No. 14-24-00834-CR

In the Court of Appeals
for the 14th Court of Appeals District
Houston, Texas

JOHNNY INED GONZALEZ,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 230th Judicial District Court
Harris County, Texas
Denise Bradley, Judge Presiding
In Cause No. 1666317

APPELLANT'S OPENING BRIEF

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230th Judicial District Court
Harris County, Texas

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STATEMENT OF THE CASE

Johnny Gonzalez was charged with "Continuous Sexual Abuse of Young Child." [CR 41] Tex. Penal Code § 21.02(b) (West 2017).

Gonzalez pleaded not guilty [2 RR 10, 3 RR 20]. A jury found him guilty of the charged offense [CR 475]; [5 RR 5–6]. Following a punishment hearing, the jury assessed punishment at thirty years' imprisonment [CR 485]; [6 RR 58]. The court sentenced Gonzalez to thirty years' confinement in "TDC" with credit for time served and remanded him to the custody of the Sheriff [6 RR 58–59].

This appeal followed [6 RR 59] [CR 493–94].

Issues Presented

1. **The Court allowed a witness to interpret and narrate photos of the complainant's nonverbal gestures to prove that Gonzalez committed the charged offenses in specific ways.** In addition to substantive proof of guilt, this hearsay testimony also established the consistency of the complainant's statements, corroborating her testimony. The inadmissible hearsay evidence substantially and injuriously effected the jury's verdict.

2. **Of the 128 returns for executed subpoenas in the record, 33 are duplicates and 32 do not reflect proper service.** This Court should modify the bill of costs to reflect the number of subpoena returns in the record that reflect valid service under the Code of Criminal Procedure.

STATEMENT OF FACTS

Johnny Gonzalez, Appellant, lived in Pasadena with his girlfriend, D.R., her son, A.R., and her daughter, C.R.[1] [3 RR 27, 30, 32–33]. A Thanksgiving incident and argument led to Gonzalez and D.R. breaking up [3 RR 41]. Earlier in the relationship, C.R. "took it hard" when it seemed like they were going to break up [3 RR 40], but when D.R. told C.R., who was nine at the time [3 RR 43],[2] she "shrugged her shoulders as if she didn't care," which was unusual to D.R. [3 RR 41].

D.R. said, "[w]hen she said she didn't care, I asked her if – she said, 'I don't care, It's whatever.' And I told her, 'Are you okay? You don't seem like it's affecting you as before.' She said, 'No.' And I asked her, 'Did anything happen for you not to care?' She said, 'Yes.'" [3 RR 42] D.R. claimed that after more questioning, C.R. said that Gonzalez had touched her where he shouldn't have, and then "[s]he drew a picture of her in shorts and Johnny touching her basically under her shorts and she wrote the word 'hurt.'" [3 RR 46]

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[1] Members of the household are referred to by their initials to protect their identity in compliance with Rule of Appellate Procedure 9.10(a)(3). C.R. is the complainant in this case.

[2] There was also testimony that she was seven years' old at the time [3 RR 34]. According to C.R.'s recitation of her birthdate, she was nine at the time of the charged offense in autumn 2019 [3 RR 225].

C.R. testified that Gonzalez started touching her around August, when football season started—A.R. was playing football that year [3 RR 233–34]. According to D.R., they all hung out in a backyard shed that Gonzalez made into his "man cave," but he and C.R. would be in the shed alone when D.R. would go into the house to use the restroom [3 RR 35, 37–38]. Apart from her trips to the restroom, D.R. said that C.R. and Gonzalez would be alone when she picked her son up from football [3 RR 68]. C.R. said the first time she remembered him doing something to her they were "in the back shed behind my house and he pulled my pants down and he started touching me." [3 RR 234] She alleged that the first time he touched her, "he would get his fingers, and he would put them up my – put it up my vagina," which hurt and "kind of burned." [3 RR 235] She said his fingers moved when he did it [3 RR 235]. According to her, that happened three or five times [3 RR 235–36]. Sometimes he wouldn't put his finger inside the vagina, he would just touch it [3 RR 235].

She testified that it happened a second time when they "were in the back shed and I was watching TV and then he changed the TV to Pornhub and he pulled my pants down and then he started touching me in my privates." [3 RR 236] She said that happened three to five times [3 RR 236–37].

She added that there were also times when he touched her on the breasts, with his hands, sometimes with her clothes on and sometimes off [3 RR 237–38]. She said he squeezed or twisted her nipples, and did that "like, seven times." [3 RR 238]

According to C.R., Gonzalez also exposed his penis to her "a lot," but she did not know how many times [3 RR 240]. She said he also placed his penis in her mouth and she felt, "like, things coming out," like "the white stuff," which felt gooey, would sometimes go in her mouth, but she also saw it go on the floor and told police officers exactly where it fell [3 RR 240–41, 266]. Additionally, she said he put his mouth and tongue on her vagina maybe three times [3 RR 244–45].

C.R. testified that the incidents with Gonzalez in the shed ended "around November," which she said she remembered because her father was getting married and she did not want to ruin it [3 RR 246–47]. She said that when she and her mother were alone, her mother asked if Johnny had ever touched her, and she said yes [3 RR 246].

According to D.R., upon C.R.'s December disclosure, she confronted Gonzalez and he denied it, rushed into the house, and tried to confront C.R., then went to the kitchen, grabbed a knife, and told her if she told anyone she was basically killing him [3 RR 48–49,

52] She said Gonzalez asked C.R. why she was lying, but she made no reply apart from shaking her head "no." [3 RR 59]

Gonzalez testified, admitting he was the same Johnny Gonzalez who was the subject of the trial [4 RR 7]. He explained that he and D.R. had a really big argument when the allegations were brought against him in which he said hurtful things about her son that he recognized he should not have said [4 RR 10–11]. On the same night, she confronted him with the allegations, which he denied and though he told her to call the police, she never did [4 RR 11]. He denied that he did any of the things alleged to C.R. and didn't know why she would make the accusations [4 RR 13–14, 16–18].

Gonzalez said he lived in the shed but did not hang out with C.R. there, and the only time she came to the shed she was with her mother [4 RR 15]. He said, "I don't like nobody in the back with me." [4 RR 15] On redirect, he testified that he and D.R. had found out that C.R. was watching pornography with her cousins at D.R.'s mother's house [4 RR 18].

Gonzalez's mother and sister both testified that C.R. has a reputation for being untruthful [4 RR 22, 26].

The police retrieved cuttings from the carpet in the shed and found no semen [3 RR 156] [State's Exhibit 33], but did detect DNA mixtures from three people and came to the conclusion that there

was, in some cases, very strong support for the propositions that D.R. and Gonzalez were contributors [3 RR 146–50]; [State's Exhibits 34, 35].

A "child abuse pediatrician" named Dhvani Shangvi testified that her patients at the Children's Assessment Center are referred to the clinic by either CPS or law enforcement, but her examinations differ from "SANE" exams as they are a "non-acute exam." [3 RR 193–94] Nevertheless, she repeated without objection C.R.'s allegations made to her [3 RR 203–08] for the purposes of an exam "focused less on finding body fluids or semen or something like that and more just on assessing for injuries and making sure that the child is doing okay and plugged in to any necessary referrals or resources." [3 RR 196] Ultimately, "[t]here was no exam finding that was diagnostic of sexual assault." [3 RR 217]

Following argument, the jury deliberated and found Gonzalez guilty of continuous sexual abuse of a child as charged in the indictment [5 RR 5–6].

At the punishment hearing, Gonzalez presented the testimony of seven current and former family members [6 RR 6–44]. After arguments, the jury assessed punishment at thirty years' confinement in TDCJ [6 RR 58] [CR 486–88. The Court pronounced sentence in open court [6 RR 58–59].

Summary of the Argument

Issue One

Testimony interpreting photos of the complainant's nonverbal gestures into words described how Gonzalez allegedly committed specific aspects of the charged offenses.

This evidence of out-of-court nonverbal statements was available to the jury both as substantive evidence of guilt and as corroborative evidence to show that the complainant had told a consistent story about abuse. The erroneous admission of this hearsay testimony affected the jury's deliberations, both as evidence relating to her credibility and as substantive evidence of guilt. Because these improperly admitted facts carried a substantial and injurious influence on the verdict, the conviction must be reversed so a fair trial may occur.

Issue Two

Gonzalez was assessed costs for, among other things, issuance of subpoenas. The record contains at least 33 duplicate subpoena returns and 32 returns that do not demonstrate email service in accordance with the terms of the law. Therefore, the bill of costs

should be re-calculated to reflect the correct costs for subpoenas with valid returns.

ARGUMENT

Issue One

1. Inadmissible hearsay testimony interpreting the meaning and significance of the complainant's gestures had a substantial and injurious effect or influence on the jury's verdict.

The court reversibly erred when it allowed Alicia Wooldridge to tell the jury the alleged meaning of the complainant's gestures portrayed in photographs from a forensic interview. Woolridge, a forensic interview supervisor at the Children's Advocacy Center (CAC), testified without objection that the forensic interview was conducted by another person. She testified that the complainant "was very responsive to questions" and "used a lot of gestures." [3 RR 179]

1.1. The claim was preserved by objections to the State's photos followed by objections to Woolridge's interpretation of the meaning of the gestures.

Over defense objections, the court admitted Exhibits 39–44 and 46, which were the photos from the interview [3 RR 173–75, 184]. Then, when the State asked what was being "demonstrated in the photo," Gonzalez objected "to anything outside of what's in the

picture, a description of any other actions . . . the objection is hearsay." [3 RR 186] Woolridge's testimony was that she was "demonstrating," and that "she had her hand around a hypothetical object, and she was moving her hand back and forth." [3 RR 186] The court refused a request for a running objection [3 RR 186]. When the State asked what the complainant was demonstrating in Exhibit 40, Woolridge answered that "she had her hand on the back of her head, and she was demonstrating her head being pushed into an object," at which point counsel again objected to hearsay and the court overruled the objection [3 RR 186–87]. After Woolridge testified that Exhibit 42 portrayed a demonstration of "I believe it was with her mouth, could feel or taste," the court granted the defense a running objection [3 RR 187–88]. In Exhibit 43, "she was also talking about sensory." [3 RR 188] In Exhibit 44, "she was demonstrating her clothes being removed." [3 RR 188] In Exhibit 46, "she was demonstrating a mouth and tongue being put on her body." [3 RR 188] The witness then testified that sensory questions are important because "it provides detail that – it's not usually coached to make up or children tend to not lie about. So sensory detail just gives us an opportunity to better understand what happened." [3 RR 190]

Counsel's repeated objections followed similar hearsay objections to the photos themselves and "let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992); Tex. R. App. P. 33.1(a), (c). While the objections sometimes followed the answers, all parties understood the defense's position and the court was in a position to take curative measures at the time of the objections. Gonzalez's hearsay concerns were well known throughout the presentation of the evidence and are preserved for appellate review.

1.2. Testimony describing nonverbal conduct was admitted to prove the charged conduct which, if true, could prove that Gonzalez committed the offenses in specific ways. The Court erred in overruling Gonzalez's objections to this inadmissible hearsay.

The rule against hearsay embraces any statement the declarant does not make while testifying at the trial and is offered as evidence to prove the truth of the matter asserted in the statement. Tex. R. Evid. 801(d). The rules define "statement" to mean "a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression." Tex. R. Evid. 801(a).

The State argued for admission of the photos over hearsay objection by claiming that the nonverbal conduct was not intended as a substitute for verbal expression. According to the prosecutor, "case law states that photos of gestures for forensic interviews can be admitted . . . because they're answering the question that the forensic interviewer is telling them, and the gesture is not a direct answer to what the forensic interview – it's actually what they are saying." [3 RR 174] The Court deferred a ruling and during a break reviewed a case referred to as *Hernandez v. State* from the First Court of Appeals from 2014 or 2015 and said, "[i]n light of my review of that case, I am overruling your hearsay objection to those exhibits; and they will be admitted." [3 RR 184]

Gonzalez could not locate a case matching that description, but did find a similar case from the Fourteenth Court of Appeals. In *Hearne*, the Court found no error in admission of photos from a CAC interview in which the complainant made gestures with her hands during the interview. *Hearne v. State*, Nos. 14-14-00501, 00502, & 00503-CR, 2015 WL 4930910 (Tex. App.—Houston [14th Dist.] Aug. 18, 2015) (not designated for publication). The Court observed that "[n]onverbal actions may be hearsay if they are 'assertions by conduct." *Hearne*, 2015 WL 4930910, at *2 (citing *Graham v. State*, 643 S.W.2d 920, 926–27 (Tex. Crim. App. 1981) (op. on reh'g.).

However, citing *Foster*, the Court concluded that "[b]ecause the gestures were being made along with the complainants' verbal statements about what appellant did to them, we cannot say that the gestures were intended as a substitute for verbal expression." *Hearne*, 2015 WL 4930910, at *2 (citing *Foster v. State*, 779 S.W.2d 845, 862 (Tex. Crim. App. 1989)). The Court concluded that the photographs were not out of court statements. *Id*. Gonzalez disputes this analysis, believing both that *Foster* was wrongly decided[3] and that it is distinguishable in this situation.[4]

Nevertheless, the *Hearne* and *Foster* rationale is inapplicable to Woolridge's testimony, which explicitly transformed photos of communicative gestures into out of court statements offered to prove that Gonzalez committed the charged offense in specific ways. Her

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[3] In *Foster*, the hearsay objection concerned police testimony that a witness in a capital murder pointed out to officers where they could find a shotgun ("[s]he gestured toward a stock tank"). *Foster v. State*, 779 S.W.2d 845, 861–62 (Tex. Crim. App. 1989)). The Court concluded this was offered as part of the circumstances of the recovery of physical evidence, not to prove that the defendant killed the victim with a shotgun. *Foster*, 779 S.W.2d at 863. This rationale has been criticized as faulty, since "the only reason that the officers searched the pond for the shotgun was because the witness told them, through the nonverbal assertion of pointing and making a throwing motion, that the shotgun had been disposed of there." Jeff Brown & Reece Rondon, Texas Rules of Evidence Handbook 841–42 n. 241(2025 ed.); Cathy Cochran, Texas Rules of Evidence Handbook 768 n. 42 (2003 ed.).

[4] In *Hearne* and in this case, the photos were not introduced to prove an issue ancillary to the alleged criminal act, as in *Foster* and the cases it cited, but to prove the complainant's specific allegations that the offense occurred and how it happened.

interpretations took assertions made as "nonverbal" conduct, translating them into statements with verbal expression. Tex. R. Evid. 801(a). The prosecutor made assurances that the questions would be what the complainant was doing rather than what the complainant said [3 RR 174], but that was not a meaningful distinction. As Woolridge testified, "[s]he was very responsive to questions. She used a lot of gestures." [3 RR 179]

- She "was demonstrating – she had her hand around a hypothetical object, and she was moving her hand back and forth." [Exhibit 39] [3 RR 186]
- "She had her hand on the back of her head, and she was demonstrating her head being pushed onto an object." [Exhibit 40] [3 RR 187]
- "She was demonstrating sensory about something coming out of an object." [Exhibit 41] [3 RR 187]
- "It was also sensory, and she was demonstrating what her – I believe it was with her mouth, could feel or taste." [Exhibit 42] [3 RR 187]
- "She was demonstrating her clothes being removed." [Exhibit 44] [3 RR 188]
- "She was demonstrating a mouth and tongue being put in her body." [Exhibit 46] [3 RR 188]

These were all out of court "statements" describing alleged incidents of abuse, which is the only way they could have a "tendency to make a fact more or less probable than it would be without the evidence." Tex. R. Evid. 401. Why else would they be admissible? In *Graham*, the victim of a shooting was shown several photographs and asked to identify the shooter. A police officer

testified that when she saw Graham's photograph, "[s]he made a shooting motion with her hand, cocking her thumb with her finger pointed out." *Graham v. State*, 643 S.W.2d 920, 926 (Tex. Crim. App. 1983) (op. on reh'g.). The testimony about the actions and conduct "was only significant as indicating her belief" as to who shot her. The Court held that "[s]uch conduct was assertive in nature and testimony concerning that conduct was hearsay" and the court erred to overrule the defense's hearsay objection. *Graham*, 643 S.W.2d at 927–28.

Similarly, the First Court of Appeals concluded that testimony about a "stabbing motion" made by a witness in a capital murder case was inadmissible hearsay. *Clabon v. State*, 111 S.W.3d 805, 807–09 (Tex. App.—Houston [1st Dist.] 2003). The descriptions of the hand motions "were given in order to indicate that appellant had admitted knowing information about the murders" to the declarant. *Clabon*, 111 S.W.3d at 808. In *Clabon*, the evidence was significant to the opolice because the part of the body indicated by the motions were the "exact areas of the body" in which the victim had been stabbed. *Clabon*, 111 S.W.3d at 807 . Accordingly, the evidence served a dual purpose, as it was an admission with corroborating details.

In contrast, the admissible evidence in *Foster* was not, in the Court's view, an assertion that anyone put the shotgun in the tank and was not a substitute for verbal expression where the declarant's response to a specific question was non-verbal. As support for this theory, and in contrast to *Graham*, the Court cited *Nix*, in which a rape complainant pointed out to officers *where* she had been assaulted. *Foster*, 779 S.W.2d at 862 (citing *Nix v. State*, 150 Tex. Crim. 66, 198 S.W.2d 907 (1946)). The Court explained in *Nix* that the evidence was admissible to prove that the victim pointed out a place where police located physical evidence associated with the crime. *Id*. The Court reasoned that "[t]he girl was not asserting who raped her, or what the car looked like, or what time it happened, or any other fact necessary to be proven at trial in the case against the defendant." *Id*.

In this case, Appellant was charged with an offense that involved commission of indecency with a child and aggravated sexual assault of a child [CR 41]. The charge allowed proof of aggravated sexual assault of a child by, among other things, penetration of the anus or sexual organ of the child by any means, penetration of the child's mouth by the defendant's sexual organ, and by causing the mouth of the child to contact the anus or sexual organ of another person, including Gonzalez [CR 464–65, 467]. The charge allowed proof of

indecency with a child by any person's touching of the child's anus or any part of her genitals, or by the touching of any part of the child's body with any part of the genitals [CR 466–67]. The charge also allowed conviction on lesser charges of aggravated assault by a child and indecency by contact with proof of penetration of her sexual organ by any means, by contact between Gonzalez's sexual organ and C.R.'s mouth, or by touching C.R.'s sexual organ [CR 468].

Testimony describing nonverbal conduct was admitted to prove specific actions Gonzalez allegedly took that, if true, would tend to prove that he committed the offenses in specific ways. This was inadmissible hearsay, and the Court erred in overruling Gonzalez's objections to it.

1.3. Erroneous admission of Woolridge's testimony interpreting the meaning of the complainant's nonverbal conduct had a substantial and injurious effect or influence on the jury's verdict.

The trial court's erroneous decision to allow Woolridge to describe C.M.'s gestures harmed Gonzalez. Improper admission of hearsay is non-constitutional error. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

Because the erroneous admission of evidence is not constitutional error, the reviewing court may reverse only if the error affected the

appellant's substantial rights. Tex. R. App. P. 44.2(b); *Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000). 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).

An error does not affect a substantial right if the reviewing court, "after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). The propriety of the outcome, whether the evidence was sufficient, is an inadequate measure of harm under Rule 44.2(b). The harmless-error analysis must determine whether the admission of the evidence influenced the jury. *Solomon*, 49 S.W.3d at 365.

The sufficiency of the complainant's testimony turns on credibility. Only if the jury believes her testimony beyond a reasonable doubt may a jury convict solely based on that testimony, but it must believe her first. So the correct harm analysis under Rule 44.2(b) turns on whether improperly admitted facts affected the jury's decision about the child's credibility. The State acknowledged as much in jury selection, informing the panel that it wouldn't be fair for her just to play the video of the child's interview, stating, "[i]t's my job to bring you maybe the interviewer of the child and ask those

questions so that you guys can judge the credibility of those witnesses for yourself." [2 RR 70]

In this case, the child's testimony was the only substantive evidence of guilt, but it was repeated through an echo chamber of the outcry witness [3 RR 26–74], Woolridge's descriptions of a CAC interview she did not conduct [3 RR 157–91], and a pediatrician [3 RR 192–222]. The inadmissible hearsay played two roles—not only was it used as substantive evidence of guilt, it also served as corroborative evidence to convince the jury that the child was credible.

Throughout the proceedings, the State focused on bolstering the complainant's credibility.

In jury selection, the panel was prepared to consider "fuzzy" memories through the prism of whether the details go to the elements to be proven, and if not, to "just throw it away." [2 RR 83] Here, the details Woolridge elaborated on illuminated the "how" of the elements. Having discussed how jurors may consider "consistency" in determining credibility during jury selection, the State's opening statement previewed the testimony it would present and concluded by observing that the police brought the case to the District Attorney's Office only "after reviewing all the information and seeing consistencies of everything." [3 RR 24] The State

returned to this, asking Detective Carnley whether he found the complaining witness to be consistent throughout the forensic interview, medical records, and the outcry statements [3 RR 105].[5]

The State returned to these themes in closing, setting up its concluding argument, to be given from the complainant's perspective (and in her voice), by telling the jurors: "I did not lie to you guys. The only argument is that whether or not you believe [C.M.] and [C.M.] is enough. Again, just icing on the cake to corroborate what she was saying." [4 RR 60–61] "She told the forensic interviewer everything." [4 RR 62]

The hearsay descriptions of C.M.'s gestures were potent evidence, both substantive and corroborative. Their improper admission for the jury's consideration could only influence the jury, having a substantial and injurious effect or influence in determining the jury's verdict.

[5] The defense successfully objected to the question, but the jury was not instructed to disregard [3 RR 105].

Issue Two

2. Modification of assessed court costs is appropriate as the cost assessed for returned subpoenas is not supported by the record.

Gonzalez has discovered non-reversible error in the trial court's judgment concerning the assessment of costs and brings it to the Court's attention so it may make appropriate modifications.

This Court has the authority to modify the trial court's judgment to make the record speak the truth when it has the necessary information to do so. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

A defendant may challenge the costs imposed in a bill of costs for the first time on appeal when the costs are not imposed in open court and the judgment does not contain an itemization of the costs. *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016). Courts may modify a bill of costs on appeal because the bill of costs obligates an appellant to pay the items listed. *Jones v. State*, 691 S.W.3d 671, 679 (Tex. App.—Houston [14th Dist.] 2024, pet ref'd).

A court of appeals may modify the bill of costs independent of finding errors in the trial court's judgment. *Pruitt v. State*, 646 S.W.3d 879, 883 (Tex. App.—Amarillo 2022); *Bryant v. State*, 642

S.W.3d 847, 850 (Tex. App.—Waco 2021); *Dority v. State*, 631 S.W.3d 779, 794 (Tex. App.—Eastland 2021); *see also* Tex. R. App. P. 43.6 (a court of appeals "may make any … appropriate order that the law and the nature of the case require").

2.1. Charges for Law Enforcement Subpoenas must reflect properly served subpoenas.

A court is authorized to assess a $5 reimbursement fee "for summoning a witness" . . . "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(3). But a cost may not be imposed for a service not performed. *Id.*; Tex. Code Crim. Proc. art. 103.002.

Houston courts of appeal have concluded that when nothing in the record demonstrates that a peace officer served a subpoena on a witness or conveyed or attached a witness, there is no basis for assessing fees related to summoning, attaching, or conveying witnesses. *Rhodes v. State*, 676 S.W.3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023)[6] (striking fees for "attach/convey witness" where there was no evidence that a peace officer served a subpoena on any witness or conveyed or attached any witness);

[6] *Rhodes* was abrogated on other grounds in *Bradshaw v. State*, 707 S.W.3d 412 (Tex. Crim. App. 2024). In *Rhodes*, the Court suggested that the correct name for *Rhodes* is *Junior v. State*. *Bradshaw*, 707 S.W.3d at 415 n.1. Gonzalez has cited the case as *Rhodes* since that is how it is listed in Westlaw and, according to the Court of Criminal Appeals, in Lexis as well.

Robles v. State, No. 01-16-00199-CR, 2018 WL 1056482, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2018) (not designated for publication) (striking $10 of $25 witness fee when record showed that two of five subpoenas were never served).

Thus, for a court to assess a $5 witness-summoning fee, the record must show two things: 1) valid service of a subpoena 2) by a peace officer.

A criminal subpoena "may summon one or more persons to appear" in court to testify or to bring specified evidence "on a specified day." Tex. Code Crim. Proc. arts. 24.01(a), 24.02. A criminal subpoena is served in one of four ways: reading the subpoena in the hearing of the witness; delivering a copy of the subpoena to the witness; electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness unless [two exceptions apply]. Tex. Code Crim. Proc. art. 24.04(a).

The return of the subpoena must show either 1) the time and manner of service, if read or delivered to the witness; 2) the acknowledgment of receipt, if emailed; 3) the return receipt, if sent

by certified mail; or 4) the cause of failure to serve, if the subpoena is not served. Tex. Code Crim. Proc. art. 24.04(b).

Service not made in accordance with the statute is invalid. *Ex parte Terrell*, 95 S.W. 536, 537–38 (Tex. Crim. App. 1906) (applying the direct predecessor of the modern art. 24.04); *see also Fuller v. State*, No. 14-94-00064-CR, 1996 WL 11176, at *1–2 (Tex. App.—Houston [14th Dist.] Jan. 11, 1996) (not designated for publication) (witness was not validly served to authorize a writ of attachment when the record did not show compliance with the plain statutory methods of service).

2.1.1. The charges for the subpoenas do not match the number of validly executed subpoenas in the record.

The "Criminal Bill of Cost" in this case reflects a charge of $480 for "LEA – Summon Witness." [CR 489] At $5 per return, that equals 96 validly executed subpoenas. By Gonzalez's count, the record contains 128 subpoenas marked as "executed," so it appears the clerk did not count all of them, and in fact, the record contains many (33) duplicate returns, which comes close to explaining the difference of 32. In addition to the duplicate returns, Gonzalez has also identified many returns that do not demonstrate facially valid proof of service.

2.1.1.1. The acknowledgment of receipt for 32 emailed subpoenas required by Article 24.04(a)(3) does not demonstrate they were sent *to the witness* as valid service would require.

Twenty-two subpoena returns that were "executed" do not show that the individual witness was served by the Officer's subpoena email.

Sixteen subpoenas addressed to the Pasadena Police Department have returns indicating that the Department received them and was processing them in accordance with the Texas Public Information Act. In some cases, the return said that the "request" would be forwarded to the relevant department [CR 102–03; 114–15; 137–38; 155–56; 191–92; 201–02; 238–37; 271; 299; 308; 326–27; 336–37; 357–58; 389–90; 434; 436].

Three returns show that they were emailed to "IFS Administrative Services." [CR 124; 316; 352] The returns contain no information suggesting that the witness was actually served.

Three more returns demonstrate that they were delivered to an automated inbox at "Public Health Pediatrics" [CR 329–30; 360–61; 373–74]. Though the returns state that the inbox "is the official recipient for all subpoenas and court information for the Texas Children's Hospital Child Protection Team Only," they contain no information proving that the individual witnesses were served.

None of the returns bear any evidence of a receipt that could enable verification of the person acknowledging receipt, nor do they show they were delivered to any witness. Tex. Code Crim. Proc. art. 24.04(a)(3), (b), (c).

Finally, in addition to the 22 subpoenas with facially insufficient returns, many returns state only that the subpoenas were served by email and, as proof of service, state "Emailed to witness and/or designated recipient." Gonzalez has reviewed all of the subpoena applications for returns with these minimal notes and isolated ten returns in which the subpoena application does not indicate that the subpoenas would be sent to a unique email facially associated with the witness to be subpoenaed [CR 243–47; 266–75; 276–78, 281; 338–40; 391–93; 401–04, 413 438]. In these cases, there is no evidence that the witness was actually served with the subpoena since the email listed was a generic organizational email. Again, there is no way to verify that the witness was served. Tex. Code Crim. Proc. art. 24.04(a)(3), (b), (c).

In total, 32 subpoenas in the Clerk's Record do not show that a witness was properly served and, therefore, cannot support a charge for their issuance and service.

2.1.1.2. The record contains 33 duplicate returns, inflating the potential count of issued and served subpoenas.

Gonzalez found 25 subpoena returns that included multiple copies [CR 132–33; 170–71; 175–76; 185–186; 194–95; 256–57; 259–60; 262–63; 268–69; 274–75; 278–79; 281–82; 286–87; 289–90; 292–93; 295–96; 393–96; 404–05; 407–08; 410–11; 413–14; 416–20; 422–23; 425–29; 431–32; 438–39; 444–45]. In most cases, there was one duplicate return, but in two cases, there were four duplicate returns in the record. All told, Gonzalez counts 33 duplicate subpoena returns. Those duplicates cannot support a charge for execution of a subpoena since no "service" was performed. for summoning a witness" "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. arts. 102.011(a)(3); 103.002.

2.2. This Court should adjust the bill of costs to reflect the subpoenas in the record that show proper service on their face.

The record, by Gonzalez's count, contains 128 returns for "executed" subpoenas. Counting 33 duplicates and 32 returns that do not reflect proper service, the maximum number of validly served subpoenas in the record is 73, meaning that the maximum cost assessed for "LEA – Summon Witness" is $365, rather than the $480 assessed [CR 489].

Gonzalez asks this Court to modify the bill of costs accordingly with a maximum allowable charge of $360 for "LEA – Summon Witness."

PRAYER

Johnny Gonzalez prays that this Honorable Court reverse the trial court's judgment and remand for a new trial. Additionally, he prays that this Honorable Court modify the assessment of costs to properly reflect the subpoenas issued and returned in compliance with the Code of Criminal Procedure.

Respectfully submitted,

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/s/Michael S. Falkenberg

Michael S. Falkenberg

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