT: Please do. (Bench conference:) MR. DIAZ: Judge, I'm going to object to direct, leading questions. This is Direct Examination. If Ms. Ramos is leading her witness and if it does become impeachment, which, again, is my concern, she is testifying and putting words in there. There is no evidence. THE COURT: To leading? MR. DIAZ: Yes. THE COURT: Just to leading. MS. RAMOS: Judge, except that I'm

asking foundational questions that she has already denied. And so I need to give the date and the specific statement that was made and for her to answer so I can determine whether or not -- THE COURT: Let's clear the jury again. (Bench conference concluded.) THE BAILIFF: All rise. (Jury exited the courtroom at 10:55 a.m.) THE COURT: Okay. Take your seats. If we are going to approach, I'm going to ask the attorneys to try to speak as quiet as possible. MS. RAMOS: It is very hard. I apologize, Judge. THE COURT: I understand. So the objection is leading. MR. DIAZ: And, Judge, again, if I may, I didn't mean to interrupt. THE COURT: Please. MR. DIAZ: Again, this is my -- THE COURT: Well, let's lay it all out. Let's start from scratch. MR. DIAZ: Again, this is my concern, they are calling her to impeach her with these prior inconsistent statements. That is impeachment. No way around that. The case law is clear on that. THE COURT: Let's stop because I have already made my ruling on that. So let's move past that. So now she is impeaching her and your objection to the specific question asked is leading. MR. DIAZ: Leading and testifying. Counsel is testifying. THE COURT: Yes? MS. RAMOS: So for each statement that I anticipate I'm going to have to impeach her with, I am asking first the open-ended question. So for this specific question, the open-ended question was: Which room did your dad sexually abuse you. Right? And she has denied that she was sexually abused again. So now I'm asking the specific question -- let me backtrack. I'm sorry.

THE COURT: Okay. Now, you asked the basic question: Where did the sexual abuse happen? She said it didn't happen. MS. RAMOS: In the Damon house. THE COURT: In the Damon house, right. Continue. MS. RAMOS: And so then I'm asking pursuant to 613(a), (a)(1), which has a foundation requirement in which it states: "When examining a witness about the witness' prior inconsistent statement, whether oral or written, a party must first tell the witness the contents of the statement, time and place of the statement, and the person to whom the statement was made." The beginning portion of my impeachment questions will contain that. That's why I have the photographs to establish time and place. Now we are talking about the issue is the contents of the statement. And so it is it appears leading in that it is a yes or no question. However, I am not suggesting an answer to her. I know what the answer is. I'm not saying that she is going to agree with me, which is the purpose of the question. In fact, I don't know what she is going to answer when she responds to my questions. So while they are yes or no questions, they are foundational questions that I'm allowed to ask pursuant to 613(a)(1). THE COURT: Yes, sir? MR. DIAZ: May I respond, Judge? THE COURT: Yes. MR. DIAZ: Yes, I understand you have already made your ruling, but it continues to be impeachment. And the Court of -- Texas Court of Criminal Appeals is quite clear on this. They have another witness to come in here and tell the jury what took place, what "Mary" had said. So, again, it is my concern

because they might as well play the whole CAC interview at this point, basically that's what they are doing in essence. That's my concern. It is way above impeachment, way beyond impeachment at this point. Yeah. I think that is what case law is clear on. It becomes prejudicial and she already said she had lied. So, I mean, to keep basically playing that whole -- testifying to that whole interview, we know what she is going to say. She's already denied it. So at some point, again, I know you made your ruling initially, Judge, but it is beyond impeachment at this point. It becomes relevance at this point because she has already lied. She said she made it up. And Remko is coming. THE COURT: Understood. I understand your argument. Anything else? MS. RAMOS: Just that if I need to respond to the relevance argument, it is highly relevant because she has lied. And as I explained earlier, we have a legitimate purpose other than impeaching to contradict what she has now testified to which is that she, quote-unquote, fabricated the truth. So that is directly relevant in that the jury can understand and be provided information that she did give specific details of the sexual abuse during her interview. And, again, it is not leading because these are foundational requirements allowed under the rules. MR. DIAZ: Judge, the State knows that at this point. They've known that since June and now they know it today after her first question. She said I made up everything. So from here on out, I think it is prejudicial. THE COURT: Anything else? MS. RAMOS: No, Judge. THE COURT: I'm going to take a closer look at

the rule and I'm going to review your case law and come out with my ruling. MR. DIAZ: Yes, sir, I've got more. THE COURT: What's that? MR. DIAZ: I've got a couple more. THE COURT: No, no. I'm good. I just need to cover one thing. MR. DIAZ: May I use the restroom, Judge? THE COURT: Yes, please. Give me like 15 minutes. MR. DIAZ: Yes, yes. THE COURT: Fifteen-minute break. (A brief recess was taken.) THE COURT: Back on the record outside the presence of the jury. I've taken a look at the case law, reviewed the rule. I need to get my pad. Your objection is overruled. I read through everything, and I understand the arguments. Defense objection is overruled. So we'll continue. (RR 5 at 81-87).

The State called Mary solely to impeach her with prior inconsistent statements, knowing that she recanted. The prosecutor, Ramos even acknowledges this to the Court.

Instead, we conclude the State's knowledge that its own witness will testify unfavorably is a factor the trial court must consider when determining whether the evidence is admissible under Rule 403. Analyzing lack of surprise or injury in terms of Rule 403 is preferable not only because it comports with the plain language of Rule 607, but because it will lead to the conclusion that a trial court abuses its discretion under Rule 403 when it allows the State to admit impeachment evidence for the primary purpose of placing evidence before the jury that was otherwise inadmissible. The impeachment evidence must be excluded

under Rule 403's balancing test because the State profits from the witness' testimony only if the jury misuses the evidence by considering it for its truth. Consequently, any probative value the impeachment testimony may have is substantially outweighed by its prejudicial effect. …We hold the Court of Appeals erred in failing to find the trial court abused its discretion under Rule 403 when it permitted the State to admit evidence of K.P.'s prior inconsistent statements to impeach her testimony. *Hughes v. State*, 4 S.W.3d 1, Tex.Crim.App.).

In *Pruitt v. State*, 770 S.W.2d 909, Court of Appeals Fort Worth, the appeal involved the question of whether the State may impeach its own witness with a prior inconsistent statement when it has called the witness knowing that he will provide little or no testimony useful to the State. We hold the right to impeach one's own witness by use of a prior inconsistent statement does not extend to employment of such impeachment as a mere subterfuge to get otherwise inadmissible hearsay evidence before a jury.

A witness' prior inconsistent statement may be used to impeach the witness' credibility. See TEX.R. EVID. 607. A Rule 607 challenge to a witness' credibility may come from any party, including the party calling the witness. *Hughes v. State*, 4 S.W.3d 1, 5 (Tex.Crim.App.1999). However, a party may not use impeachment by prior inconsistent statements as a mere subterfuge to get otherwise inadmissible hearsay evidence before the jury. [*372] Id.; *Pruitt v. State*, 770 S.W.2d 909, 909

(Tex.App.-Fort Worth 1989, pet. ref'd). A party's knowledge that its own witness will testify unfavorably is a factor the trial court must consider when determining whether the evidence is admissible under Rule 403. *Hughes*, 4 S.W.3d at 5; see also *Barley v. State*, 906 S.W.2d 27, 37 n. 11 (Tex.Crim.App.1995). A trial court abuses its discretion under Rule 403 if it allows the State to use impeachment evidence for the primary purpose of placing otherwise inadmissible evidence before the jury. *Hughes*, 4 S.W.3d at 5. "The impeachment evidence must be excluded under Rule 403's balancing test because the State profits from the witness' testimony only if the jury misuses the evidence by considering it for its truth. Consequently, any probative value the impeachment testimony may have is substantially outweighed by its prejudicial effect." *Id*. *Brasher v. State*, 139 S.W.3d 369 (Tex. App. 2004).

The new rules of criminal evidence do not prohibit a party from impeaching his own witness. See Tex.R.Crim.Evid. 607. Nonetheless, the rules do not permit a party to call a witness primarily for the purpose of impeaching the proposed witness with evidence that would be otherwise inadmissible. See *Pruitt v. State*, 770 S.W.2d 909 (Tex.App.--Fort Worth 1989, pet. ref'd). The federal courts, in interpreting the identical federal rule, have consistently reached the same result. See *United States v. Sebetich*, 776 F.2d 412, 429 (3rd Cir.1985); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C.Cir.1986); *United States v. Hogan*, 763 F.2d

697, 702 (5th Cir.1985); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir.1984). M--V--'s out-of-court statement was admissible only as evidence to impeach M--V--. It could not have been admitted as evidence to impeach the victim. See Tex.R.Crim.Evid. 801-803. *Zule v. State*, 820 S.W.2d 801 (Tex. Crim. App. 1991).

It is well-settled that a party may not call a witness primarily for the purpose of impeaching the proposed witness with evidence that would otherwise be inadmissible. See *Barley v. State*, 906 S.W.2d 27, 37 n. 11 (Tex.Crim.App.1995), cert. denied, 516 U.S. 1176, 116 S.Ct. 1271, 134 L.Ed.2d 217 (1996); *Pruitt v. State*, 770 S.W.2d 909, 910-11 (Tex.App.--Fort Worth 1989, pet. ref'd). We find, therefore, that it was improper for the State to call Stern as a witness knowing that he would feign a memory loss only to introduce facts into evidence by asking leading questions. See *Sills v. State*, 846 S.W.2d 392, 396-97 (Tex.App.--Houston [14th Dist.] 1992, pet. ref'd); *Gannaway v. State*, 823 S.W.2d 675, 678 (Tex.App.--Dallas 1991, pet. ref'd). *Armstead v. State*, 977 S.W.2d 791 (Tex. App. Fort Worth 1998, pet. ref'd).

The trial court clearly abused its discretion based upon the following: 1. making a ruling before the witness, Mary, testified. The trial court should have allowed Mary to testify before making a ruling. 2. It was clear based upon the representations of the State, to the Court, that they knew that Mary was going to

recant. 3. Obviously, Mary's recantation was a strategy that the Appellant was going to pursue, so the State should have asked Mary minimal questions, such as the identity of the Appellant and why she was there. The Appellant would have opened the door to Mary's recantation based upon strategy and then the State could obviously impeach Mary at that point on redirect. 4. The State planned on calling Fiona Remko, from the Child Advocacy Center, whom they designated as their outcry witness to testify as to what Mary told her during the interview, so there was no need to call Mary just to impeach her knowing that she would provide little, if any testimony useful to the State.

The State acknowledges to the Court that their line of questioning of Mary was for impeachment purposes. MS. RAMOS: Yes, Judge. So I agree that's what the case law says that we are not allowed to do that.

Second of all, the -- *when I anticipate I'm going to have to impeach her, if I'm going to have to impeach her*, and I'm asking my very specific foundation questions that isn't it true on this day you made this statement to this interviewer. Depending on what she says.

MS. RAMOS: Judge, except that I'm asking foundational questions that she has already denied. And so I need to give the date and the specific statement that was made and for her to answer so I can determine whether or not.

MS. RAMOS: So for each statement that I anticipate I'm going to have to *impeach* her with, I am asking first the open-ended question.

MS. RAMOS: And so then I'm asking pursuant to 613(a), (a)(1), which has a foundation requirement in which it states: "When examining a witness about the witness' prior inconsistent statement, whether oral or written, a party must first tell the witness the contents of the statement, time and place of the statement, and the person to whom the statement was made." The beginning portion of my *impeachment* questions will contain that.

It is clear from the record that the State called Mary solely to impeach her, knowing that her testimony would be of little to no value to their case, once she told them that she lied about these allegations. The trial court abused its discretion by allowing the impeachment before even hearing how the State proffered their direct examination or how Mary would testify. Even after the Appellant objected, the trial court allowed the State to impeach Mary and lead her by allowing the prosecutor to essentially testify, which was prejudicial. This clearly violated Texas Rules of Evidence 403 and the harm was calling Mary in front of the jury for this sole reason.

POINT OF ERROR THREE

...the second-prong inquiry and consider whether the record contains some evidence from which a jury rationally could find that appellant is guilty of

robbery but not guilty of aggravated robbery. *Penaloza*, 349 S.W.3d at 711 ; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). The evidence must establish the lesser-included offense as a "valid rational alternative to the charged offense." *Sweed*, 351 S.W.3d at 68. ...there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Id.* If some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations, then the standard is met and the instruction is warranted.

ARGUMENT
POINT OF ERROR THREE: THE TRIAL COURT FAILED TO GIVE A LESSER INCLUDED INSTRUCTION.

(Charge conference) MS. LOERA: Your Honor, we are asking for the lesser included of aggravated sexual assault, the indecency with a child by contact and indecency by exposure. And we base this on Cavazos v. State. The Court have applied the Aguilar test to determine whether instruction of lesser included should be given to a jury. And these three lesser includeds that I requested, they do pass the first test that's the lesser included offense of continuous -- of a continuous sexual abuse of a young child. So the three lessers that I stated, they all fall within that range. Now, the next step would be to see if there is any evidence during trial that would permit a rational jury to find that if the Appellant is guilty, he's guilty of

only the lesser offense. And so as far as the aggravated sexual assault, there was testimony that -- this was testimony that Mr. Gutierrez penetrated the Complainant with his genitals and if they were to believe that and nothing else he could be charged with aggravated sexual assault -- convicted. He could be convicted of aggravated sexual assault. And then as far as the indecency, both for exposure and indecency of contact, based on Linda's testimony alone, the jury could determine that fact, if they were to believe just that the child had their hand on the penis or if they only believe the toilet exposing the penis, they could convict of only those lesser includeds. THE COURT: Understood. (RR 6 at 54-55).

THE COURT: Understood. I think that would go to the bigger charge. So that is an argument for the jury. It is a finding of not guilty because the State didn't prove their case. But I would agree, based on the case law provided and the argument by counsels, the request from Defense Counsel is denied. Okay? (RR 6 at 62).

MR. FADEN: Okay. So with regards to the aggravated sexual assault, based upon the dates of the offense, on or before 8/31 of 2017, it should -- the aggravated lesser would say: A person commits the offense of aggravated sexual assault if he intentionally and knowingly -- and you would insert the language of 22.021(a)(1)(a) or Penal Code Section 22.021(a)(1)(b) and -- or the language in the Texas Penal Code 22.021(a)(2)(a), (b), or (c), which would encompass a person

commits an offense if the person intentionally or knowingly causes the penetration of the anus or sexual organ of another person by any means without that person's consent, causes the penetration of the mouth of another person by the sexual organ of the actor without the person's consent, or causes the sexual organ of another person without the person's consent to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor, or regardless of whether the person knows the age of the child at the time of the offense. The person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means, causes the penetration of the mouth of the child by the sexual organ of the actor, causes the sexual organ of the child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor, causes the anus of the child to contact the mouth, anus or sexual organ of another person, including the actor, or causes the mouth of the child to contact the anus or sexual organ of another person, including the actor. Okay. That's aggravated sexual assault. With regards to indecency with a child by contact -- THE COURT: I need y'all to try to be as quiet as possible. We are taking a record. MR. FADEN: So indecency with a child by sexual contact. These are the dates between 9/1 of 2009, 8/31 of 2017, would allege the lesser would include a person commits an offense of the child younger than 17 years of age, whether the child is same or opposite sex, he engages in sexual contact with the child or causes the child to engage in

sexual contact. And that would be 21.11(a)(1). Okay. Let me find the other one. Indecency by -- with a child by exposure, 21.11(a)(2), a person commits an offense with a child younger than 17 years of age and not his spouse, whether the child is the same or opposite sex, and with the intent to arouse or gratify the sexual desire of any person he exposes his anus or any part of his genitals knowing the child is present and causes the child to expose the child's anus or any part of the child's genitals. That would be the -- what I just read into the record would be described as the application paragraphs. The definitions of the charges. And then the application paragraphs, the same would flow from that. Okay. I think that's it. That's what we would be asking for. The Court denied that. And just to be clear for the record, it is aggravated sexual assault of a child, indecency with a child by contact, and indecency with a child by exposure. Okay. (RR 6 at 63-66).

The Appellant requested lesser included in the Court' charge and read their proposed instructions into the record.

Standard of Review

In determining whether the trial court should have given a jury charge on a lesser-included offense, we employ a two-pronged test. *Hall v. State,* 225 S.W.3d 524, 535-36 (Tex.Crim.App.2007). First, we determine if the proof necessary to establish the charged offense includes the lesser offense. *Id.* at 535-36. If it

does, we then review the evidence to determine that if the accused is guilty, he is guilty only of the lesser offense. *Id.* at 536.

The Texas Code of Criminal Procedure provides, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Tex. Code Crim. Proc. Ann. art. 37.08 (West, Westlaw through 2019 R.S.). We apply a two-prong analysis to determine whether the trial court should have included a lesser-included offense instruction in the jury charge. *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013) ; *Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007).

In the first prong, we compare the elements of the offense as charged in the indictment or information with the elements of the asserted lesser-included offense. *Meru*, 414 S.W.3d at 162 ; *Hall*, 225 S.W.3d at 535–36. This first-prong inquiry presents a question of law and does not depend on evidence adduced at trial. *Hall*, 225 S.W.3d at 535 ; *Shakesnider v. State*, 477 S.W.3d 920, 924 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The State does not dispute that the first prong is met—the offense charged in the indictment, aggravated robbery, contains all of the elements of the proposed lesser-included offense of robbery. *See* Tex. Code Crim. Proc. Ann. art. 37.09(1) ; *Palacio v. State*, 580 S.W.3d 447, 454 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) ("An offense is a lesser-included offense of the charged offense if the indictment for the greater offense ... alleges all

of the elements of the lesser-included offense."); *see Penaloza v. State*, 349 S.W.3d 709, 711 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) ("Robbery is a lesser included offense of aggravated robbery."). The only difference between the two offenses is that aggravated robbery, as charged in this case, requires an additional finding that the defendant used or exhibited a deadly weapon. *See* Tex. Penal Code Ann. §§ 29.02, 29.03 (West 2010) ; *Penaloza v. State*, 349 S.W.3d at 711. So, we turn to the second-prong inquiry and consider whether the record contains some evidence from which a jury rationally could find that appellant is guilty of robbery but not guilty of aggravated robbery. *Penaloza*, 349 S.W.3d at 711 ; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). The evidence must establish the lesser-included offense as a "valid rational alternative to the charged offense." *Sweed*, 351 S.W.3d at 68.

We review all of the evidence presented at trial. *Id.* Anything more than a scintilla of evidence suffices to entitle a defendant to a lesser charge. *Sweed v. State*, 351 S.W.3d at 68. Although a scintilla of evidence presents a low threshold, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Id.* If some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is

subject to different interpretations, then the standard is met and the instruction is warranted. *Id.* We review the trial court's decision on the submission of a lesser-included offense for an abuse of discretion. *Davison v. State* , 495 S.W.3d 309, 311 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

When we apply that test, in accordance with the cases we have just cited, we hold that the offenses of aggravated sexual assault of a child, indecency with a child, and sexual performance by a child, as alleged in the indictment in the case before us, are lesser included offenses of the offense of continuous sexual abuse.

We now proceed to the second part of the test: Is there some evidence in the record that would permit a rational jury to find that, if the defendant is guilty, he is guilty only of the lesser offense? We have outlined the evidence above and have examined the entire record. We hold that there is no evidence in the record that would permit a jury rationally to find that, if appellant is guilty, he is guilty only of a lesser included offense. Under this record, the lesser included offenses are not valid and rational alternatives to the charge against appellant. *Hall,* 225 S.W.3d at 535–36, *Brown v. State*, 381 S.W.3d 565 (Tex. App. 2012).

In this case, the State concedes that the lesser included instructions that the Appellant requested are lesser-included offenses of the charged offense, continuous sexual abuse of a child. "*And we do concede that aggravated assault,*

indecency by contact, and indecency by exposure are, in fact, lesser included offenses of continuous sexual abuse of a young child". (RR 6 at 57). There was some evidence in the record that supported the Appellants requested instructions.

More particularly, the second step requires examining all the evidence admitted at trial, not just the evidence presented by the defendant. *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). The entire record is considered; a statement made by the defendant cannot be plucked out of the record and examined in a vacuum. *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000). Anything more than a *scintilla of evidence* is adequate to entitle a defendant to a lesser charge. *Sweed*, 351 S.W.3d at 68. Although this threshold showing is low, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. *Id*. "*However, we may not consider the credibility of the evidence and whether it conflicts with other evidence or is controverted*." *Goad*, 354 S.W.3d at 446–47. "*Accordingly, we have stated that the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations*." *Sweed*, 351 S.W.3d at 68, *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016).

Loera (Charge conference) Now, the next step would be to see if there is any evidence during trial that would permit a rational jury to find that if the Appellant is guilty, he's guilty of only the lesser offense. And so as far as the aggravated sexual assault, there was testimony that -- this was testimony that Mr. Gutierrez penetrated the Complainant with his genitals and if they were to believe that and nothing else he could be charged with aggravated sexual assault -- convicted. He could be convicted of aggravated sexual assault. And then as far as the indecency, both for exposure and indecency of contact, based on Linda's testimony alone, the jury could determine that fact, if they were to believe just that the child had their hand on the penis or if they only believe the toilet exposing the penis, they could convict of only those lesser includeds. THE COURT: Understood.

Diaz (Charge conference) MR. DIAZ: Judge, may I add something to that, please? THE COURT: Please. MR. DIAZ: Also, you know, as far as the interview was concerned, Mr. Gutierrez's interview, I think there was testimony from Lieutenant Rogers, he indicated there were no years they -- throughout there in his interview. What that means basically is that the time frame, there is really no time frame. They mentioned this happened ten times in Rosenberg, okay, did it happen ten consecutive days? In addition to that, the same thing with Damon. You know, there was no time frame on that. So could a rational, reasonable juror determine

this all happened within 30 days. I think there is enough testimony to support that, Judge. (RR 6 at 54-56).

The trial court clearly abused its discretion by not including the Appellant's requests for lesser included charges. The trial court heard some evidence, which the Appellant provided in support of his argument.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Appellant, Richard Allen Gutierrez respectfully asks that the judgment of the trial court be reversed and that a judgment of acquittal be entered or in the alternative that Appellant's sentence be set aside and for such other and further relief to which Appellant may be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. 9.4(i) 3, I hereby certify that the foregoing document, appellant's brief, filed on June 29, 2025, has 10205 words based upon the word count under Microsoft Word.

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CERTIFICATE OF SERVICE

In accordance with TEX. R. APP. P. 9.5, I Michael C. Diaz, certify that a true and accurate copy of the foregoing brief for appellant has been served, by electronic service on June 29, 2025, to the District Attorney's Office, Fort Bend County, Texas.

/s/Michael C. Diaz
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