NO. 14-24-00462-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

RYAN VINCENT ROSSI

Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1721699
From the 482nd District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

DAUCIE SCHINDLER
Assistant Public Defender
Harris County, Texas
TBN. 24013495
1310 Prairie St., 13th floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278

Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Ryan Vincent Rossi 1226 North Pointe Dr. Mooresville, IN 46158
TRIAL PROSECUTORS:	Mr. Steven L. Belt SBT No. 24094274 Ms. Elizabeth Buss Assistant District Attorneys Harris County, Texas 1201 Franklin, Suite 600 Houston, Texas 77002
DEFENSE COUNSEL AT TRIAL:	Mr. James Tucker Graves Attorney at Law SBT No. 00785925 2751 South Loop 336 W, Ste. B Houston, Texas 77304
PRESIDING JUDGE:	Hon. Veronica Nelson 182nd District Court Harris County, Texas 1201 Franklin Avenue, 17th floor Houston, Texas 77002
COUNSEL FOR APPELLANT ON APPEAL:	Daucie Schindler Assistant Public Defender Harris County, Texas 1310 Prairie Street, 13th floor Houston, Texas 77002

Table of Contents

INDEX OF AUTHORITIES

Cases:

Federal:

State:

Statutes:

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney requests oral argument.

STATEMENT OF THE CASE

Mr. Rossi was charged with sexual assault of a child with a deviate sexual intercourse allegation. The incident was alleged to have occurred on July 13, 2020. (C.R. at 29). On April 14, 2023, he entered a plea of not guilty and proceeded to trial by jury. On April 24, 2023, after several days of deliberation, a mistrial was granted when the jury was unable to reach a verdict. (9 R.R. at 7).

On June 6, 2024, he again entered a plea of not guilty and proceeded to trial by jury. (14 R.R. at 15; C.R. 164). On June 17, 2024, the jury found Mr. Rossi guilty of the lesser included offense of indecency with a child by exposure. (19 R.R. at 4; C.R. at 164). After finding him guilty, the jury sentenced Mr. Rossi to seven (7) years in the Institutional Division of the Texas Department of Criminal Justice. (20 R.R. at 38-39; C.R. at 164). Mr. Rossi filed timely notice of appeal, and the Harris County Public Defender's Office was appointed to represent him. (C.R. at 177-180). Undersigned counsel was assigned to this case on August 16, 2024.

ISSUE PRESENTED

DID APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO PREJUDICE FROM THE FAILURE OF COUNSEL TO LIMIT THE AMOUNT OF HEARSAY ADMITTED AND REQUEST A PRETRIAL HEARING AS REQUIRED BY ARTICLE 38.072, §2(B)(2)?

STATEMENT OF FACTS

Allyssa Rolen grew up in Columbia, Louisiana, but moved to Houston in 2014. She lived initially in Baytown with her son, but later, in December 2018, she moved to the Village on the Lake Apartments in Clear Lake. (15 R.R. at 14-21; State's Exhibits 1-8). Rolen described life at the Village on the Lake Apartments including a family-friendly pool where she, her niece, Ava, and her son would often swim. (15 R.R.at 24). Ava came from Arkansas in May 2020 to help babysit her son, Jayden, during the COVID-19 pandemic. (15 R.R. at 25). During that summer, Ava and Jayden met JG at the pool. JG had recently moved from Indiana to Texas due to a strained relationship with her mother. She was living with Appellant who was her estranged father. JG was around the same age as Ava. (15 R.R. at 26-27).

Ava and JG quickly became friends. (15 R.R. at 28-31; State's Exhibit 9). Rolen described forming a maternal bond with JG that developed soon after they met, particularly after JG confided about her troubled relationship with her mother. Rolen related to JG's emotional struggles because of her own issues with her father. (15 R.R. at 34-36). Despite the short timeframe, Rolen believed that both she and JG viewed their relationship as mother-daughter-like. (15 R.R. at 39-40).

Rolen first met Appellant about two weeks after meeting JG. She wanted to meet him because JG had been spending significant time at her place and she felt it was important to introduce herself. (15 R.R. at 43). According to Rolen, Appellant lived in a corner unit near her own. She described his apartment as "decent" noting that although JG had complained about doing chores at her father's house, she had her own bedroom when Peyton was not there. (15 R.R. at 38, 44-45).

During the visit, when JG walked past Appellant, who was seated on the couch, he slapped her on the buttocks hard enough to produce a loud sound. (15 R.R. at 46-48). Rolen described what she observed as troubling given their father-daughter relationship. Appellant did not say anything before slapping JG but laughed afterward. (15 R.R. at 49-51). A second incident occurred when Appellant picked JG up from the pool. As they left the pool area, he slapped her butt again. JG jumped and said "stop." (15 R.R. at 52-53).

Because of her discomfort, Rolen refused to let Ava go into Appellant's apartment. She described Appellant as "creepy." (15 R.R. at 56). Rolan felt Appellant was hitting on her when he suggested they hang out while the kids stay at her apartment—behavior she interpreted as flirtatious. (15 R.R. at 57-58). Nonetheless, Rolen kept in contact with Appellant while JG was with her. Most of their messages were about JG's whereabouts, but she eventually received what she interpreted as inappropriate messages from him. (15 R.R. at 60-66; State's Exhibits 11-18). Rolen

tried to maintain civility and communication with Appellant. This was her strategy to stay close and protect JG. (15 R.R. at 69-73).

In early July, JG informed Rolen of alleged inappropriate behavior toward her by Appellant. This prompted Rolen to call JG's mother, Emily, because she wanted to keep JG safe without triggering CPS involvement. Rolen informed Emily that she was going to contact the Pasadena Police Department. (15 R.R. at 99-100). Two officers responded, but Rolen wasn't sure whether they were child abuse specialists. The officers spoke with her and separately interviewed JG. Rolen made clear that her young son was not allowed to be interviewed. (15 R.R. At 101-02). The police did not collect any physical evidence from her apartment and sometime later, they went to Appellant's apartment. (15 R.R. at 103).

After the police arrived, CPS was notified. CPS coordinated with JG's mother, who granted permission for Rolen to keep JG temporarily. (15 R.R at 104-05). Rolen paid out of pocket to fly Emily to Texas and to fly them both back to Indiana. JG strongly resisted returning to her mother, exhibiting severe anxiety, crying, and expressing a desire to stay with Rolen. (15 R.R at 109-10).

Rolen sent an email on July 14, 2020, the same day JG made the final disclosure, to Emily. She wanted to document what she had witnessed. (15 R.R. at 114-16; State's Exhinit19). In the email, Rolen wrote that JG felt unwelcome in her father's home. Appellant belittled JG, he told her she would "not become anything in life," and compared her unfavorably to his other daughter. He and Casey screamed at JG, called

her vulgar names including "fat" and "cocksucker," and threatened to send her back to her mother daily—even over minor issues like forgetting to water a plant. JG spent most days cleaning the apartment and packed everything alone in preparation for a move. She feared returning to her mother's home because she associated it with falling into "the wrong crowd." (15 R.R. at 117-18).

Rolen further recounted in the email that on July 3rd, JG appeared visibly upset and swore Rolen to secrecy. She described how JG told her that Appellant entered her room, began discussing sex again, and then exposed his penis, asking whether JG had licked "here or here." She also disclosed that JG told her that Appellant had allegedly been video recording her in the shower, brushing off confrontations by saying it was a joke. She included the allegation that Appellant often told JG she wasn't his daughter and pressured her to sleep in his bed. (15 R.R. at 119-20). Rolen identified Appellant in court. (15 R.R. at 121).

Emily, JG's mother, was born in a small town in Indiana. Her childhood was described as troubled. She eventually moved in with her paternal grandmother due to her unhealthy home environment. (16 R.R. at 14). She met Appellant through a mutual friend who had dated him in the past. Emily and Appellant entered a relationship during her high school years, and she gave birth to their daughter, JG, at the age of 19. Appellant began a relationship with someone else, Casey, after JG's birth. JG's birth certificate listed Emily as the mother, but Appellant was not listed as the father due to relational complexities at the time. (16 R.R. at 17). She initially kept him away from

JG. Emily finally allowed Appellant to see JG when she was about two to three months old. (16 R.R. at 18). Over the following years, Appellant's interactions with JG were sporadic. Most visits centered around holidays or birthdays. Driven by the desire for a father figure, JG had begun to communicate with him directly after getting her first phone. (16 R.R. at 20).

Brian entered Emily and JG's lives when JG was around a year and a half old. Emily and Brian eventually married and Brian legally adopted JG. (16 R.R. at 22). Emily divorced Brian in 2012 after separating in 2011. This divorce was devastating for JG especially since Brian, who had adopted her, did not remain in her life afterward. Emily described the emotional toll this abandonment had on JG, prompting her to start therapy to cope with the loss of her adoptive father and other members of his family. (16 R.R. at 24).

Emily rejected the notion that her home had a "parade of men" and affirmed she had structured rules in her household. She described a routine of homework before TV, limited electronics, and requiring permission for things. JG had her own cell phone and would communicate with Appellant using it. Emily would sometimes take the phone away as a form of discipline for typical teenage behaviors. (16 R.R. at 25). Emily admitted to being physically abusive toward JG, including hitting, kicking, and pushing her into walls. She attributed the abuse to her lack of a healthy parenting example growing up. On one occasion, JG when revealed to Emily that a boy named Mikey had attempted to rape her. (16 R.R. at 27). This revelation occurred during a physical

altercation between Emily and JG so Emily immediately stopped the abuse and drove to confront Mikey and his father. After speaking with them, she did not believe JG's claim, and JG retracted the allegation shortly thereafter. (16 R.R. at 29).

Due to ongoing behavioral issues, Emily first sent JG to stay with Appellant's mother over Thanksgiving break, but ultimately Appellant and his partner Casey took JG to live with them in Texas. Emily believed this would be beneficial for JG, who had lost a previous father figure and was struggling emotionally. (16 R.R. at 30). JG moved to Houston around Thanksgiving of 2019. Appellant and Casey drove to Indiana to pick her up and bring her back. Appellant and Casey's daughter Peyton also lived in the home. According to Emily, Casey disliked both her and JG. (16 R.R. at 32).

Emily had limited communication with JG during this time. She could only contact her daughter through Appellant or Casey. JG had no social media presence, further isolating her from her mother. (16 R.R. at 33). Emily sent JG a care package that included a journal for self-expression. Soon after, Emily received a distressing phone call from Allyssa Rolen, who told her that JG had confided she was being abused by Appellant. This news caused Emily to have a panic attack. She called 911 out of shock and concern. (16 R.R. at 35). Feeling guilty and terrified for JG's safety, Emily immediately flew to Texas. Upon arrival, she met with a detective and CPS, who initiated an investigation into JG's allegations. (16 R.R.at 37). According to Emily, CPS found reason to believe JG's sexual abuse allegations against Appellant were credible.

After the investigations by both CPS and police, Emily brought JG back home to Indiana. (16 R.R. at 38). Reintegration into daily life took months. Emily recalled JG's 16th birthday party on April 10, 2021, as a bright moment. However, while setting up for the party, JG told Emily she needed to share something serious. She was highly nervous and emotional. Emily suspected it was related to her past abuse, and JG confirmed her suspicions by beginning to disclose additional details about what had happened with Appellant once her friends had left. (16 R.R. at 40-43). JG disclosed new incidents and Emily believed she was the first person with whom JG confided in about these incidents. (16 R.R. at 45-48; State's Exhibits 23 and 24). Emily documented the details of JG's allegations by typing them as she recounted the events. She alleged that she made no alterations and took multiple breaks. (16 R.R. at 51).

Despite JG having previously made a false allegation against Mikey, Emily maintained confidence in her current account. (16 R.R. at 52). Emily confirmed that JG could have returned home at any time while living in Texas and that their relationship, though strained at the time, was not completely severed. (16 R.R. at 53). On cross-examination, Emily admitted that Jillian did not have her phone when leaving for Texas due to disciplinary actions related to inappropriate social media use. (16 R.R. at 57). Appellant enforced a strict no-phone, no-social-media policy in his home, and Emily agreed to abide by his rules while JG lived there. (16 R.R. at 58).

JG testified regarding her difficult childhood, marked by an abusive mother. She admitted that she often clashed with her mother and had even called the police multiple

times for protection. She acknowledged making poor choices as a teenager but maintained that they were typical mistakes for someone her age. (16 R.R. at 131-143). Her biological father, Appellant, had not been part of her life until she was around seven or eight years old. Before that, she had only known her adoptive father, Brian, whom she loved deeply. When she was nine years old, Brian left her and her mother and was no longer in her life. This was a painful rejection she still felt. After that, Jillian lived with her mother and her mother's various boyfriends, feeling abandoned and unwanted. (16 R.R. at 145-151). By 2019, things between her and her mother worsened. That Thanksgiving, her mother dropped her off at her paternal grandmother's house—a woman JG had never considered family. She stayed there for about a week before Appellant picked her up to take her to Texas. She described feeling awkward and nervous about moving in with a near-stranger. (16 R.R. at 152-154).

Once in Texas, JG struggled to fit into her new household. She believed that Peyton, her half-sister, was treated as the favorite. Appellant was a strict disciplinarian—she had to earn everything she wanted, and if she failed, it was taken away. Unlike Peyton, who was rewarded for following the rules, JG complained of having privileges revoked, including her birth control shot and orthodontic care. According to JG, she removed her braces herself after being denied a visit to the orthodontist. (16 R.R. at 154-158).

JG accused Appellant of inappropriate sexual behavior, including slapping her bottom in front of others and making her show him her tan lines. (16 R.R. at 160-61).

She recalled an incident that occurred in June 2020 and a second about ten days later. The first incident occurred when Appellant exposed himself and engaged in inappropriate behavior in front of her. The second occurred when JG voluntarily entered his room—believing it was the coolest room in the house—but found herself in an even worse situation. JG explained that she initially kept quiet about the incidents because she was unsure of what to do. She eventually told Allyssa. However, she did not immediately tell her mother or the authorities, fearing no one would believe her. It was only after several conversations with trusted individuals that the finally reported the abuse. (16 R.R. at 170-79).

Claudia Gonzales, an employee at the Children's Assessment Center (CAC), detailed her involvement in a forensic interview with JG. (15 R.R. at 194-96). She emphasized that her role was not to determine the truthfulness of the child's claims but to facilitate a neutral environment for disclosure. (15 R.R. at 190-91). During cross-examination, Gonzales admitted that she had not reviewed other statements and was relying solely on the interview she conducted. (15 R.R. at 196). She did not know if JG ever changed her story. (15 R.R. at 154-56).

Dr. Rosa Macklin-Hinkle, an expert in child sexual abuse with the CAC, confirmed that she had testified in over a dozen trials, always for the prosecution. (15 R.R. at 209-15). She clarified that she did not determine whether a child was lying or whether an actual assault had occurred. Instead, her role was to educate the jury about the common dynamics of sexual abuse and trauma because some responses by children

might seem confusing or unexpected. (15 R.R. at 210-11). She claimed to follow the most currently accepted methodologies in psychology to assess and support victims. (15 R.R. at 208-09). During cross-examination, she admitted to relying on "soft science" rather than hard, empirical data. She frequently used phrases like "it could be." (15 R.R. at 240-41). Dr. Macklin-Hinkle acknowledged that prior false allegations could be a vulnerability factor in future abuse cases, but she had no knowledge of ever having personally dealt with a client who had made such claims. (15 R.R. at 248-49).

Lori Flanders, an employee in the leasing office at Village on the Lake Apartments, described her minimal interactions with Appellant. Most of her contact had been with Casey who handled their interactions at the leasing office. She confirmed that she saw Appellant from time to time but did not have any meaningful interactions with him. (15 R.R. at 252-261). She did recall a moment when Appellant made a comment about his daughter that stood out to her. When asked about Casey's reaction, she stated that Casey simply told him to "shut up." (15 R.R. at 261-62). On cross-examination, she admitted to having no knowledge of any specific details of what JG had alleged. (15 R.R. at 261).

Molly McCutcheon, another employee in the leasing office at Village on the Lake Apartments, testified regarding her interactions with Appellant. (15 R.R. at 262-264). She had limited interactions with Appellant at the leasing office. She remembered an inappropriate comment he had made to her, but McCutcheon admitted that she did not remember every detail of the conversation. (15 R.R. at 268-69). Though she couldn't

remember his exact facial expression at the time, she remembered feeling that his words were inappropriate and unwelcome. (15 R.R. at 269).

Appellant would testify on his own behalf, denying the allegations. (17 R.R. at 68-131). Both Casey and Peyton would testify on his behalf, also denying the allegations. (17 R.R. at 205-276). Bryan G would testify that he discontinued visitation with JG because she is manipulative and prone to lying. (17 R.R. at 301-304).

SUMMARY OF THE ARGUMENT

The record demonstrates trial counsel's representation fell below objective standards of reasonableness, and the deficient performance caused extreme prejudice to appellant when trial counsel failed to request a pretrial hearing as required by article 38.072, §2(B)(2) of the Texas Code of Criminal Procedure.

ARGUMENT: ISSUE ONE

DID APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO PREJUDICE FROM THE FAILURE OF COUNSEL TO LIMIT THE AMOUNT OF HEARSAY ADMITTED AND REQUEST A PRETRIAL HEARING AS REQUIRED BY ARTICLE 38.072, §2(B)(2)?

A. Standard of Review and Applicable Law on Ineffective Assistance

Whether counsel has rendered a defendant's constitutional right to effective assistance is reviewed under the two-pronged test set out in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) (adopting the Strickland standard).

To prevail on an ineffective assistance claim, appellant must show (1) counsel's representation fell below an objective standard of reasonableness and (2) a reasonable

probability exists that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. 668, 687 (1984); *Andrews v. State*, 159 S.W.3d 98, 101-02 (Tex. Crim. App. 2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Andrews*, 159 S.W.3d at 102.

The burden of proof in on the claimant to show by a preponderance of evidence counsel was ineffective. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). There is a presumption that counsel's conduct falls within a wide range of reasonable professional assistance that can be overcome by a showing of counsel's conduct that no competent attorney would have engaged in. *Andrews*, 159 S.W.3d at 101.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Whether the challenged conduct was strategic is a question of fact; whether counsel's conduct was objectively reasonable however is not. *Strickland*, 466 U.S. at 698. Both the performance and prejudice parts of an ineffectiveness inquiry are mixed questions of law and fact. Even a single error on counsel's part may be sufficient to warrant a finding of ineffective assistance. *Andrews*, 159 S.W.3d at 103.

In the rare case in which trial counsel's ineffectiveness is apparent from the trial record, an appellate court may address and dispose of the claim on direct appeal.

Massaro v. United States, 538 U.S. 500, 508 (2003); *Robinson v. State*, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000). Allowing this disposition alleviates the unnecessary judicial redundancy and burden on the trial courts of holding additional hearings in writ applications when no additional evidence is necessary to the ultimate disposition of the case. *Thompson v. State*, 9 S.W.3d 808, 817 (Tex. Crim. App. 1999).

An Appellant may prevail on ineffective assistance claim by providing a record that affirmatively demonstrates that counsel's performance was not based on sound trial strategy. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). If "no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as [he] did." *Andrews*, 159 S.W.3d at 102. A single egregious error of omission or commission by counsel has been held to constitute ineffective assistance, even in the absence of a record setting forth counsel's reasons for the challenged conduct. *Vasquez v. state*, 830 S.W.2d 948, 950-51 (Tex. Crim. App. 1992); *McKinny v. State*, 76 S.W.3d 463, 470-71 (Tex. App. -Houston [1st Dist.] 2002, no pet.).

B. Deficient Conduct

1. Statutory Requirements for Outcry Hearsay to be Admissible

Generally, hearsay statements are inadmissible except as provided by statute or other rule. Tex. R. Evid. 802; see Tex. R. Evid. 803 (providing exceptions). Texas Code of Criminal Procedure article 38.072 provides a statutory exception that allows the State

to introduce outcry statements made by a child victim of certain offenses, which would otherwise be considered inadmissible hearsay. *Martinez v. State*, 178 S.W.3d 806, 810-11, n. 14 (Tex. Crim. App. 2005). Article 38.072 is the outcry statute applicable to the complaint in this case because the Complainant was under eighteen (18) years of age at the time of the alleged incident. Tex. Code Crim. Proc. Art. 38.072, §1 (1). The statute applies to statements that: (1) describe the alleged offense; (2) were made by the child against whom the charged offense was allegedly committed; and (3) were made to the first person over 18 years of age or older, other than the defendant, to whom the child made a statement about the alleged offense. Tex. Code Crim. Proc. Art. 38.072 §(2)(a)(1)(A); (2); & (3).

The statements described in art. 38.072, §(2)(a)(1)(A); (2); & (3) are "not inadmissible because of the hearsay rule if: (1) on or before the 14th day before the date the proceedings begin, the party intending to offer the statement: (A) notifies the adverse party of its intention to do so; (B) provides the adverse party with the name of the witness through whom it intends to offer the statement; (C) provides the adverse party with a written summary of the statement; (2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement, and (3) the child is available to testify at the proceeding in court or in any other manner provided by law. Tex. Code Crim. Proc. Art. 38.072, §2(b)(1), (2), & (3).

Here, the record shows that State gave a "Notice of Intention to Use Abuse Victim's Hearsay Statement." The Notice states that the State intended to offer JG's statements through Allyssa Rolen, Officer B.R. Wagganer, and Milea Henson, and includes a summary of their statements. (C.R. at 44-45). At trial, the State presented the testimony of Rolen without defense objection. The testimony of Rolen constituted inadmissible hearsay.

2. Counsel failed to request hearing required by statute

The record does not indicate that an article 38.072 hearing was requested or conducted. However, prior to the testimony of Allyssa Rolen, the following plan was announced by the court:

> THE COURT: All right. So I guess we can have a hearing with Ms. Goldsmith and then we can have a hearing with Ms. Rolen. But if this is just what Ms. Rolen was told, I don't think that covers the entirety of – because it has to be detailed about what happened in that offense that is alleged.
>
> That part I do know, so if you have case law saying the first outcry is just the person that was first told of a potential sexual assault and not the entirety of what has been alleged in the indictment, please send it to me. I just don't –
>
> MR. GRAVES: I've got somebody to look at that.
>
> THE COURT: I think if we can get Ms. Rolen – and I don't want to have that outcry hearing right now with Ms. Rolen because its 10:04 and I told this jury 10:00, they've already had to wait for us.
>
> So let's get started. We can do this during lunch. So if Ms. Rolen needs to be recalled that's fine, but right now, let's get started.

(15 R.R. at 10-11). The requirements of article 38.072 are mandatory. *Long v. State*, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990); *Duncan v. State*, 95 S.W.3d 669, 671 (Tex. App. -Houston [1st Dist.] 2002, pet. ref'd). When no hearing is conducted, the statutory requirements have not been met, the exception is not invoked, and the testimony constitutes inadmissible hearsay. *Dorado v. State*, 843 S.W.2d 37, 38 (Tex. Crim. App. 1992).

Given the context of the trial – that Appellant's entire defense was that JG's allegations were false and, yet counsel allowed Rosen to bolster JG's testimony with inadmissible hearsay. Because the only issue at trial was JG's credibility, trial counsel's failure to object to such extensive improper testimony can only be characterized as falling below an objective standard of reasonableness. *See Andrews*, 159 S.W.3d at 101; *Vasquez,* 830 S.W.2d at 950-51; *McKinny*, 76 S.W.3d at 470-71. Moreover, counsel's deficient conduct cost Appellant a fair trial.

The fact that trial counsel agreed to conduct the hearing during lunch and then failed to request the hearing prior to Rolen's outcry testimony is some evidence from the record that trial counsel's failure to object or request a hearing was ineffective and not strategic at all. This is one of those cases in which the record clearly reflects that counsel's performance "fell below an objective standard of reasonableness." *See Andrews*, 159 S.W.3d at 102. (concluding that if "no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of

reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as [he] did.").

3. Prejudice

Allyssa Rolen would testify, without objection and without a hearing, regarding the hearsay statements of JG. According to Rolen, JG came over the morning of July 3rd, crying and visibly distressed. Rolen took her into her private bathroom to talk. Rolen recalled closing the door behind them. (15 R.R. at 83-84). After calming JG enough to speak, JG revealed that Appellant had come to her bedroom door, exposed his penis, and asked if it aroused her. He also asked if she had performed oral sex on a previous boyfriend while stroking himself. (15 R.R. at 85-86). JG also disclosed that Appellant had twice thrown cold water on her while she was showering and filmed her naked. She said that these incidents occurred when no one else was home. (15 R.R. at 87). Despite the gravity of the situation, Rolen did not report the abuse because JG begged her not to involve authorities. (15 R.R. at 90-91).

Approximately two weeks later, JG called Rolen early in the morning in a panic, crying so hard she was incomprehensible. When she arrived at Rolen's apartment, she took her to the bathroom again and JG eventually calmed down enough to speak. (15 R.R. at 92). In this second disclosure, JG began to describe another incident from the night before. (15 R.R. at 93). JG disclosed that Appellant pressured her to sleep in his bed. She took a long shower hoping he'd be asleep by the time she returned. When she finally entered the room, she placed a pillow between them and used her own blanket

while lying on top of the covers—deliberately avoiding contact since Appellant allegedly slept naked. (15 R.R. at 94-95). Later that night, JG said that she woke up to Appellant on top of her, saying she looked cold. He then forced her to touch his erect penis and masturbate him. She didn't flee because she was afraid and felt she had no safe place to go. (15 R.R. at 96-97).

In the prejudice question, counsel's errors are examined in the context of the overall record. *Ex parte Menchaca*, 854 S.W.2d 128, 132 (Tex. Crim. App. 1993). Appellant would ultimately be convicted of the lesser included offense of indecent exposure suggesting that the only part of JG's testimony the jury ultimately believed was that bolstered by the hearsay testimony of Allyssa Rolen.

There is no possible trial strategy from defense counsel's failure to object to the extensive inadmissible testimony of the outcry witness when the only issue at trial was the credibility of the complainant. *See Fuller v. State*, 224 S.W.3d 823, 837 (Tex. App. - Texarkana 2007, no pet.) (holding that trial counsel's failure to object to testimony bolstering a child sexual assault victim's truthfulness and credibility amounted to ineffective assistance because "[t]he only real issue in this case was the credibility of the witnesses, in particular the complaining witness.").

Even if allowing extensive, inadmissible testimony to come in without objection constituted counsel's trial strategy, it cannot reasonably be considered *sound* trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482-83 (Tex. Crim. App. 2006) (stating that, to prevail, appellant must prove ineffective assistance by preponderance of

evidence and must overcome strong presumption that counsel's conduct falls within a wide range of reasonably professional assistance or might reasonably be considered *sound* trial strategy). Here, counsel's performance was deficient. This Court should reverse Appellant's conviction and remand this case for a new trial.

PRAYER

Mr. Rossi prays this court reverse his conviction and remand for a new trial or enter any other relief from the judgment as appropriate under the facts and the law.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ *Daucie Schindler*
DAUCIE SCHINDLER
Assistant Public Defender
1201 Franklin, 13th floor
Houston Texas 77002
(713) 368-0016
TBA No. 24013495
email: daucie.schindler@pdo.hctx.net

CERTIFICATE OF COMPLIANCE

Pursuant to proposed 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)*.

1. Including the portions exempted by *Tex. R. App. Proc. 9.4 (i)(1)*, this brief contains 5,854 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Garamond 14 point font in text and Garamond 13 point font in footnotes produced by Microsoft Word Software.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in *Tex. R. App. Proc. 9.4(j)*, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

/s/ Daucie Schindler
DAUCIE SCHINDLER

CERTIFICATE OF SERVICE

I certify that on the 15th day of May, 2025, a copy of the foregoing instrument has been electronically served upon the Appellate Division of the Harris County District Attorney's Office.

/s/ Daucie Schindler
DAUCIE SCHINDLER

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

David Serrano on behalf of Daucie Schindler
Bar No. 24013495
David.Serrano@pdo.hctx.net
Envelope ID: 100864541
Filing Code Description: Brief Requesting Oral Argument
Filing Description: Brief for Appellant
Status as of 5/15/2025 10:12 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Curtis Barton	24042649	curtis.barton@pdo.hctx.net	5/15/2025 9:33:06 AM	SENT
Daucie Shefman Schindler	24013495	daucie.schindler@pdo.hctx.net	5/15/2025 9:33:06 AM	SENT
Jessica Caird	24000608	caird_jessica@dao.hctx.net	5/15/2025 9:33:06 AM	SENT