No. 01-24-00338-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

LUIS NOGUERA
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1769799
From the 209th District Court of Harris County, Texas

BRIEF FOR APPELLANT

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IDENTITY OF PARTIES AND COUNSEL

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PRESIDING JUDGE:	Hon. Brian Warren 209th District Court Harris County, Texas 1201 Franklin Houston, Texas 77002
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STATEMENT OF THE CASE

August 11, 2022	Luis Noguera was charged by indictment with the aggravated robbery of Rina Acevedo. Supp. CR at 24.
April 29, 2024	Jury selection began and was completed. 1 RR at 2.
April 30 – May 1, 2024	The trial on the merits began, ending in a conviction. 1 RR at 3–4.
May 1, 2024	Mr. Noguera changed his punishment election, with the agreement of the State, from jury punishment to court punishment.
May 2, 2024	Mr. Noguera was sentenced to 45 years imprisonment by the court. Suppl. CR at 111.
May 2, 2024	Notice of Appeal was timely filed. Supp. CR at 117.

STATEMENT REGARDING ORAL ARGUMENT

The issues in this case are not complex and the Court would not be aided by oral argument. Mr. Noguera does not request oral argument.

ISSUES PRESENTED

Issue One: The Trial Court Erred in Denying Defense Counsel's *Motion to Sever*, Allowing the State to Present Evidence of a Prior Felony Conviction and Prison Sentence During the Culpability Phase of the Trial

Issue Two: The Trial Court Violated Noguera's Constitutional Right to Confrontation by Allowing Testimony from a DNA Analyst that was Based on Work from Non-Testifying Analysts

Issue Three: Defense Counsel Provided Ineffective Assistance by Failing to Object Under the Confrontation Clause of the United States Constitution

STATEMENT OF FACTS

Luis Noguera was tried for two offenses, unlawful possession of a weapon and aggravated robbery. The two charges stem from the same incident. The State alleged that Noguera committed unlawful possession by using a gun during the aggravated robbery, and that he had a prior felony conviction.

Felon in Possession of a Weapon Charge

Fingerprints were taken from Mr. Noguera the morning the trial began, and a latent print examiner confirmed that his print matched the prints on a ten-print card. 4 RR at 21. The ten-print card was part of a pen packet that

contained records from Luis Noguera's conviction and sentencing for the felony offense of burglary of a habitation. 4 RR at 26. Mr. Noguera was later acquitted by the jury of this offense. 5 RR at 4.

Aggravated Robbery Charge

Valerie Lopez is the daughter of Rina Acevedo. 4 RR at 30. In 2022, Valerie and her mother were saving to buy a car. 4 RR at 32. Rina met someone willing to sell them a car, and Valerie identified that person as Luis Noguera. 4 RR at 33–34. Luis told Rina that his aunt sold cars and he could help Rina get a car with his aunt. 4 RR at 110.

On the day Rina met Luis, he called her and told her he loved her. 4 RR at 112. He also told her he had been kicked out of his home by his mother, so Rina invited him to come to her house. 4 RR at 117. The two had sex that night, leaving before Rina's children could see him there. 4 RR at 118. Luis returned to Rina's home later the next day. Valerie test drove the car and the women agreed to buy it, so they went to their bank to get the money. 4 RR at 35–36.

Luis picked Rina up to take her to his aunt's car dealership to complete the paperwork for the sale, but first they stopped to fill the car with gas. 4 RR at 127. Then Luis drove them to a park, where they got out for a while. 4 RR at

128. After the park, they went to a street near Luis's aunt's home and waited in the car, but then left and went to an abandoned warehouse. 4 RR at 128, 133.

Leaving the warehouse, they returned back to the street by Luis's aunt's house, where they began to have sex in the car. 4 RR at 136. Rina asked to stop having sex because she was not comfortable in the back seat due to it being dirty. 4 RR at 138. Luis stopped, and then climbed into the front seat of the car. 4 RR at 140. He asked Rina to close her eyes for a surprise; when she opened them, he was pointing a gun towards her forehead. 4 RR at 140. He racked the gun, asking Rina if she wanted to die. 4 RR at 141. Then Luis told Rina to get out of the car and drove off with her money. 4 RR at 142.

When Rina returned to the apartment she shared with Valerie, Rina was upset and told Valerie that Luis had put a gun to her head and taken her purse before leaving her in a field. 4 RR at 43–44.

Police collected surveillance footage from the gas station and bank that showed Valerie, Rina, and Luis together. 4 RR at 64, 68. Rina provided police a possible cell phone number for the suspect. 4 RR at 63. Using that number, a police analyst found a Facebook photograph and name for the suspect — Luis Noguera. 4 RR at 70. Photo arrays were presented to both Valerie and Rina, and

both women picked out a photo they believed to be the suspect, whom they identified in court as Luis. 4 RR at 90, 98–99.

Punishment Phase

After conviction, Mr. Noguera changed his punishment election from jury to court punishment, with the State's agreement. 6 RR at 5. He pleaded "true" to the enhancement paragraph. 6 RR at 7.

An officer testified who helped arrest Mr. Noguera. 6 RR at 10. Police conducted a traffic stop on Noguera, who was the front passenger in the car. 6 RR at 14. Noguera got out of his car and fled on foot but was caught one street over. 4 RR at 13; 6 RR at 9. A handgun was found in the glove box of the car after his arrest. 6 RR at 14. Upon investigation, the police established that the gun was legally owned by Noguera's girlfriend, who was also the driver of the car at the time of his arrest. 6 RR at 18.

The State admitted its Exhibit No. 99, a signed stipulation of evidence. 6 RR at 23. The stipulation included convictions for evading arrest, credit card abuse, unauthorized use of a motor vehicle, theft, terroristic threat, robbery by threats, and burglary of a habitation. 8 RR at St. Ex. 99.

Sexual Assault Allegation

Demetria Johnson testified that she was sexually assaulted by Noguera. 7 RR at 12. On the night in question, she went to a club with a friend, but the friend left without her. Noguera offered her a ride, and at some point, both Noguera and Johnson got into the back seat of the car. 7 RR at 13. Johnson said that Noguera pulled out a gun. 7 RR at 14. She later went to the hospital where she underwent a sexual assault examination, which included DNA collection via buccal swab. 7 RR at 14, 44. The investigation went dormant.

The sexual assault case was reactivated in January 2022 when there was a CODIS hit on the DNA collected from Johnson. 7 RR at 48. Later testing would show that Noguera could not be excluded as a contributor to the DNA collected from Johnson, and the possibility of a randomly chosen nonrelative being included was one in 101 septillion individuals. 7 RR at 76. Police were able to use the CODIS information to construct a photo array. 7 RR at 50. Johnson was shown a photo array and identified Noguera as her assailant. 7 RR at 22.

Aggravated Robbery Allegation

Dygrin Espinal testified that he was coming home one evening when he was accosted by a man with a handgun. 7 RR at 83. Espinal did not speak English like the assailant, but the assailant was gesturing towards Espinal's keys, so

Espinal gave them to the assailant. 7 RR at 85. Espinal's car was stolen but was later recovered and processed by the crime lab, including collecting DNA and fingerprints. 7 RR at 86, 101. DNA comparison showed that there was "very strong support" that Luis Noguera was a contributor to the DNA mixture recovered from the steering wheel. 7 RR at 135. Espinal was shown a photo array and positively identified Noguera as the man who stole his car. 7 RR at 87.

SUMMARY OF THE ARGUMENT

The trial court denied Defense Counsel's motion to sever the offenses, forcing Noguera to proceed to trial on both the aggravated robbery charge and unlawful possession of a weapon charge. The judge did not have discretion to deny the severance in this instance and erred in doing so. Further, evidence used by the State to prove the unlawful possession charge harmed Noguera in his aggravated robbery case. His conviction should be reversed, and he should receive a new trial.

Noguera's right to confrontation under the Sixth Amendment to the United States Constitution was violated when the trial court allowed a DNA analyst to testify about the work of other non-testifying analysts. The work of

the other analysts was testimonial hearsay and its admission violated Noguera's right to confront those witnesses. It cannot be shown that this error did not contribute to Noguera's sentence beyond a reasonable doubt.

Lastly, Defense Counsel was ineffective when he failed to object to the testimonial hearsay presented by the State's witness. Because Counsel failed to object under the Sixth Amendment, Noguera was deprived of review under the Tex. R. App. P. 44.2(a) standard for Constitutional error harm.

ARGUMENT

Issue One: The Trial Court Erred in Denying Defense Counsel's *Motion to Sever*, Allowing the State to Present Evidence of a Prior Felony Conviction and Prison Sentence During the Culpability Phase of the Trial

Noguera's trial comprised two indictments, one for the aggravated robbery at issue here and one for unlawful possession of a weapon by a felon. To prove the unlawful possession charge, the State sponsored a penitentiary packet reflecting a prior conviction and imprisonment for burglary of a habitation. The jury acquitted Noguera of the unlawful possession charge, but the penitentiary packet harmed him in his aggravated robbery case.

I. Preservation of Error and Relevant Facts

During a hearing before jury selection began, Defense Counsel moved to sever the two offenses into separate trials:

> **Defense Counsel:** Your Honor, just when we were off the record, the severance. They're charging both of these cases, felon in possession of a weapon and the aggravated robbery, which occurred at the same time, same complainant, we're asking that the State pick which one they want to go on for jury trial and not abandon the other one but just not proceed to jury trial on whichever one they choose.
>
> **Court:** I'm going to allow the State to try these two together. They're out of the same transaction, the same facts are going to come in. For judicial efficiency, I'm going to do it this way…. Respectfully, your objection is overruled; and your motion is overruled.

3 RR at 4–5.

II. Standard of Review

A trial court's decision to deny a severance request is reviewed for abuse of discretion. *Torres v. State*, No. 01-13-00300-CR, 2014 WL 4373119, at *2 (Tex. App.—Houston [1st Dist.] Sept. 4, 2014, pet. ref'd), citing *Salazar v. State*, 127 S.W.3d 355, 365 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). Texas Penal Code § 3.04(a) grants defendants an absolute right to sever consolidated charges, except those excluded by 3.04(c), and the trial court does not have any

discretion to deny such a motion. *Werner v. State*, 412 S.W.3d 542, 546–47 (Tex. Crim. App. 2013).

III. Analysis

A. Severance Under Tex. Penal Code § 3.02 and 3.04

Texas Penal Code § 3.02 permits consolidation of separate criminal charges against a single defendant when they arise out of a single criminal episode. TEX. PENAL CODE § 3.02; *Werner*, 412 S.W.3d at. A "criminal episode" is the commission of two or more offenses, regardless of whether the harm is directed at more than one person, when the offenses are committed "pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan." TEX. PENAL CODE § 3.01. For the purposes of Noguera's trial, the separate offenses were part of a single criminal episode because they were committed during the same transaction. *Id.*

Defendants have an absolute right to sever most charges consolidated under Section 3.02. TEX. PENAL CODE § 3.04(a); *Werner*, 412 S.W.3d at 546. When a defendant moves to sever, the trial judge does not have discretion to deny the motion unless the defendant has been charged with an offense listed in Tex. Penal Code § 3.03(b). *Id.* Neither aggravated robbery nor unlawful possession are included in the § 3.03(b) exceptions.

Granting defendants the right to sever mitigates the disadvantages defendants face in consolidated trials, including "(1) that the jury may convict a 'bad man' who deserves to be punished — not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged." *Werner*, 412 S.W.3d at 547, citing *Llamas v. State*, 12 S.W.3d 469, 471–72 (Tex. Crim. App. 2000).

B. The Two Indicted Offenses

The offense of aggravated robbery as alleged in Noguera's indictment occurs when a person commits the offense of robbery, by committing theft while intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death, and he uses or exhibits a deadly weapon. TEX. PENAL CODE §§ 29.02, 29.03. A conviction for unlawful possession of a firearm requires proof that a person who has been convicted of a felony possesses a firearm after conviction and before the fifth anniversary of the person's release from confinement or from community supervision, whichever is later. TEX. PENAL CODE § 46.04(a).

The trial court stated that the same facts would establish both charges. 3 RR at 5. A review of the elements shows this is incorrect. One element necessary

to prove unlawful possession is not an element of aggravated robbery: That Noguera had previously been convicted of a felony offense.

C. The Trial Court Erred in Denying Defense Counsel's *Motion to Sever*

When two or more offenses have been consolidated or joined for trial under Section 3.02, the defendant has the right to a severance of the offenses. TEX. PENAL CODE § 3.04(a). When the State alleges the two crimes occurred during one criminal episode, defense counsel can sever the charges and proceed with two different trials and two different juries. *Adekeye v. State*, 437 S.W.3d 62, 71 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). Noguera had the absolute statutory right to sever his trials and the trial court erred in denying his request.

IV. Harm Analysis

A. Standard for Harm Analysis

If a judge erroneously denies a severance motion, it is reviewed for non-constitutional harm analysis under Rule 44.2(b). TEX. R. APP. P. 44.2(b); *Werner*, 412 S.W.3d at 547. For the error to be harmful, Noguera's "substantial rights" must have been affected by the erroneous ruling. 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 jury's verdict." *King v. State*, 953 S.W.2d

266, 271 (Tex. Crim. App. 1997). The entire record is reviewed to determine whether the error had "more than a slight influence on the verdict." *Fowler v. State*, 958 S.W.2d 853, 866 (Tex. App.—Waco 1997), *aff'd* 991 S.W.2d 258 (Tex. Crim. App. 1999).

"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 cases of grave doubt as to harmlessness the [appellant] must win." *Burnett v. State*, 88 S.W.3d 633, 637–638 (Tex. Crim. App. 2002) (internal quotations omitted). "[I]f there is a reasonable possibility that inadmissible evidence might have contributed to either the conviction or punishment assessed, then the error in admission is not harmless error." *Alexander v. State*, 740 S.W.2d 749, 765 (Tex. Crim. App. 1987), citing *Plante v. State*, 692 S.W.2d 487 (Tex. Crim. App. 1983) (superseded by statute on other grounds).

"Neither the defendant nor the State bears the burden of demonstrating harm; instead, we assess harm after reviewing the entirety of the record,

including the evidence, jury charge, closing arguments, voir dire, and any other relevant information." *Werner*, 412 S.W.3d at 547.

B. The Record as a Whole

In assessing harm, an examination of the entire record is necessary. After this, if the appellate court is unsure whether the error affected the outcome, the error should be treated as harmful. *Mitten v. State*, 228 S.W.3d 693, 696-97 (Tex. App.—Corpus Christi 2005, pet. ref'd).

1. Jury Selection

The judge read both indictments to the jury. 3 RR at 21. The record shows that the jury struggled to understand how the two charges related to each other and what was required to prove them:

> **Venireperson:** Moments ago, you said possession of a firearm and an alleged felon. Maybe I misunderstood, but I thought Judge Warren suggested that the possession of a firearm was illegal and therefore being indicted because he was previously convicted of a separate felony.
>
> **State:** All it meant is that it's something the State has to prove.
>
> **Court**: She's 100 percent right. It means this is what the State is going to attempt to prove. They may be able to prove it, they may not. I'll hear it for the first time as you are.
>
> **Venireperson:** Okay. So the second indictment is thrown out if the first one can't be proven. Is that my understanding?

3 RR at 45-46.

> **Venireperson:** I think there's some clarification needed. I think the allegation, or the indictment, said that he was previously convicted of a felony in 2016.
>
> **Court:** That is correct.
>
> **Venireperson:** That's a previous felony. So that's part of what they have to prove, that he was convicted of a felony in 2016 and if they can prove that and that he had a firearm, then he would be guilty of that allegation.

3 RR at 46.

> **Venireperson:** So is it – it's unknown if he was previously convicted for the felony in 2016, or that's already a known fact?
>
> **State:** Okay. Does anybody here know whether the defendant was convicted of a felony in 2016?
>
> **Venirepersons:** No.
>
> **State:** Okay. That is something that I will have to prove, that ADA Harris will have to prove, if you were seated on the jury in this trial.
>
> **Venireperson:** But there's no, like, legal record of it? Isn't that, like, public information?

3 RR at 47.

2. Evidence Admitted

In cases where there is substantial overlap of evidence between two charges, the failure to sever is most likely harmless. *Werner*, 412 S.W.3d at 548.

While the entire record must be examined, in cases with significant evidence overlap, the overlap of evidence is the most important factor. *Id.* at 549.

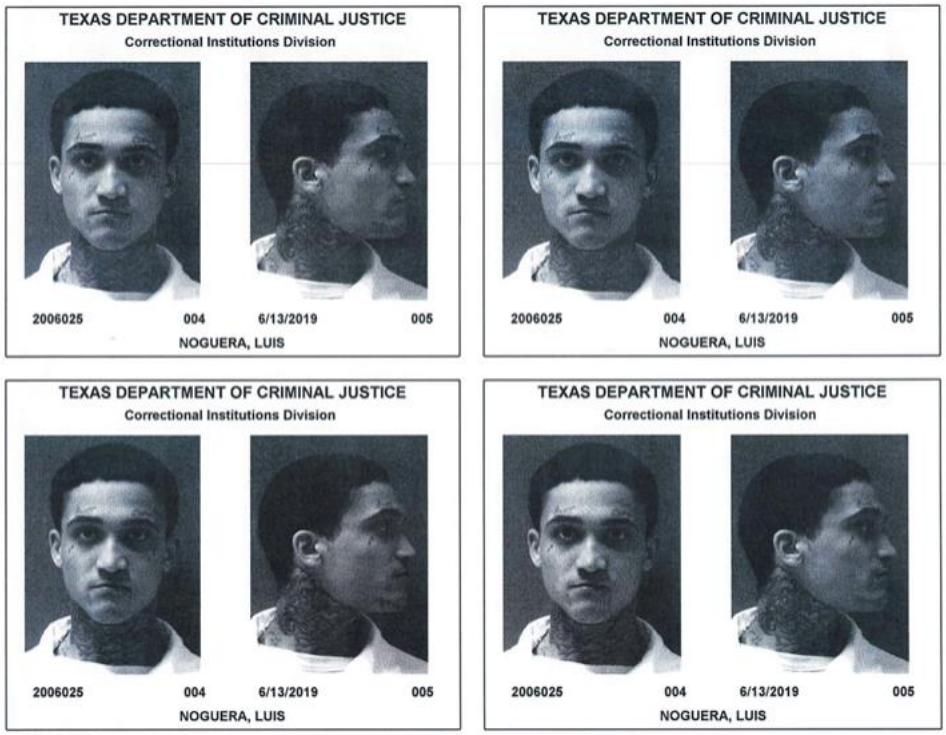
In *Werner v. State*, the defendant was charged with multiple instances of stalking. The Court of Criminal Appeals found the severance of those charges as harmless because of the unique elements of a stalking offense: It is a crime that depends on proof of a pattern of conduct, not a single act. *Id.* The evidence of the first set of stalking instances would have been admissible in a separate trial of the later instances. *Id.* In cases where evidence of one offense would be admissible in the trial of the other offense, failure to sever is harmless. *See Scott v. State*, 235 S.W.3d 255, 258-260 (Tex. Crim. App. 2007) (failure to sever offenses found harmless when evidence of the charge of possessing child pornography is the same evidence forming the basis of a charge for producing or promoting a sexual performance by a child, and a jury would have deduced that the defendant was guilty of possession of child pornography even if he had not been charged with that offense).

In Noguera's case, by contrast, it is the evidence that does *not* overlap that is significant. But for the firearm charge, Noguera's status as a convicted felon would not have properly been admitted in his aggravated robbery case, unless he chose to testify and the State used it for impeachment purposes. TEX. R. EVID.

609. Otherwise, such evidence would have been inadmissible since it is irrelevant and any probative value is substantially outweighed by the risk of unfair prejudice, misleading the jury, and confusion of the issues. TEX. R. EVID. 401, 403.

Moreover, Noguera's purported unlawful possession could not be admitted as same transaction contextual evidence because evidence of Noguera's status as a convicted felon was not necessary to the jury's understanding of the charged offense. *Torres*, 2014 WL 4373119, at *3.

To prove that Noguera was a convicted felon, the State admitted his penitentiary packet as State's Exhibit 1. Included in this exhibit are TDCJ admission photographs of Noguera, facing the camera and in profile:



8 RR at St. Ex. 1.

Additionally, the pen packet contains a judgment showing Noguera was convicted of the second-degree felony of burglary of a habitation in 2015, for which he received five years in prison. 8 RR at St. Ex. 1.

3. Arguments of Counsel

During its closing arguments, the State referred the jury to its Exhibit 1, telling them that it was put into evidence to "prove up the prior felony conviction. It doesn't matter what the prior felony conviction was. This only matters because the law says we need to show a felony, an offense designated

by law as confinement in the penitentiary; and that's where this says he went, this document." 4 RR at 158. The State asked the jury to convict Noguera of unlawful possession. 4 RR at 167–68.

Noguera's own attorney did him no favors in closing, saying that "as to felon in possession, y'all saw the pictures. That's him on there. And you saw the — if you look at the evidence. One of the exhibits does show his TDC photo. It's certainly him. You don't need fingerprints for that…So, yeah, he's been to TDC before. We know that." 4 RR at 162. He then asked the jury to find Mr. Noguera "not guilty" on the aggravated robbery charge. 4 RR at 162. He made no such plea for acquittal of the unlawful possession charge.

4. Jury Charge and Deliberations

The court's charge did not prohibit the jury from using evidence of Noguera's prior felony against him while deliberating on the aggravated robbery charge. In fact, the charge allowed the jury to use that evidence in any way it saw fit:

> While you should consider only the evidence, you are permitted to draw reasonable inferences from the testimony and exhibits that are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the evidence.

Supp. CR at 97.

The jury sent out multiple notes during its deliberations. One note asked whether the jury could convict Noguera of robbery but not aggravated robbery. Supp. CR at 106. The only element separating robbery and aggravated robbery, as charged in Noguera's indictment, is the presence of a deadly weapon. Supp. CR at 24. It stands to reason that the jury was struggling over whether the State proved that element beyond a reasonable doubt. With no option but conviction of aggravated robbery and acquittal, the jury chose conviction. *See* Jury Instructions, CR at 94–103. Given that the jury then acquitted Noguera of unlawful possession of a weapon, it can be deduced that it was proof of the weapon element that the jury found lacking, not the felony conviction element.

C. The Analogous Case of *Llamas v. State*

It is instructive to compare the record in this case with the similar case of *Llamas v. State*. In *Llamas*, the defendant was charged with two offenses—possession of a motor vehicle with an altered vehicle identification number and possession of cocaine—in two separate indictments. *Llamas*, 12 S.W.3d at 469. The jury acquitted the defendant of the latter charge and convicted him of the former. *Id.* at 470. The trial court found Llamas to be a habitual offender and sentenced him to twenty-five years in prison. *Id.*

In *Llamas*, the State argued that denial of the requested severance was harmless because the risk that severance was meant to prevent — that a defendant would suffer consecutive sentences — was ultimately impossible because Llamas had been found not guilty of the controlled substance offense. *Id.* at 471. The Court of Criminal Appeals disagreed, pointing out that "various potentialities for harm other than consecutive sentencing exist when a defendant is denied the right to severance of offenses." *Id.* at 471. These potentialities include convicting a defendant because he is a bad person in general or inferring guilt for the crime charged based on previous convictions. *Id*. at 471–72.

The Court then reinforced the underlying appellate court's conclusion that if not for the error in denying the severance, the jury would not have heard evidence of appellant Llamas's cocaine charge. *Id.* at 472.

The harm to Noguera is exponentially worse than that suffered by Llamas because the offense which should have been severed includes, as an element, that Noguera had previously been convicted of a felony. If not for the trial court's error, the jury would not have heard of his unlawful possession of a weapon charge and would never have known that he had a prior conviction for burglary of a habitation.

In *Llamas*, review of jury selection showed that some jurors acknowledged that if they believed the drug charge was proven, then that would cause them to believe that the defendant was also guilty of the other charge, and that "although ultimately most prospective jurors indicated that they would require the State to prove each charge beyond a reasonable doubt, the record reflected that the very threat section 3.04 allows a criminal defendant to avoid was present in this case." *Id.* Furthermore, the Court of Criminal Appeals quotes the underlying appellate court's observation:

> It is conceivable that appellant would not have been convicted for either offense had he been granted his request for separate trials. Clearly, evidence as to the cocaine charge was admitted in this trial that would otherwise not be relevant to the possession of altered identification numbers and vice versa. The record in this case shows that no less than five times during voir dire, venire persons commented in front of the entire jury panel that they were concerned that appellant had two charges against him. This is exactly the type of harm that section 3.04 allows a criminal defendant, in his sole and absolute discretion, to choose to avoid.

Id. at 472, citing *Llamas v. State*, 991 S.W.2d 64, 69 (Tex. App.—Texarkana 1998, pet. granted). Ultimately, the Court of Criminal Appeals agreed with the appellate court, finding that it could not be sure the error did not have a substantial or injurious effect on the jury's verdict. *Id.* at 472. Noguera's record shows similar concerns and confusion by the venire. This is a situation, like that in *Llamas*, in which the trial court "tried an 'apples' offense along with an

unrelated 'oranges' offense in the hope that the jury would find the defendant guilty of being a generally bad sort." *Werner*, 412 S.W.3d at 548.

Issue Two: The Trial Court Violated Noguera's Constitutional Right to Confrontation by Allowing Testimony from a DNA Analyst that was Based on Work from Non-Testifying Analysts

I. Facts and Preservation of Error

During the punishment phase of Noguera's trial, Houston Forensic Science Center (HFSC) analyst Aja Moss testified about DNA swabs taken from a Dodge Challenger. 7 RR at 126. The Challenger was stolen during an aggravated robbery in July 2021. 7 RR at 82, 84-85, 88. The analysis of the swabs taken from the car provided "very strong support" that Noguera was the contributor of that DNA. 7 RR at 135.

During her testimony, analyst Moss explained that before she analyzed the case, three other analysts had worked on the samples, and they were no longer employed by HFSC. 7 RR at 127. Two of the former employees were responsible for extracting the samples and performing verification steps on some parts of the technician work, including DNA extraction, quantification, amplification, and separation and detection. 7 RR at 127–28. The third analyst reviewed Moss's work. 7 RR at 129.

The State offered its exhibit 134, HFSC Laboratory Report #2. 7 RR at 130. Defense Counsel objected to violations of the right to confrontation. 7 RR at 131. The court overruled the objections to the exhibit and granted Defense Counsel a running objection to Moss's testimony. 7 RR at 132.

II. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Henriquez v. State*, 580 S.W.3d 421, 427 (Tex. App—Houston [1st Dist.] 2019, pet. ref'd). Constitutional legal rulings are reviewed *de novo*. *Id.*

III. Analysis

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. U.S. CONST., amend. VI. In operation, the Confrontation Clause "protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom." *Smith v. Arizona*, 602 U.S. 779, 784 (2024). The Clause bars admission at trial of an absent witness's statements unless the witness is unavailable and the defendant had a prior chance to cross-examine her. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

The prohibition in *Crawford* applies to "testimonial hearsay," *Davis v. Washington*, 547 U.S. 813, 823 (2006). The phrase "testimonial hearsay"

includes two limits: The statements must be both (1) hearsay and (2) testimonial. *Smith*, U.S. at 785. Hearsay is an out of court statement offered "to prove the truth of the matter asserted." *Id.* "Testimonial statements" can include reports created "under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *Id.* at 784–85, citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

A. The Statements are Hearsay

Moss testified as to how DNA is obtained through laboratory processing. First it is screened by a screening forensic analyst. 7 RR at 125. Then it goes through extraction, where the cell is broken open to release the DNA. 7 RR at 125. Next is quantification, where the analyst sees how much DNA is present within the sample, followed by amplification, where millions of copies are made of certain regions on the DNA. 7 RR at 125. Lastly, the sample goes through separation and detection, where the DNA profile is generated. 7 RR at 125.

Moss was the DNA analyst that interpreted the data from the submitted samples. 7 RR at 126. Before Moss could interpret the data and form her opinion, three other analysts handled portions of the work. One was the screening analyst. 7 RR at 127. Another HFSC employee performed the work of

a technician, doing extraction, quantification, amplification, and separation and detection. 7 RR at 127–28. The last HFSC employee to work on the case was the technical reviewer, whose duties included reviewing Moss's work. 7 RR at 128-29. Moss did not perform any testing of the DNA; she was merely the DNA interpretation writer. 7 RR at 131. Her job was to interpret the work of the other analysts; she had to rely on the results of their work to reach her own conclusions.

The Confrontation Clause applies in full to forensic evidence. The *Smith* court refers to the type of evidence at issue here—where one scientist's work informs another's work or forms the basis of another's opinion—as "basis testimony." *Smith*, 602 U.S. at 780.

> …truth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? The whole point of the prosecutor's eliciting such a statement is to establish—*because of the [statement's] truth*—a basis for the jury to credit the testifying expert's opinion. Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion. So there is no meaningful distinction between disclosing an out-of-court statement to explain the basis of an expert's opinion and disclosing that statement for its truth. A State may use only the former label, but in all respects the two purposes merge.

Smith, 602 U.S. at 795 (internal quotations and citations omitted).

Whether a statement is offered for its truth is determined on a case-by-case basis. As explained in *Smith*, if a statement is being offered as the basis for the State's expert opinion, then it is being offered for its truth. Just as in *Smith*, the statements of the other analysts came in for their truth; they were admitted to show the basis for Moss's opinions. *Id.* at 781. All of Moss's opinions were predicated on the truth of the other analysts' statements, and the factfinder could credit those opinions because "it too accepted the truth of what [the absent analyst] reported about her lab work." *Id.* The basis testimony in this case was hearsay.

B. The Statements were Testimonial

The Confrontation Clause limits statements which are hearsay and testimonial. *Smith*, 602 U.S. at 800. Determining whether statements are testimonial turns on the primary purpose of the statements and how they relate to future criminal proceedings. *Id.* A court must identify the out-of-court statement and determine the principal reason it was made. *Id*. at 800–01.

The documents Moss relied on were reports from other DNA analysts and technicians. Two of the analysts performed laboratory work and produced documents that formed the case file at HFSC. Moss then used that case file in

her analysis. 7 RR at 128. The third former HFSC employee reviewed Moss's work and discussed corrections to be made to that work. 7 RR at 129. The corrections had to be made before the case could be released. 7 RR at 129

These statements of the non-testifying analysts were made with a "focus on court." *Smith*, 602 U.S. at 802. The statements were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Henriquez*, 580 S.W.3d at 427. In *Henriquez*, the report at issue was not one of DNA analysis, but an autopsy report. *Id.* This Court ruled that an autopsy report is testimonial when an objective medical examiner would reasonably believe that the report would be used in a later prosecution. *Id.* Similarly, the inquiry here is whether an objective DNA analyst would reasonably believe that the results she reported would be used in court at a later time. Given that the DNA in question was extracted by swabs taken from a crime scene, a reasonable DNA analyst would believe that the results she reported would be used in a future criminal prosecution.

IV. Harm Analysis

An appellate court must reverse for Constitutional error unless the court determines beyond a reasonable doubt that the error did not contribute to the

conviction or punishment. TEX. R. APP. P. 44.2(a). The emphasis of the harm analysis under Rule 44.2(a) is not on the propriety of the outcome at trial. *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). The question is not whether the verdict is supported by the evidence, but rather the likelihood that the constitutional error was a contributing factor in the deliberations arriving at that verdict. *Id.* In other words, did the error adversely affect the integrity of the process leading to conviction or sentencing? *Id.* For Noguera, it did.

A. The *Scott* Factors

In determining specifically whether constitutional error under *Crawford* may be declared harmless beyond a reasonable doubt, there are several relevant factors: How important the out-of-court statement is to the State's case; whether the statement was cumulative of other evidence; the presence or absence of evidence corroborating or contradicting the statement on material points; and the overall strength of the prosecution's case. *Id.*

Reviewing courts may also consider: the source and nature of the error; to what extent the error was emphasized by the State; and how weighty the factfinder may have found the erroneously admitted evidence compared to the balance of the evidence with respect to the issue to which it is relevant. *Id.*

The State's punishment case focused on two extraneous offenses—an aggravated sexual assault and an aggravated robbery. The evidence connecting Noguera to the aggravated robbery of the Dodge Challenger consisted of the DNA evidence, surveillance photos from an apartment complex, and an eye-witness identification. 7 RR at 87, 113, 135. Because eyewitness identification is notoriously unreliable (see *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."), the DNA evidence was the only definitive link between the stolen car and Noguera. The out-of-court statements were therefore of high importance to the State's case.

In his closing argument, the prosecutor emphasized the extraneous aggravated robbery telling the judge that it "shows how brazen this defendant has become and it shows how incapable he thinks the criminal justice system is of ever holding him accountable." 7 RR at 145.

B. Weighing the Factors

With these factors in mind, the reviewing court must ask itself whether there is a "reasonable possibility" that the *Crawford* error moved the factfinder from a state of non-persuasion to one of persuasion on a particular issue. *Id*. After considering the various factors, "the reviewing court must be able to

declare itself satisfied, to a level of confidence beyond a reasonable doubt, that the error did not contribute" to the punishment before it can affirm it. *Scott*, 227 S.W.3d at 690–91, citing Tex. R. App. 44.2(a), *Chapman v. California*, 386 U.S. 18, 24 (1967).

That level of certainty cannot be reached here. The State's punishment case did not center on the offense for which Noguera had just been convicted, but rather on his criminal history as a whole. The State's chief emphasis in argument was that Noguera had committed a prior aggravated robbery and aggravated sexual assault. Without the DNA connecting Noguera to the stolen Challenger, the only evidence linking him to that offense is his presence at the apartment complex where the offense occurred and the identification by the complainant. Eye-witness identification being particularly untrustworthy, it was the DNA that was persuasive. Due to the weight given DNA evidence, and the lack of other forensic evidence tying Noguera to the extraneous aggravated robbery, the trial court's error cannot be said, beyond a reasonable doubt, not to have contributed to his sentence.

Issue Three: Defense Counsel Provided Ineffective Assistance by Failing to Object Under the Confrontation Clause of the United States Constitution

In addition to analyst Moss's testimony, another DNA analyst testified during the punishment phase of Noguera's trial. This analyst, Jessica Powers, similarly testified to work she performed, the foundation of which was work completed by non-testifying DNA analysts. Some of the non-testifying analysts worked for a laboratory that performed work outsourced by HFSC. Another of the non-testifying analysts was previously employed by HFSC and had since been terminated. But Defense Counsel did not object to this testimony.

I. Relevant Testimony

Powers, a forensic DNA analyst for HFSC, authored the final comparative analysis report on the DNA from the sexual assault kit, comparing DNA taken from the complainant and from Noguera. 7 RR at St. Ex. 142. HFSC did not perform the DNA extraction work from the sexual assault kit, but instead outsourced those tasks to another lab. 7 RR at 75. Powers reviewed the outsourced lab's work and wrote a comparison report and final comparative analysis. 7 RR at 66. In preparing her report, Powers reviewed the outsourced lab's report, worksheets, controls, and data. 7 R at 67. Powers said the outsourced lab gave raw data and conclusions, and then she formed opinions based on that data. 7 RR at 67.

HFSC tested the known reference sample from Noguera taken by buccal swab. 7 RR at 68. To analyze that sample, employee Rochelle Austin first portioned the known reference and another analyst in the lab extracted the known reference. 7 RR at 69. Austin then performed the quantification step, the amplification step, and load step. 7 RR at 69. Quantifying the sample is determining how much DNA is in the sample. In amplification, analysts make multiple copies of the DNA. During the load step, the data is generated, which is then interpreted and compared. 7 RR at 69–70. Austin was terminated by HFSC due to "work that she had made errors in[,] and they did not think that those errors could be corrected through training." 7 RR at 70. One of those errors was "possibly switching a sample." 7 RR at 71.

Powers concluded that the result she achieved in the case was reliable, and she produced the final report. 7 RR at 72. That report is Lab Report No. 5, which is State's Exhibit 142. 7 RR at 73.

Defense Counsel objected to Powers's testimony and admission of her lab report, saying the report was "not credible and reliable. I don't think the Court needs that information, anyway." 7 RR at 75. The trial court disagreed, admitting the exhibit, and giving Defense Counsel a "running objection to this testimony, as well." 7 RR at 75. Powers concluded her testimony by stating that

Noguera "cannot be excluded as a possible contributor to the DNA profile obtained" from the sexual assault kit. 7 RR at 76.

II. Standard for Ineffective Assistance of Counsel

A. The *Strickland* Test

The two-pronged *Strickland* test is applied to claims of ineffective assistance of counsel. First, Noguera must show that counsel's performance fell below an objective standard of reasonableness considering prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and is the result of sound trial strategy. *Id*. at 689; *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004). Counsel is held "accountable for knowledge, or the ability to attain knowledge, of relevant legal matters that are neither novel nor unsettled." *Ex parte Moody*, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999).

The second *Strickland* prong — prejudice — requires a showing that but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88. Reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id*. at 694. An appellant need not show that counsel's deficient

performance more likely than not altered the outcome of the case. *Milburn v. State*, 15 S.W.3d 267, 269 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

B. Ineffective Assistance of Counsel Claims on Direct Appeal

Allegations of ineffectiveness must be grounded in the record. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Ordinarily, "the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). An exception to this presumption exists when the record clearly confirms that no reasonable trial counsel would have engaged in the complained of conduct or omission. *See Chavez v. State*, 6 S.W. 3d 66, 71 (Tex. App.—San Antonio 1999, pet. ref'd); *Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992) (per curium).

When no reasonable trial strategy could justify trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record reflects the counsel's subjective reasons for acting as he did. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). In other words, Strickland does not require deference when there is no conceivable strategic purpose that would explain counsel's conduct. *Lyons*

v. McCotter, 770 F.2d 529, 534-35 (5th Cir. 1985). Holding counsel ineffective based on such a record is not speculation because the appellate record itself confirms the deficient performance. *Vasquez*, 830 S.W.2d at 951. This Court must look to the totality of the representation and the circumstances of the case in evaluating the effectiveness of counsel. *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

There are rare cases in which the record demonstrates beyond a preponderance of the evidence that trial counsel was ineffective. *Cannon v. State*, 252 S.W.3d 342, 349–50 (Tex. Crim. App. 2008). The record in Noguera's case meets this standard.

III. Analysis

A. Strickland Prong One—Counsel's Performance Fell Below an Objective Standard of Reasonableness

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. U.S. CONST., amend. VI. It prohibits the admission at trial of an absent witness's statements unless the witness is unavailable and the defendant had a prior chance to cross-examine her. *Crawford*, 541 U.S. at 53–54.

The prohibition stated in *Crawford* applies to "testimonial hearsay," *Davis*, 547 U.S. at 823. Testimonial hearsay excludes out of court testimonial

statements offered for their truth. *Smith*, 602 U.S. at 785. *Smith v. Arizona* makes clear that the Confrontation Clause applies in the context of forensic analysis when the out-of-court statement is the work of a non-testifying analyst, and that work is later relied upon for its truth by the testifying witness. *Smith*, 602 U.S. at 795. Powers testified that she reviewed the reports from the outsourced lab's analysts—which included their conclusions, as well as their worksheets, controls, and data—to form her opinion. 7 RR at 67.

Defense Counsel's objection—that the non-testifying analysts' report was "not credible and reliable," and information he did not think the court needed, preserved nothing for appeal. 7 RR at 75. An objection under the Sixth Amendment would have preserved the constitutional issue.

B. Strickland Prong Two—There Exists a Reasonable Probability that Absent Counsel's Error, the Result of the Proceeding Would have Been Different

Case law is clear that if a statement is being offered as the basis for a testifying expert's opinion, it is being offered for its truth. *Smith*, 602 U.S. at 795. Additionally, it is well understood that when laboratory testing is performed for the primary purpose of being used in future criminal proceedings, those statements are testimonial. *Smith* 602 U.S. at 800–01. The DNA analysis here was undertaken to match DNA collected in a sexual assault examination kit to

a potential perpetrator. The purpose was plainly for use in a future criminal proceeding. Had Defense Counsel objected under the Confrontation Clause, the trial court most likely would have admitted the testimony anyway, given that the court did allow testimony from analyst Moss despite the Confrontation objection (*see* Issue Two of this brief). But the court would have reversibly erred in overruling a confrontation objection.

With a preserved confrontation objection, this Court would have the ability to analyze the error under the Constitutional harmless error framework of Rule 44.2(a). Under 44.2(a), this Court would decide whether the error was a contributing factor in the outcome of the sentencing. *Scott*, 227 S.W.3d at 690. It is very likely this Court would have found the inadmissible evidence was not harmless beyond a reasonable doubt.

Looking at the *Scott* factors, the DNA report and testimony were of high importance to the State's punishment case. The evidence was not cumulative of other evidence. The judge heard evidence that Noguera had committed an aggravated robbery, robbery, and burglary, plus misdemeanor offenses of evading arrest, credit card abuse, unauthorized use of a motor vehicle, theft, and terroristic threat. 8 RR at St. Ex. 99. There was no other allegation of sexual assault or misconduct of any kind. The only evidence of sexual aberration was

the testimony of the alleged complainant, the nurse who collected that complainant's DNA, and the DNA analyst. 7 RR at 14, 44. The DNA results were the only scientific confirmation to the complainant's allegation. Both of these factors weigh heavily against the error being harmless.

The reviewing court can also consider the source of the error, the State, and how much the State emphasized the error. *Scott*, 227 S.W.3d at 690. In his closing argument, the prosecutor spent more time discussing the alleged sexual assault than any other single prior offense. He said that Noguera "violently rapes her at gunpoint before taking everything she has." 7 RR at 144. He noted that the complainant testified she willingly went into the back seat with Noguera and thought Noguera was getting out a condom, "but that's not good enough for him. He was not interested in consensual sex that night. He wanted to rape someone at gunpoint, and that's what he did because that's who he is." 7 RR at 145. The State told the court "The man who sits before you is a burglar, an armed robber, and a rapist. And he's proud of it. He wants you to know it." 7 RR at 147. These factors also weigh heavily against a finding of harmless error.

There is a reasonable probability that, had Defense Counsel made the proper objection—that the DNA analysts testimony violated the Confrontation

Clause—the result of this appeal would have been different, Therefore, Noguera's case should be remanded for a new punishment hearing.

PRAYER

Noguera prays this Court find that the trial court erred in denying his request for severance, which harmed him, and reverse his conviction and remand his case for a new trial. Alternatively, Noguera prays this Court finds that the trial court's error in the sentencing phase of his trial harmed him and his trial counsel provided ineffective assistance during the sentencing phase and remand his case for a new punishment hearing.

Respectfully submitted,

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A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was sent on the same date by first-class mail to:

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Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i). Exclusive of the portions exempted by Tex. R. App. Proc. 9.4 (i)(1), this brief contains 8,228 words printed in a proportionally spaced typeface.

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