COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

_____

CASE NOs.

_____

XXXXXX YYYYY,
Defendant-Appellant

v.

STATE OF TEXAS,
Plaintiff-Appellee.

_____

APPEAL FROM THE 7th CRIMINAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

_____

BRIEF OF DEFENDANT-APPELLANT

_____

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

XXXXXX YYYYY was charged by two indictment returned on February 11, 2009 with aggravated sexual assault. (CR at 2-3 (07-41443); 2-3 (07-41444))[1] In one case Mr. YYYYY was accused of penetrating the complainant's sexual organ with his sexual organ on or about October 1, 1997. (CR at 2 (07-41443) In the other, he was accused of contacting the complainant's sexual organ with his mouth on or about September 1, 2003. (CR at 2 (07-41444)

A trial was held in both cases on May 3-5, 2010. The jury found Mr. YYYYY guilty on both indictments. (CR at 18 (07-41443); 30 (07-41444)). The jury imposed sentences of thirty years imprisonment in both cases. (CR at 30 (07-41443); 42 (07-41444)). The court imposed sentences in accordance with the jury verdict and ordered the sentences be served consecutively. (CR at 32-33 (07-414443); 44-45 (07-41444)).

A timely Notice of Appeal was filed in both cases on May 6, 2010 and the Trial Court's Certification of Defendant's Right to Appeal was filed in both cases on May 25, 2010 (CR at 32-33 (07-41443); 49-50 (07-41444)).

[1]References to the Clerk's Record ("CR") refer to the page number(case number). References to the Reporter's Record ("RR") refer to the volume number:page number.

ISSUES PRESENTED

I. Whether the Trial Court Erred When it Allowed the State's Expert Witness to Testify as to the Percentage of Children Who Are Truthful When Reporting Claims of Sexual Abuse.

II. Whether Assuming, *Arguendo*, That Trial Counsel Did Not Properly Object to the Expert's Testimony as to the Percentage of Children Who Are Truthful When Reporting Claims of Sexual Abuse, He Would Have Provided Ineffective Assistance of Counsel.

III. Whether the Trial Court Erred in its Ruling That Hearsay Could Be Contained in the Question Put to the Witness.

IV. Whether the Cumulative Effect of the Errors at the Guilt-innocence Portion of Mr. YYYYY's Trial Require That a New Trial Be Ordered.

V. Whether the Trial Court Erred When it Allowed a Direct Reference to a Defendant's Decision Not to "Say" Anything in the Punishment Phase of His Trial in Violation of His Right Not to Testify.

VI. Whether the Trial Court Impermissibly Ordered Two Child Sexual Assault Sentences to Be Served Consecutively When There Was No Evidence That One of the Offense Occurred Subsequent to September 1, 1997.

STATEMENT OF FACTS

A. Guilt/Innocence

Cathy Doan is the half-brother of XXXXXX YYYYY. (RR 5:16-19) She and Mr. YYYYY lived in the same house until she her "7th grade year" when Mr. YYYYY moved into an apartment with his wife. (RR 5:19) She testified that, when she was in Kindergarten, Mr. YYYYY "put his penis inside my vagina and he put me on top of him." (RR 5:21-25) Ms. Doan also testified that, during this alleged incident, "he told me to put my mouth on his penis." (RR5:24) The only time frame that Ms. Doan provided for this incident was that it occurred when she was in Kindergarten in the 1997-1998 school year. (RR 5:33-34, 45) Nevertheless, she admitted that she did not know an exact date on which it occurred. (RR 5:45)

Ms. Doan testified that this was "the beginning" and that she was not "regularly" assaulted by Mr. YYYYY "but it happened from time-to-time." (RR 5:26) During those times, Mr. YYYYY allegedly came into her room and touched Ms. Doan "inappropriately" on her "private parts" with his mouth and fingers. (RR 5:27-33) Ms. Doan described one incident in which Mr. YYYYY allegedly put his mouth on her vagina during her menstrual period. (RR 5:31) She got her period in the 4th grade and the alleged assaults stopped when Mr. YYYYY moved out of the house, so she surmised that this particular incident happened when she was between

the ages of 9-10 (4th grade) and 12-13 (7th grade) (RR 5:34-36, 47)

Ms. Doan testified that she told her mother (who is also Mr. YYYYY's mother), Lan Doan, about the alleged sexual assaults when she was 15 years old after her mother found her in her room kissing her boyfriend and her mother became angry. (RR 5:38-39) At the time, her mother called Mr. YYYYY and he denied the allegations. (RR 5:43) Ms. Doan also testified that she had previously told her friend, Ann Dang, about the incident when she was 11 years old but asked Ann not to tell anybody. (RR 5:32, 40-44) After she told her mother, Ms. Doan urged her mother to call Ann. (RR 5:41-42)

Lan, the mother of both Mr. YYYYY and Cathy Doan, confirmed that Ms. Doan made an "outcry" to her after she returned home on a Halloween day and found Ms. Doan in her bedroom with her boyfriend. (RR 5:81-85) Nevertheless, during the times that Ms. Doan alleged that this had occurred, she appeared to her mother to have been "very normal" and her mother did not believe her allegations. (RR 5:91-93) Her mother believed Cathy made up the allegations to avoid getting in trouble for having her boyfriend in the room. (RR 5:89)[2]

Ann Dang testified that, while she and Ms. Doan were "most likely in the 5th

[2]It was the state that first elicited the fact that Loan Doan did not believe her daughter. (RR 5:86)

grade, almost 6th grade," Ms. Doan told her something personal "about things going on with her stepbrother." (RR 5:98-102) She did not repeat what she was told until she got a call "out of the blue" from Ms. Doan's mother. (RR 5:102-03)

The state presented the testimony of Beth Farrell, a therapist with the Dallas Children's Advocacy Center. (RR 6:8) Ms. Farrell met with Cathy Doan on twelve occasions and met with her parents on one occasion. (RR 6:10) During Ms. Farrell's direct testimony, the following exchange took place:

> Q. Now, did–did she ever talk to you about the details of the abuse she suffered?
>
> MR. LAMB: Objection; calls for a hearsay response.
>
> THE COURT: He just asked her if she talked to her. Unless she starts talking about that, that's premature. Overruled at this time.
>
> A. Yes

(RR 6:11-12) Ms. Farrell also testified to a "sand tray" activity she conducted with Ms. Doan during therapy. (RR 6:18-23)

The state's final witness was Dr. AAAA BBBBBB who was the senior director of clinical services at the Dallas Children''s Advocacy Center. (RR 6:26) Dr. BBBBBB first testified generally about the concept of "delayed outcry" and how children come to disclose sexual abuse. (RR 6:29-38) She also testified that, in incestuous situations, family members will sometimes chose not to support the

alleged victim in order to protect the integrity of the family especially if the alleged abuse has stopped. (RR 6:36-40) Dr. BBBBBB further testified that it is not uncommon, even when the abuse happens over a period of years, for an alleged perpetrator not to "be caught in the act." (RR 6:40) Significantly, over objection by the defense, Dr. BBBBBB testified that only "approximately two percent of all [child sexual abuse] allegations are false." (RR 6:42)[3] Dr. BBBBBB then went on to discuss the research that allegedly supported her statistic that 98% of alleged sexual abuse allegations are true and then described the research into what normally causes the false allegations. (RR 6:42-44)

> Q. Is this your opinion or your experience?
>
> A. No. There's a wide body of research that looks at false allegations. One of the largest studies was conducted by the Family Court Association in which they looked at 9,000 individuals over twelve states. They looked at how many of those were false allegations.
>
> A second study was done by Everman and Boat in which they looked at 1,200 individuals and divided that by age and found similar specifics. A final study was conducted by Jones in which he looked at approximately 600 individuals in the state of Colorado who were referred through CPS and he also found similar statistics.

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[3]The state would return to this statistic in it's closing argument: "We know that - - We know that XXXXXX YYYYY is guilty because we know the false allegation research. We know that we talked to the doctor who has done three independent studies. Three independent studies done totally separately. All of them involve hundreds of children, all of them coming up with the same results that ninety-eight percent of the time the children are telling the truth, two percent of the time they're not." (RR 6:126)

Q. And so what the numbers have shown is that in - - in these type of cases, ninety-eight percent of the time, the child is telling the truth?

A. That's correct.

Q. And two percent of the time, there's a false allegation?

A. Yes, that's correct.

(RR 6:42-43)

After the state rested, the defense recalled Lon Doan, the mother of Cathy Doan and XXXXXX YYYYY. Lon Doan essentially repeated her testimony that, from 1987 through 2008 she did not hear nor notice anything suspicious that would have indicated that her daughter was being sexually abused and that Mr. YYYYY has always denied the allegations. (RR 6:57, 69) Mr. YYYYY also testified in his own defense and denied the allegations. (RR 6: 77-79)

B. Punishment

At the punishment phase of the trial, the state called no witnesses and presented no evidence. (RR6:130) The defense briefly presented the testimony of Mr. YYYYY's mother who asked the jury to sentence Mr. YYYYY to probation. (RR 6:131-34)

In its closing, the state was permitted to make the following argument over the objection of Mr. YYYYY's counsel:

> Prosecutor: ....He's [Mr. YYYYY is] not surprised to be here looking at twelve people who will be deciding his fate. *He doesn't know what to say* and that's–
>
> Defense Attorney: Objection, Your Honor. Counsel is commenting on the failure of the defendant to testify as to what he knew.
>
> The Court: "I don't think it was that. Its' overruled.

(RR 6:147) (emphasis added) The state went onto suggest to the jury that it not sentence Mr. YYYYY to "any sentence less than 30 years" (RR 6:155)

Ultimately, the jury sentenced Mr. YYYYY to 30 years in both cases and, the trial judge, *sua sponte,* ordered the sentence be served consecutively. (RR 6:157,159-160)

SUMMARY OF THE ARGUMENT

I. The Trial Court Erred When it Allowed the State's Expert Witness to Testify as to the Percentage of Children Who Are Truthful When Reporting Claims of Sexual Abuse.

Over defense objection, the state's expert witness was allowed to testify that ninety-eight percent of the time that children make sexual assault allegations they are "telling the truth" and only two percent of "all [child sexual abuse] allegations are found to be false." This testimony was was unambiguously prohibited by this court's holding in *Wilson v. State*, 90 S.W.3d 391, 392-93 (Tex. App.–Dallas 2002). Likewise, it was based on the expert witness' false citation to three scientific studies. Finally, the state used this inadmissible and false testimony to effect the verdict in the case by referring to it in its closing as a primary reason "[w]e know that XXXXXX YYYYY is guilty."

II. Assuming, *Arguendo*, That Trial Counsel Did Not Properly Object to the Expert's Testimony as to the Percentage of Children Who Are Truthful When Reporting Claims of Sexual Abuse, He Would Have Provided Ineffective Assistance of Counsel.

Mr. YYYYY believes that trial counsel's objections and actions were sufficient to preserve his objections to Dr. BBBBBB's testimony. Nevertheless, in the event this court was to hold otherwise, the failure to properly and fully object to the testimony would constitute ineffective assistance of counsel. There would have been

no conceivable strategy or tactic that would have counseled against fully objecting to this clearly inadmissible testimony as demonstrated by the fact that trial counsel did lodge an objection to the testimony in the first place. Moreover, Mr. YYYYY was harmed by any deficient performance of trial counsel in this regard given that this was a case in which the complainant's credibility was the only real issue at trial and given that the state ultimately used the inadmissible testimony in its closing argument to tell the jury it was how they could "know" Mr. YYYYY was guilty.

III. The Trial Court Erred in its Ruling That Hearsay Could Be Contained in the Question Put to the Witness.

The trial court overruled Mr. YYYYY's objection to the state's question to its expert witness: "Now, did–did [Cathy Doan] ever talk to you about the details of the abuse she suffered?" By inserting the hearsay into the question and asking the witness to agree that the out of court statement was, in fact, made to her, the state was allowed to indirectly place hearsay into evidence. This was error.

IV. The Cumulative Effect of the Errors at the Guilt-innocence Portion of Mr. YYYYY's Trial Require That a New Trial Be Ordered.

When there are multiple errors at trial, an appellate court should consider their cumulative effect. Here, the above errors, when considered cumulatively, require reversal of Mr. YYYYY's conviction.

V. The Trial Court Erred When it Allowed a Direct Reference to a Defendant's Decision Not to "Say" Anything in the Punishment Phase of His Trial in Violation of His Right Not to Testify.

Over Mr. YYYYY's objection, the state argued in its closing of the punishment portion of the trial that "[Mr. YYYYY is] not surprised to be here looking at twelve people who will be deciding his fate. *He doesn't know what to say* ." The reference to Mr. YYYYY not knowing "what to say" to the "twelve people who [would] be deciding his fate" could only have been meant to point out to the twelve people on the jury that Mr. YYYYY was not testifying. Moreover, by overruling Mr. YYYYY's objection to this impermissible argument, the trial court tacitly endorsed the state's comment about Mr. YYYYY's failure to "say" anything to the jury

VI. The Trial Court Impermissibly Ordered Two Child Sexual Assault Sentences to Be Served Consecutively When There was No Evidence That One of the Alleged Offenses Occurred Subsequent to September 1, 1997.

Mr. YYYYY was convicted of two offenses. One alleged offense occurred subsequent to September 1, 1997, however, there was no proof that the other alleged offense did not occur prior to September 1, 1997. When Tex. Penal Code § 3.03 was amended to allow cumulation of sentences in sexual assault cases, the amendment provided that it did not apply to offenses committed before September 1, 1997. The amendment was ambiguous as to whether a trial court can commutate sentences when

one of the offenses occurred after September 1, 1997 and one of the offenses occurred prior to September 1, 1997. Given this ambiguity and applying the "rule of lenity," the trial court erred in cumulating Mr. YYYYY's sentences.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE'S EXPERT WITNESS TO TESTIFY AS TO THE PERCENTAGE OF CHILDREN WHO ARE TRUTHFUL WHEN REPORTING CLAIMS OF SEXUAL ABUSE

Over defense objection, the state's expert witness, Dr. AAAA BBBBBB, was allowed to testify that ninety-eight percent of the time that children make sexual assault allegations they are "telling the truth" and only two percent of "all [child sex abuse] allegations are found to be false." (RR 6:42-43) Dr. BBBBBB explained that she was basing her percentages on three scientific research studies:

> ....One of the largest studies was conducted by the Family Court Association in which they looked at 9,000 individuals over twelve states. They looked at how many of those were false allegations.
>
> A second study was done by Everman and Boat in which they looked at 1,200 individuals and divided that by age and found similar specifics. A final study was conducted by Jones in which he looked at approximately 600 individuals in the state of Colorado who were referred through CPS and he also found similar statistics.

(RR 6:42-43) In closing, the state focused on Dr. BBBBBB's statistics:

> We know that - - We know that XXXXXX YYYYY is guilty because we know the false allegation research. We know that we talked to the doctor who has done three independent studies. Three independent studies done totally separately. All of them involve hundreds of children, all of them coming up with the same results that ninety-eight percent of the time the children are telling the truth, two percent of the time they're not."

(RR 6:126)[4]

A. The Testimony Was Clearly Prohibited under this Court's Case Law

Dr. BBBBBB's testimony was unambiguously prohibited by this court's holding in *Wilson v. State*, 90 S.W.3d 391, 392-93 (Tex. App.–Dallas 2002). There, the state's expert, Cindy Alexander (who like Dr. BBBBBB worked for the Dallas Children's Advocacy Center) told the jury that, "based on research," false child sexual assault allegations are made in "2 to 8 percent" of cases. This court held that it was error for the trial court to have allowed this testimony:

> This testimony went beyond whether the child complainant's behavior fell within a common pattern and addressed whether children who claimed to be sexually assaulted lie. Her testimony did not aid, but supplanted, the jury in its decision on whether the child complainant's testimony was credible. *See Schutz I*, 957 S.W.2d at 70-71; *Yount*, 872 S.W.2d at 712; see also TEX.R. EVID. 702. Therefore, the trial court erred by allowing Alexander to testify about what percentage of children lie about being sexually assaulted.

Id. at 393.

B. Making Matters Worse, in this Case, Dr. BBBBBB Completely Misrepresented the Studies She Cited to the Jury

Curiously, the percentages testified to by Cindy Alexander in *Wilson* have a wider range of false claims than the definitive "two percent" testified to by Dr.

[4]Contrary to the state's argument, Dr. BBBBBB never testified that she did her own independent studies.

BBBBBB in this case even though they both work for the same organization and even though the studies relied upon by Dr. BBBBBB had all been completed at the time of Ms. Alexander's testimony in the earlier case. The reason for this is that Dr. BBBBBB completely misrepresented the findings in the three studies she cited to the jury.

1. Thoennes and Tjaden

The first study that Dr. BBBBBB told the jury about was one "conducted by the Family Court Association in which they looked at 9,000 individuals over twelve states." (RR 6:42) The study can by found in Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 Child Abuse & Neglect 151-63 (1990) and is attached hereto as Attachment A.[5]

First, the 9,000 number referred to by Dr. BBBBBB was simply the total number of custody/visitation cases reviewed by the researchers in the twelve jurisdictions. Less than two percent of the cases actually involved allegations of sexual abuse. *Id*. at 153. More importantly, "[i]n the 129 cases for which a

[5]This court may take judicial notice of scientific articles. *See Mata v. State*, 46 S.W.3d 902, 910 (Tex. Crim. App. 2001) ("We may take judicial notice of scientific literature not presented by either party at trial or on appeal."); *Emerson v. State*, 880 S.W.2d 759, 764 (Tex. Crim. App.) ("We are authorized to take judicial notice of any scientific fact which "'is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" (citation omitted)), *cert denied*, 513 U.S. 931 (1994).

determination of the validity of the allegation was available, 50% were found to involve abuse, *33% were found not to involve abuse*, and 17% resulted in an indeterminate ruling." *Id*. at 151 (abstract) (emphasis added).

2. Everson and Boat

Dr. BBBBBB also told the jury that her statistics came from a study done by "Everman [sic.] and Boat in which they looked at 1,200 individuals and divided that by age and found similar specifics." (RR 6:42) The study can be found in Mark D. Everson & Barbara Boat, *False Allegations of Sexual Abuse by Children and Adolescents*, 28 Journal of the American Academy of Child & Adolescent Psychiatry 230-35 (1989) and is attached hereto as Attachment B.

Unlike the two percent figure attributed to them by Dr. BBBBBB, Boat and Hall found false allegations in between 4.7-7.6 percent of all cases. *Id*. at 232. More importantly, the alleged victim in this case, Cathy Doan, was fifteen years old when she first made these allegations to her mother. (RR 5:38). Boat and Hall concluded that, in cases in which the child making the allegation is between 12-17.9 years old, the percentage of false allegations is between 8.0-12.7 percent. *False Allegations of Sexual Abuse by Children and Adolescents* at 232.

3. Jones and McGraw

Finally, Dr. BBBBBB told the jury that she was relying upon a "study...by

Jones in which he looked at approximately 600 individuals in the state of Colorado who were referred through CPS and he also found similar statistics." (RR 6:43) The study can be found in David P.H. Jones & J. Melbourne McGraw, *Reliable & Fictitious Accounts of Sexual Abuse to Children*, 2 Journal of Interpersonal Violence 27-45 (1987) and is attached hereto as Attachment C.

Of the 576 Colorado cases reviewed, Jones and McGraw did, in fact, conclude that only 8 (1.4%) involved definitive false reports by children. *Id*. at 30. Nevertheless, they did not conclude the contrast as alleged by Dr. BBBBBB (*i.e.* that more than 98 percent of children were telling the truth). Indeed, they concluded that only 309 (53%) of the 576 allegations were "founded" because there was insufficient information in 137 of the cases (27%) and because 130 of the cases (23%) were unfounded for some other reason than the child actually lying (*e.g.* an adult brainwashing a child). Thus, putting aside Dr. BBBBBB's unambiguously false testimony regarding the other two studies, her testimony was false as to the Jones and McGraw study at least to the extent she testified that it supported her testimony that ninety-eight percent of children are definitively telling the truth when it concluded that this was only definitively determined in fifty-three percent of the cases.

C. Conclusion

Not only was Dr. BBBBBB's testimony impermissible based upon case law

that had been in place for eight years prior to the trial in this case, but here, as discussed above, the testimony was false and possibly perjurious.[6] Moreover, here, the state argued this testimony in its closing as a primary reason "[w]e know that XXXXXX YYYYY is guilty."

Indeed, the harm in this case is distinguishable from *Wilson*, in which this court held that the defendant was not harmed by Cindy Alexander's "percentage testimony." *Wilson*, 90 S.W.3d at 393-94. In *Wilson*, Alexander's testimony was not demonstrably false. Likewise, in *Wilson*, medical records supported the complainant's allegations. *Id*. at 394. In addition, there was evidence of the defendant's flight in Wilson. *Id*. Finally, in *Wilson*, unlike in the instant case, "the State ...never referred to [the expert's] testimony about the percentage of children who lie about being sexually abused" in its closing argument. *Id*.

In sum, as in most sexual assault of children cases, " successful conviction often depend[s] primarily on whether a jury believe[s] the complainant, turning the trial into a swearing match between the complainant and the defendant." *Boutwell v. State*, 719 S.W.2d 165, 177-78 (Tex. Crim. App. 1985). Here, the state violated

[6]This is not the first time that Dr. BBBBBB has offered such false testimony. *See, e.g., Savannah v. State,* 2010 WL 5375969, *4 (Tex. App.– Dallas Dec. 29, 2010) (unpublished) ("BBBBBB testified that research shows only about two percent of all allegations of sexual abuse are shown to be false, and within that percentage, most false allegations concern coaching by a parent who is in the midst of a divorce.")

established case law in order to give itself a significant step forward by allowing its expert to falsely tell the jury that three "independent studies" each verified that ninety-eight percent of children tell the truth about sexual assault allegations and only two percent lie. What is more, the state then argued that this impermissible and false testimony told the jury how it could "know" that Mr. YYYYY was guilty. In light of this, it seems evident that Dr. BBBBBB's testimony had an "injurious effect" on the jury.

II. ASSUMING, *ARGUENDO*, THAT TRIAL COUNSEL DID NOT PROPERLY OBJECT TO DR. BBBBBB'S TESTIMONY, HE WOULD HAVE PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL

The full exchange with Dr. BBBBBB regarding her "percentage testimony" is as follows:

> Q. What -- Based on your research in your field of study, what are the reasons that children falsely accuse people?
>
> MR. LAMB: Excuse me, Judge. Again, Your Honor, object on the grounds of relevancy, specifically this. The prejudicial effect outweighs the probative value in this.
>
> Again, it is our objection that the witness is being placed in a position of a juror deciding guilt and innocence, and that this is bolstering.
>
> THE COURT: Overruled for the reasons I previously stated.
>
> MR. LAMB: Thank you, Your Honor.
>
> Q. [By Mr. Castello] You can go ahead and answer.

A. Approximately, two percent of all allegations are found to be false. Within those two percent, the majority of those have to do with a custody or divorce related issue. The second reason has to do with mental health issues, and the third reason has to do with an adult person coercing a child to make a statement that is not true.
Q. Is this just your opinion or your experience?

A. No. There's a wide body of research that looks at false allegations. One of the largest studies was conducted by the Family Court Association in which they looked at 9,000 individuals over twelve states. They looked at how many of those were false allegations. A second study was also done by Everman and Boat in which they looked at 1,200 individuals and divided that by age and found similar specifics. A final study was conducted by Jones in which he looked at approximately 600 individuals in the state of Colorado who were referred through CPS and he also found similar statistics.

Q. And so what the numbers have shown is that in -- in these type of cases, ninety-eight percent of the time, the child is telling the truth?

A. That's correct.

Q. And two percent of the time, there's a false allegation?

A. Yes, that's correct.

(RR 6:41-43) Following that exchange, defense counsel engaged Dr. BBBBBB in cross-examination as to her claim that ninety-eight percent of children tell the truth about sexual assault allegations, and only two percent lie, in order to attempt to undermine her testimony. (RR 6:48)

Mr. YYYYY submits that trial counsel's objections and actions were sufficient

to preserve his objection to Dr. BBBBBB's "percentage testimony." Nevertheless, in an effort to avoid this court's clear holding in *Wilson*, it is possible that the state will argue that Mr. YYYYY's trial counsel somehow waived the objection to this full testimony. For example, strictly speaking, Dr. BBBBBB's answer to the objected to question could be viewed as non-responsive. Also, trial counsel's relevance and bolstering objection differs from the Tex. R. Evid. 702 grounds upon which *Wilson* was decided.[7] Also, trial counsel did not object to the follow-up questions and answers quoted above in which the prosecutor restated Dr. BBBBBB's testimony. Finally, trial counsel questioned Dr. BBBBBB about the statistics in cross-examination once the statistics were admitted.[8]

Nevertheless, to the extent trial counsel failed to preserve an objection under *Wilson* to the above quoted testimony, he rendered Mr. YYYYY ineffective assistance of counsel. For example, in *Sessmus v. State*, 129 S.W.3d 242, 247 (Tex. App–Texarkana 2002), the state offered testimony from expert witnesses regarding a child-complainant's credibility that was "absolutely inadmissible" and trial counsel

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[7]Under *Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993), a "bolstering" objection to this type of testimony appears to be sufficient. *See Bickems v. State*, 2002 WL 1741684, *1 (Tex. App.–Dallas 2002) (unpublished)

[8]*But see Maynard v. State*, 685 S.W.2d 60, 65 (Tex. Crim. App. 1985) ("[T]he harmful effect of improperly admitted evidence is not cured by the fact that the defendant sought to meet, destroy, or explain it by the introduction of rebutting evidence. Such testimony does not act as a waiver of the right to challenge the admissibility of the evidence originally admitted.")

did not object. The Court of Appeals had no problem concluding that this was deficient performance in that "[t]here [was] no conceivable strategy or tactic that would justify allowing this testimony in front of a jury." *Id*. at 248. The *Sessmus* court also found that the defendant was harmed given that "the question of whether the victim was truthful was the ultimate question before the jury." *Id*. at 248.

Sessmus relied upon this court's earlier opinion in *Miller v. State*, 757 S.W.2d 880 (Tex. App.–Dallas 1988). There, like here, there was expert testimony regarding the child-complainant's credibility. *Id*. at 881-83. In finding Miller's trial counsel ineffective for failing to object to such testimony, this court concluded: "[W]e can glean no sound trial strategy in defense counsel's failure to object to the extensive, inadmissible testimony concerning the only real issue at trial-complainant's credibility." *Id*. at 884.

Here, assuming *arguendo* that trial counsel did not preserve his objection to Dr. BBBBBB's clearly inadmissible testimony recited above, trial counsel provided ineffective assistance of counsel. The fact that trial counsel did lodge an objection to this testimony from Dr. BBBBBB in the first place "indicates he was aware this testimony was inadmissible." *Lane v. State*, 257 S.W.3d 22, 27 (Tex. App.–Houst.[14th] 2008). Indeed, the fact that trial counsel attempted to prevent the admission of some of the inadmissible expert testimony defeats any argument that

trial counsel was following a trial strategy (1) of not objecting to the testimony in order not to emphasize the critical nature of the testimony in front of the jury; or (2) aimed at discrediting Ms. Doan by using the State's experts. *See id*. at 27 n.1.

In addition, Mr. YYYYY would have been harmed by trial counsel's deficient performance in this case where Mr. Doan's credibility was "the only real issue at trial." As noted in Point of Error I, in discussing harm, there was no evidence such as medical records or the defendant's flight to support Ms. Doan's claim. More importantly, the state argued to the jury that Dr. BBBBBB's objectionable testimony was th very reason it could "know" that Mr. YYYYY was guilty.

III. THE TRIAL COURT ERRED IN ITS RULING THAT HEARSAY COULD BE CONTAINED IN THE QUESTION PUT TO THE WITNESS

As noted above, during the direct examination of Beth Farrell, the state, asked Ms. Farrell:

> Now, did–did [Cathy Doan] ever talk to you about the details of the abuse she suffered?

(RR 6:11) Nevertheless, Mr. YYYYY's trial counsel objected on hearsay grounds, but he was overruled because the trial court believed the objection was "premature."

> THE COURT: He just asked her if she talked to her. Unless she starts talking about that, that's premature. Overruled at this time.

(RR 6:11-12) Ms. Farrell answered "yes" to the question. (RR 6:12)

The trial court was simply incorrect when it stated that the prosecutor "just asked [Ms. Farrell] if she talked to [Cathy Doan]." The question was much more than that. The prosecutor asked Ms. Farrell if Ms. Doan told her "about the abuse she suffered."

What the trial court missed is that the question itself contained a hearsay statement by the declarant, Ms. Doan. Therefore, when Ms. Farrell was allowed to answer "yes" to the question she was placing Ms. Doan's hearsay before the jury. *See. Austin v. Shampine*, 948 S.W.2d 900, 911 (Tex. App. – Texarkana 1997) (Affirming trial court's hearsay ruling because "the question itself did not contain a 'statement' by Andrews."); *Allen v. State*, 2002 WL 396610 (Tex. App.– Houst. [1st] March 14, 2002) (unpublished) (Finding error in the trial court's allowing hearsay when "the prosecutor's question contained hearsay.") Simply put, when it comes to the hearsay rules, prosecutors may not do indirectly what they cannot do directly. *Schaffer v. State*, 777 S.W.2d 111, 114 (Tex. Crim. App. 1989).

The end result of the state's question to Ms. Farrell and the trial court's ruling was to convey to the jury that Ms. Doan made an out-of-court statement to Ms. Farrell detailing the "abuse she suffered." It is impossible to reach any other conclusion. Still, Mr. YYYYY acknowledges that, in and of itself, this error does not likely rise to the level of "harmful error." Nevertheless, as set forth in Point of Error IV, this

error must be considered commutatively, with the error surrounding the testimony of the state's other Advocacy Center Witness, Dr. AAAA BBBBBB.

IV. THE COURT MUST CONSIDER THE CUMULATIVE EFFECT OF THE ERRORS AT THE GUILT-INNOCENCE PORTION OF MR. YYYYY'S TRIAL

As discussed above, it was error to allow Dr. BBBBBB to testify, in direct contravention of this courts' case law, that ninety-eight percent of children tell the truth about sexual assault allegations. Alternatively, it was ineffective on the part of Mr. YYYYY's trial counsel to allow such testimony without a proper objection. Also, it was error for the trial court to allow the state to present hearsay to the jury through Beth Farell when the hearsay was contained within the question posed to Ms. Farrell.

When there are multiple errors at trial, an appellate court should consider their cumulative effect. *See Martin v. State*, 151 S.W.3d 236, 242 (Tex. App.-Texarkana 2004). A number of errors may be harmful in their cumulative effect. *See, e.g., Feldman v. State*, 71 S.W.3d 738, 757 (Tex. Crim .App.2002). Mr. YYYYY submits that the testimony of Dr. BBBBBB was harmful in and of itself, but acknowledges that the error regarding Ms. Farrell's testimony, viewed only in isolation, probably did not rise to the level of "harmful." In any event, the cumulative effect of these errors are certainly harmful.

V. THE TRIAL COURT ERRED WHEN IT ALLOWED A DIRECT REFERENCE TO MR. YYYYY'S DECISION NOT TO "SAY" ANYTHING IN THE PUNISHMENT PHASE OF HIS TRIAL IN VIOLATION OF HIS RIGHT NOT TO TESTIFY.

Mr. YYYYY testified at the guilt-innocence portion of his trial but exercised his constitutional rights under the Fifth Amendment to the United States Constitution and Article 10, Section 1 of the Texas Constitution as well as his statutory right under Tex. Crim. Code Art. 38.08 not to testify at the punishment phase of his trial. Nevertheless, in its closing argument during the punishment phase of the trial and over Mr. YYYYY's objection that it was a comment on his failure to testify, the state argued:

> He's [Mr. YYYYY is] not surprised to be here looking at twelve people who will be deciding his fate. *He doesn't know what to say* and that's–

(RR 6:147) (emphasis added) The trial court overruled Mr. YYYYY's objection. (RR 6:147)

The defendant has a privilege not to testify at both the guilt-innocence and the punishment phases of the trial. *Wilkens v. State*, 847 S.W.2d 547, 553 (Tex.Crim.App.1992), *cert. denied*, 507 U.S. 1005 (1993). Waiver of the privilege at the guilt-innocence phase of the trial does not waive the privilege at the punishment phase of the trial. *Id.*, at 553.

It is impossible to conceive what the reference to Mr. YYYYY not knowing

"what to say" to the "twelve people who [would] be deciding his fate" could refer to other than to point out to those twelve people that Mr. YYYYY was not testifying. It is the equivalent of arguing "'Gentlemen of the jury, the defendant is guilty as shown by circumstances so strong that he could not face you and give a satisfactory explanation.'" *Parker v. State*, 201 S.W. 173 (Tex. Crim. App. 1918). Moreover, the prohibition against a direct comment on the accused's failure to testify is mandatory. *Tovar v. State*, 777 S.W.2d 481, 489 (Tex. App.-Corpus Christi 1989).

As noted by the Court of Criminal Appeals, "[t]he prejudicial effect of a direct reference to the defendant's failure to testify normally cannot be cured by an instruction to the jury to disregard." *Montoya v. State*, 744 S.W.2d 15, 37 (Tex. Crim. App. 1987), *cert denied*, 487 U.S. 1227 (1988). In this case, not only did the trial court not instruct the jury to disregard the state's comment that Mr. YYYYY did not "say" anything to the jury, but, "the trial court overruled appellant's objection, and there was no attempt to cure the prejudicial effect of the prosecutor's comments."[9] In other words, the trial court tacitly endorsed the state's comment about Mr. YYYYY's failure to "say" anything to the jury.[10]

Mr. YYYYY also notes that the jury sentenced him to the thirty years, the very

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[9] *Snowden v. State*, 2010 WL 2927472, *4 (Tex. App. – Dallas July 28, 2010) (unpublished)

[10] *Id.*

minimum amount that the state suggested would not be "insulting." (RR 6:155) Thus, it is certainly possible that, but for the state's argument that Mr. YYYYY chose not to say anything in mitigation, that the jury could have imposed a lesser sentence.

Finally, as recently observed by this court, it must be "mindful of the impact its] decision may have on future arguments and [it should be] loathe to open the door to similar comments in other cases. The privilege against self-incrimination must remain inviolate."[11]

VI. THE TRIAL COURT IMPERMISSIBLY ORDERED THAT MR. YYYYY'S SENTENCES SHOULD BE SERVED CONSECUTIVELY

It was alleged that the offense in Case Number 07-41433 occurred on or about October 1, 1997. (CR at 2 (07-41443) Nevertheless, the only evidence presented at trial was that it occurred during the 1997-1998 Kindergarten year. (RR 5:33-34, 45) Indeed, Ms. Doan admitted that she did not know an exact date on which the alleged offense occurred and there was no testimony that her Kindergarten school year began after September 1, 1997. (RR 5:45) In light of the lack of evidence of whether the alleged assault referenced in Case Number 07-41433 occurred prior to September 1, 1997, it must be assumed that it did not. *Yebio v. State*, 87 S.W.3d 193 (Tex. App. – Texarkana 2002).

[11] *Id.*

The trial court, in this case, *sua sponte* ordered Mr. YYYYY's sentences to run consecutively.[12] Nevertheless, Mr. YYYYY submits that, given the lack of proof that the first offense took place after September 1, 1997, the cumulation was error. As explained in *Yebio*:

> If multiple cases arising out of a single criminal episode are tried together, the court must order the sentences to run concurrently. TEX. PEN.CODE ANN. § 3.03 (Vernon Supp.2002). However, an exception to that rule was enacted by the Legislature effective September 1, 1997; the exception provides that, if the defendant commits certain specified crimes, the court may direct the sentences to run either concurrently or consecutively. *The exception, however, does not apply to offenses committed before September 1, 1997.* Act of June 13, 1997, 75th Leg., R.S., ch. 667, § 7(a), 1997 Tex. Gen. Laws 2250, 2252. Therefore, whether the trial court had the discretion to order Yebio's sentences to run concurrently depends on whether the offenses occurred before September 1, 1997. The indictments alleged that the offenses occurred on or about September 5, 1997. If the evidence shows they occurred after September 1, 1997, the trial court acted within its authority by ordering the sentences to run consecutively.

Id. at 195 (emphasis added).

The issue in this case becomes whether the trial court can cumulate sentences when one of the offenses occurred after September 1, 1997 and one of the offenses must be assumed to have occurred prior to September 1, 1997. The amendment to Tex. Penal Code § 3.03 simply stated that the change in law applied to "an offense

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[12]Mr. YYYYY's trial counsel did not object to the cumulation order, but, "[a]n improper cumulation order is, in essence, a void sentence, and such error cannot be waived." *Laporte v. State,* 840 S.W.2d 412, 415 (Tex. Crim. App. 1992).

committed on or after" its effective date, September 1, 1997, and that offenses committed before that date were subject to the law in effect when the offense was committed. *See* Act of May 31, 1997, 75th Leg., R.S., ch. 667, §§ 7, 8, 2250, 2252-53.

Mr. YYYYY acknowledges that the only published case to decide this issue decided it against his position. *DeLeon v. State*, 294 S.W.3d 742 (Tex. App.–Amarillo 2009) Nevertheless, in *DeLeon*, the appellant did not argue that the 1997 amendment was ambiguous. *Id*. at 747. Mr. YYYYY submits that it is, in fact, ambiguous.

It is true that the 1997 amendment differed from the 1995 amendment which allowed certain intoxication cases to be cumulated and which prohibited cumulation if "any of the offenses were committed before the effective date." *Id*. at 746 n.5. It is equally true, however, that, had the legislature intended to allow cumulation in sexual assault cases where one of the offenses took place prior to September 1, 1997 and one took place on or after that date, it could have easily state that the amendment applied where "either" or "one or more" of the offenses were committed after September 1, 1997. Likewise, the amendment provides: "An offense committed before September 1, 2007, is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose." Given that

Section 3.03, by definition, applies only where there are at least two or more offenses, had the legislature meant to say that only offenses committed before September 1, 2007 could not be cumulated with each, than why did it talk about "an offense" committed before September 1, 2007 rather than "offenses?"

In light of this ambiguity in the amendment to Section 3.03, Mr. YYYYY submits the "rule of lenity" should be applied. As explained by the Texas Court of Criminal Appeals, if statute is ambiguous:

> the rule of lenity would apply. The rule, as supplied by the U.S. Supreme Court, embodies "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L. ED. 905 (1955). The rule of lenity is, in essence, another extratextual factor for a court to consider if, and only if, a statute is ambiguous.

Cuellar v. State, 70 S.W.3d 815, 819 n.6 (Tex. Crim. App. 2002). Consequently, the judgements in this case should be reformed in light of the fact that the state presented no evidence in this case that the offense alleged in Case No. 07-41433 did not occur prior to September 1, 1997.

CONCLUSION

For the foregoing reasons, the convictions against Mr. YYYYY in both cases should be reversed and the cases remanded for new trials. In the alternative, the sentences in both cases should be vacated and the cases remanded for new punishment hearings. In the alternative, the judgements should be reformed so that the sentences are ordered to run concurrently.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 18th of January, 2011, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, on the Dallas County District Attorney's Office, 133 N. Riverfront Blvd., Dallas, Texas.

F. Clinton Broden