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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AUSTIN, TEXAS

ALBERTO MONTELONGO
Appellant

v.

STATE OF TEXAS
Appellee

PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHTH COURT OF APPEALS, EL PASO, TEXAS
APPELLATE CAUSE NUMBER 08-16-00001-CR

PETITION FOR DISCRETIONARY REVIEW

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellant does not request oral argument.

STATEMENT OF THE CASE

Appellant, Alberto Montelongo (hereinafter "Montelongo") was indicted for one count of Attempt to Commit Capital Murder of Multiple Persons, four counts of Aggravated Assault With a Deadly Weapon, and one count of Assault Causing Bodily Injury, Family/Household Member, Two or More Times Within 12 Months. CR 9- 15. After a jury trial, Montelongo was found guilty of Attempt to Commit Capital Murder of Multiple Person, and he was sentenced to 99 years imprisonment and a $10,000.00 fine. CR 251. Montelongo was also found guilty of Assault Causing Bodily Injury, Family/Household Member, Two or More Times within 12 Months. CR 253. For this crime, Montelongo was sentenced to 10 years imprisonment and a $10,000.00 fine. *Id.* On October 30, 2015, Montelongo filed a motion for new trial alleging ineffective assistance of trial counsel. CR 263. The motion included a request for a hearing. CR 269. On November 19, 2015, the trial court entered an order setting a December 8, 2015, hearing on Montelongo's motion for new trial. CR Supp (December) 5. But then on November 23, 2015, the trial court entered an order cancelling the December 8, 2015 hearing. CR Supp (December) 8. No written order was entered deciding Montelongo's motion for new trial. Therefore, the motion was overruled by operation of law on December 14, 2015 (75 days after Montelongo was sentenced in open court). *See* Tex.R.App.P. 21.8. Montelongo timely filed his notice of appeal of December 29, 2015. CR 277.

STATEMENT OF PROCEDURAL HISTORY

The Eighth Court of Appeals affirmed the trial court's judgement on August 31, 2018. Appellant filed a motion for rehearing on December 14, 2018 which was denied on January 9, 2019.

GROUNDS FOR REVIEW

(1) Whether or not the 8th Court of Appeals erred in finding that Appellant waived his right to a hearing on a properly presented and filed motion for new trial?

ARGUMENT

Appellant asserts that he was deprived of his right to due process, a fair and impartial jury, and effective assistance of counsel as a result of the trial court's abuse of discretion in failing to hold a hearing on Appellant's properly filed and presented motion for new trial. The 8th Court of Appeals resolved Appellant's issue by finding waiver. The finding of waiver is unwarranted.

A. Relevant Facts

A jury found Montelongo guilty of attempted capital murder and assault on a family member, 2 within 12 months. R. 7:131. On September 30, he was sentenced to 99 years and 10 years respectively, for each count. R. 7:131. Montelongo filed a timely motion for new trial on October 30, 2015, which specifically requested that the court grant him a hearing on his motion for new trial. CR. 263. The matter was set for a hearing by the court but subsequently, the hearing was cancelled without an explanation. CR. 29. The court did not reset the matter for a hearing and the motion was overruled by operation of law.

B. Legal authority

"When an accused presents a motion for new trial raising matters not determinable from the record, which could entitle him to relief, the trial judge abuses his discretion in failing to hold a hearing." *Oestrick v. State v. State*, 29 S.W.3d 556, 569 (Tex.Crim.App.2000). The purpose of the hearing is to fully

develop the issues raised in the motion. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex.Crim.App.1994). As a prerequisite to obtaining a hearing, the motion must be supported by an affidavit specifically showing the truth of the grounds for attack. *King v. State*, 29 S.W.3d at 569; *Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App.1993). The affidavit need not reflect each and every component legally required to establish relief, but rather must merely reflect that reasonable grounds exist for holding that such relief could be granted. *Jordan v. State*, 883 S.W.2d at 665; *Reyes v. State*, 849 S.W.2d at 816.

C. Argument

In this case, Appellant raised ineffective assistance of counsel as one of several grounds for the granting of a new trial. CR. at 263-274.The motion was accompanied by an affidavit from Appellant's trial attorney, which contained sufficient facts supporting a claim that counsel had been ineffective. CR. at 271-273. It was also sworn to by appellate counsel. In the affidavit, trial counsel admitted that he was intimidated by the trial court into limiting his voir dire and that he failed to conduct a full and thorough voir dire, out of fear of being held in contempt.CR. at 271-274.

Additionally, trial counsel stated in his affidavit that because he was held in contempt early on by the trial court, trial counsel did not zealously cross examine witnesses, he was reluctant to make objections during trial and his overall

performance was lacking. *Id.* In essence, defense counsel admitted there was a conflict of interest that prohibited him from providing effective assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)(finding violation of the Sixth Amendment's right to effective assistance of counsel if there is an actual conflict of interest that adversely affects defense counsel's performance.)

In addition to this, in his affidavit trial counsel admitted to a myriad of other failings (i.e., failed to investigate Appellant's mental health issues and did not investigate or present mitigation evidence despite the abundant availability of such evidence) which cannot in any light be construed as falling within the wide range of reasonable professional assistance. *Id. See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994)*; See Milburn v. State*, 15 S.W.3d 267, 270-71 (Tex. App. – [14th Dist] 2000, pet. ref'd)(finding trial counsel ineffective for failing to investigate and present mitigating evidence that consisted of at least twenty witnesses available to testify on appellant's behalf regarding matters such as appellant's fitness as a father and as an employee). *See also Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex.Crim.App.1990)(explaining that a criminal defense lawyer has a duty to make an independent investigation of the facts of a case, which includes seeking out and interviewing potential witnesses). Finally, trial counsel cited personal health concerns and fear of incarceration for contempt, as reasons for his deficient performance in his representation of Appellant. CR. at 271-273.

From defense counsel's affidavit, it was abundantly clear that his main concern was self-preservation. Trial counsel was not functioning as counsel envisioned by the Sixth Amendment as he candidly admitted in his affidavit, that he was not zealously defending his client. Many of these admissions are borne out by the record.

Appellant further alleged in his motion for new trial, that the trial court's comments during voir dire improperly chilled the honest exchange of information between the potential jurors and the litigants. CR. 271-273. As a result, Appellant claimed that he was deprived of due process, trial by an impartial jury and the right to counsel. This allegation was supported by trial counsel's affidavit in which he described the manner in which he believed the trial court intimidated the jurors. CR. at 271-272.These allegations are also borne out by the record, which at times, shows the trial court intimating to jurors that any indication by them that they could not be fair would not be acceptable. R. 3:54-60; 3:66. 28

The affidavits that accompanied the motion for new trial, specifically showed the truth of the grounds asserted and reflected that reasonable grounds existed for a finding of ineffective assistance of counsel, a violation of due process, deprivation of the right to a fair and impartial jury and, the deprivation of the right to counsel. *Jordan v. State*, 883 S.W.2d at 665. As such, Appellant was entitled to a hearing on

the issues raised in sections 3 and 4 of his motion for new trial. *King v. State*, 29 S.W.3d at 569.

D. The 8th Court of Appeals erred in finding that Appellant waived his right to a hearing on a properly presented and filed motion for new trial

In this case, there is no legitimate reason to find waiver. Appellant timely filed a motion for new trial which contained detailed specific reasons for the relief requested. Appellant timely requested a hearing which was acknowledged by the trial court when it set a hearing on the motion. But then the trial court sua sponte cancelled the hearing. Ostensibly, it did so because Appellant's motion for new trial claimed that the trial court's behavior unfairly impacted trial counsel's performance and the trial court's behavior improperly chilled the honest exchange of information between potential jurors and the litigants. The 8th Court of Appeals opinion supports this supposition, as it points out that an affidavit attached to a motion for new trial is only a pleading and does not become evidence until introduced at a hearing as such. Opinion p. 9-10; *Jackson v. State*, 139 S.W.3d 7, 20 (Tex.App.--Fort Worth 2004, pet. ref'd). (To constitute evidence, the affidavit must be introduced as evidence at the hearing on the motion.) Had a hearing on the motion for new trial been held there would have existed evidence on the record of the trial court's improper behavior.

Under this set of circumstances, it serves no legitimate purpose to find wavier of Appellant's right to a hearing on his motion for a new trial. This 8th Court of Appeals acknowledges that Appellant timely filed a motion for new trial, that the motion was presented to the trial court in a timely manner and, that the motion was set for a hearing. Yet, the 8th Court of Appeals still chose to find waiver because the record does not show that Appellant attempted to reschedule the hearing after the trial court cancelled it. The trial court's sua sponte cancellation of the hearing cannot undo Appellant's proper and timely preservation of an appellate complaint.

The 8th Court of Appeals relies on several cases that are inapplicable. In *Oestrick v. State*, defendant's motion for new trial was not presented to the trial court. 939 S.W.2d at 235. Therefore, even though the trial court failed to hold a hearing, there was no error shown absent some indication that the motion requesting a hearing had been properly presented to the trial court. *Id.* In this case, the motion was properly presented, and Appellant was entitled to a hearing. *See Vera v. State*, 868 S.W.2d 433, 435 (Tex.App.—San Antonio 1994, no pet.)(It is enough that the appellant requested a hearing, he was entitled to a hearing, and he was denied a hearing.)

In *Tello v. State*, although the court stated that there was no indication that appellant attempted to reschedule a cancelled hearing, it did not find waiver. 138 S.W.3d 487, 496 (Tex. App. 2004), aff'd, 180 S.W.3d 150 (Tex. Crim. App. 2005). Instead, the 14th Court overruled appellant's point of error because it found that the

4 affidavits filed with the motion for new trial did not support a finding that counsel was ineffective. *Id.*

The trial court in *Johnson v. State*, actually gave the defendant a hearing but the hearing was interrupted by a bomb threat. 925 S.W.2d 745, 748 (Tex. App. 1996). The continuation of the hearing however, was scheduled outside the 75-day time frame in which the judge has to rule. *Id.* Johnson argued that there were special circumstances that merited an exception to the 75-day rule. *Id.* The appellate court held that if Johnson wished to avail himself of some exception to the rule, it was incumbent upon him to show that the exception applied to him. *Id*. Since he had not done so, he was not entitled to relief. *Id.* No such claim is made here. Here Appellant followed the proper procedure for obtaining a hearing and the trial court erred in failing to give him that hearing when it cancelled the hearing it had initially set.

Similarly, in *Baker v. State*, the trial court was willing to give *Baker* a hearing, but the hearing was inadvertently set outside the 75-day time frame. 956 S.W.2d 19, 24 (Tex. Crim. App. 1997). The trial court's willingness to hold a hearing was evidenced by the fact that the hearing actually took place even though 75 days had already passed. *Id.* Baker did not object and thus, the Court of Criminal Appeals held that he waived the issue. Consequently, Baker is not applicable to this case.

E. Conclusion.

The 8th Court of Appeals reliance on waiver is simply wrong. The trial court was well aware of the issue before it. A timely motion for new trial raising legitimate issues of fact was presented to the trial court prompting the trial court to set the matter for a hearing. Yet by its opinion, the 8th Court of Appeals effectively allows the trial court to avoid ruling on the matter by engaging in gamesmanship. As pointed out above, there is no case that explicitly requires an appellant to object if a trial court fails to hold a hearing that it had previously set. The import of the cases cited by the 8th Court of Appeals in support of its waiver holding is that motions for new trial should be properly presented to the trial court and when the trial court inadvertently sets a matter outside the 75-day time frame, it is incumbent upon the appellant to point this out to the court. In a case such as this one, when it is the trial judge's conduct that is brought into question, it makes no sense to hold that appellant must do anything more than what he did in this case. *See Proenza v. State*, 541 S.W.3d 786, 799 (Tex. Crim. App. 2017)(When the trial judge's impartiality is the very thing that is brought into question, the typical justification for requiring contemporaneous objection is lessened.)

PRAYER FOR RELIEF

For all the above reasons, Appellant prays that the Court grant the petition for discretionary review. Appellant also prays for all other relief to which he is entitled in both equity and law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4 because it has been prepared in a conventional typeface (Times New Roman font), with no smaller than 14 point font for text and 12 point font for footnotes.

I certify that this document in the above-captioned case was prepared with Microsoft Word for Windows, and that, according to the program's word-count function, the sections covered by Texas Rule of Appellate Procedure 9.4, contains 2985 words, bringing this document into compliance with the word-count limitations of that Rule.

/s/ Joe A Spencer

CERTIFICATE OF SERVICE

Undersigned counsel hereby acknowledges that, on March 11, 2019 a copy of the foregoing documents was served, through his Appellate Division, on Mr. Jaime Esparza, District Attorney for the 34th Judicial District of Texas, via notification provided by the electronic filing notification service to DAAppeals@epcounty.com

/s/ Joe A. Spencer
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APPENDIX

Appendix 1 – Appellant's Brief

Appendix 2 – State's Brief

Appendix 3- Appellant's Reply Brief

Appendix 4 – Appellate Court Opinion

Appendix 1 – Appellant’s Brief

ACCEPTED
08-16-00001-CR
EIGHTH COURT OF APPEALS
EL PASO, TEXAS
9/27/2016 12:06:03 AM
DENISE PACHECO
CLERK

No. 08-16-00001-CR

IN THE

EIGHTH COURT OF APPEALS

OF TEXAS

EL PASO, TEXAS

FILED IN
8th COURT OF APPEALS
EL PASO, TEXAS
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DENISE PACHECO
Clerk

ALBERTO MONTELONGO,
Appellant

vs.

THE STATE OF TEXAS,
Appellee.

On Appeal in Cause No. 20150D02224
in the 243rd District Court
El Paso County, Texas
The Honorable Luis Aguilar, Judge Presiding

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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No. 08-16-00001-CR

IN THE

EIGHTH COURT OF APPEALS

OF TEXAS

EL PASO, TEXAS

ALBERTOMONTELONGO,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

TO THE HONORABLE COURT OF APPEALS,

ALBERTOMONTELONGO, Appellant, would show the following in support of his request for reversal of his conviction and sentence.

STATEMENT OF THE CASE

Montelongo was charged with one count of attempt to commit capital murder of multiple persons and one count of assault bodily injuryfamily violencecases within12 months. R. 1:5. Appellant pled not guilty. R. 4:13. He was found guilty by a jury and assessed asentence of 99 years in prison on Count I and 10 years in prison on Count IItorun concurrently. R.7:133.

ISSUES PRESENTED

1. Whether the trial court abused its discretion when it failed to hold a hearing on his motion for new trial.
2. Whether Appellant was denied his 6th Amendment right to the effective assistance of counsel and his right to due process, when the trial court repeatedly threatened to hold defense counsel in contempt.
3. Whether Appellant was denied his 6th Amendment right to the effective assistance of counsel and his right to due process, when the trial court erroneously held defense counsel in contempt after the conclusion of voir dire. R. 3:109.
4. Whether Appellant was denied his right to a fair and impartial trial when the trial judge severely admonished two jurors who claimed they could not judge another person and accused another juror of trying to get out of jury duty when she spoke up. R. 3:54-60; 66.

STATEMENT OF FACTS

It was alleged that on or about February 2, 2015, Montelongo attempted to murder two individuals in one criminal transaction, to wit: Jesus Rodriguez and Angelica Parra.R. 4:11. It was also alleged that on or about January 29, 2015 and on or about February 2, 2015,Montelongo intentionally, knowingly, or recklessly caused bodily injury to Angelica Parra, a member of the defendant's family or household, during a period that was 12 months or less in duration. R. 4:13.

State's Case

VerlimirovicBratislav

Bratislav was the doctor that treated Jesus Rodriguez on February 3, 2015 for a gunshot wound to the head.R. 4:28. He described two surgical procedures undergone by Rodriguez and he opined that most bullet shots to the head are fatal. R. 4:41. Based on the trajectory in the head, Barislav could not say what angle the gun was pointing when it was fired. R. 4:49.

Blanca Votta

Votta was a Crime Scene Investigator. R. 4:51. On February 2, 2015, she was sent out to the scene of 13926 Bradley. R. 4:53. She took pictures and collected a gun, casings and a knife as evidence. R. 4:54. She speculated that thekitchen utensils strewn about the floor of the kitchen indicated there had been a struggle

there.R. 4:69.Votta stated that the knife had a bloodstain on it. R. 4:75. The gun had a bullet with holes on the side of it, chambered into the barrel. R. 4:78-80. She gathered Rodriguez's clothes from the hospital and found two condoms in one of his pockets.R. 4:86.

Martin Hernandez

Hernandez was an operations officer with the U.S Border Patrol.R. 4:97. He stated that Border Patrol Agents are trained in the use of firearms. 4:97 Agents are taught which bullets go with different guns, how to put bullets into a magazine, how to load a magazine into a gun, and how to point and aim at a target. R. 4:97-98. He explained that, when aiming at a target, they are taught to use various stances to include the isosceles stance.R. 4:98. The isosceles is a stance where yousquare up toward your target with your shoulders straight.R. 4:99. Hernandez stated that in the early morning hours of February 3, 2015, he was called to respond to a barricaded incident.R. 4:101. He learned that Montelongowas involved.4:103. Hernandez knew thatMontelongowas a firearms instructor and taught firearms safety with the Border Patrol.R. 4:103. Hernandez explained that accidental shootings can happen on the firing range or anywhere an agent handles his weapon.R. 4:104. He also agreed that an individual might take the isosceles stance when he perceives a danger but that does not always equate with a dangerous

situation.R. 4:107.

Daisy Parra

Daisy was the 18-year-old daughter of complainant Angelica Parra. R. 4:110-111. On the day of the shooting, she had been going back and forth between doing laundry and texting. R. 4:113. Her mother's friend Jesse was planning on going over that night to watch movies with them. R. 4:114-115. On that night, when Jesse arrived, Daisy was in her room.R. 4:115. Daisy heard Jesse's voice from her room and later the angry voice of Montelongo.R. 4:115. Daisy came out of her room and saw Montelongo holding a gun with both hands, pointing it at Jesse, with his hand on the trigger.R. 4:123. Montelongo was about five or six feet from Jesse.R. 4:123. At that point she could not see where her mother was located.R. 4:124. Montelongo saw Daisy in the hallway and called her name, telling her to "get over here."R. 4:125. When she heard that, Daisy ran to her room to call the police.R. 4:125. She called 911 from the bathroom. R. 4:126. Daisy could hear her mother whining and Montelongo screaming.R. 4:127-128. At one point while she was still on the call, she heard a gunshot.R. 4:128. At that point, Daisy decided to get out of the house through her bedroom window.R. 4:129. Once outside of the house, she saw a sheriff and ran to him.R. 4:130. Daisy said that she had known Montelongo for about eight years, since the time she was about ten.R. 4:133. She

did not get along with him.R. 4:138. Although her mother and Montelongo argued a lot, she had never seen them get physical.R. 4:133. Montelongo did live at the house but he hardly stayed there and she did not know if he had belongings there. R. 4:139.

Jerome Washington

Washington was a detective with the El Paso County Sheriff's Office.R. 4:143-144. On February 3, 2015, when he arrived at 13926 Bradley, he was told that someone had been "holed up"inside the house for more than four hours.R. 4:148. The Swat Team was there and had deployed a robot into the house.R. 4:148. The robot is used to facilitate communication with individuals and it also has a camera for visuals.R. 4:148-149. Washington identified pictures from the robot whichshowedMontelongo holding a gun in his hand with Angelica Parra also in the picture.R. 4:152-153.

Richard Pryor

Pryor was another crime scene investigator with the Sheriff's Department.R. 4:161. He identified a vehicle found on Desert Willow.R. 4:167-168. The vehicle was a 2009 maroon Honda belonging to Montelongo. R. 4:172.Pryor said the vehicle was 571 feet from the Bradley residence garage door.R. 4:172.He did not know why the vehicle was there or how long it had been there.R. 4:173.

Blanca "Angelica" Parra

Parra was a border patrol supervisor at the Las Cruces, NM border patrol station. She met Alberto Montelongo in October, 2003 at a border patrol academy.R. 5:10-11. From 2003 to 2014 they had an on again, off again relationship.R. 5:11. They married on February 18, 2014 and separated in July of 2014.R. 5:11-12. They tried to reconcile after that but it didn't happen because Montelongo did not want to move back to the house.R. 5:13-14. Parra said that Montelongohad a lover that she found out about in June or July of 2014.R. 5:14. By December, 2014, Parra no longer wanted to work out the relationship. R. 5:14.

Jesus"Jesse" Rodriguez was a friend that Parra met on plentyoffish.com.R. 5:15. When she created a profile on that website, she specified that she was looking for friends. R. 5:16. Parra and Rodriguez started texting in mid-December of 2015 and did not meet in person until January of 2015.R. 5:18-19. By January 29, 2015, Parra and Rodriguez had gone on a total of three dates but had not had sex.R. 5:21.

On the night of January 29, 2015, Parra was asleep in her bedroom and was awakened by the sound of her bedroom door opening.R. 5:21. Montelongo came into her bedroom and told her he wanted to work things out.R. 5:22. Parra said she told Montelongo that she did not want to work things out because she was tired of his lies.R. 5:23. She stated that Montelongo told her he had spoken to God, who had told

him to get his woman to submit to him.R. 5:24. Parra laughed at him and Montelongo got mad.R. 5:24-25. He kept trying to convince her but she told him she did not want to talk to him anymore and grabbed her iPad and started ignoring him.R. 5:25. She testified that at that point,Montelongo grabbed her by her hair and started banging her head against the headboard.R. 5:26. Parra felt like she was going to black out but she didn't.R. 5:27. Montelongo told her in Spanish that she "deserved this for being a whore."R. 5:27. After that, he got up and walked to the garage, got in his car, and left.R. 5:29. After Montelongo left the residence, Parra discovered that she had injuries to her face.R. 5:31. Parra reported the incident to the Sheriff. R. 5:32. Afterward, Montelongo asked Parra if she had called the Sheriff and whether he would be arrested. R. 5:32.

On the night of February 2, 2015, Rodriguez went over to Parra's home to watch a movie with Parra and her daughter, Daisy.R. 5:33.He arrived just after 10 p.m.R. 5:34. Parra and Rodriguez were in the kitchen with Parra showing Rodriguez a game on her iPhone, when Parra heard the click of the front door opening.R. 5:36. She saw Montelongo entering and immediately addressing Rodriguez with "What the fuck are you doing in my house?"R. 5:37. Parra explained that Montelongo immediately began questioning Rodriguez about having sex with his wife, wanting to know how many times they had had intercourse.R.

5:38. Parra stated that she thought that they might get into a fight so she stepped in between them.R. 5:38. She said that Montelongo had his hands inside his pockets.R. 5:40. When he took his hands out of his hoodie, he had a gun, which he pointed at Rodriguez.R. 5:41. Parra said that she tried to explain to Montelongo that they had done nothing but Montelongo ignored her and continued questioning Rodriguez.R. 5:42.

At one point, Montelongotold Parra to get on her knees and call her daughter to come over to where they were.R. 5:45. Parra refused to get on her knees and called her daughter once, but then stopped calling for her because she thought the if she came, Montelongo would hurt her.R. 5:46. She then felt Jesse's hands on her shoulders, moving her, using her as a shield. R. 5:46. Montelongotold Rodriguez "What a brave man." R. 5:46. Parra then heard a shot.R. 5:47. Right before she heard the shot, she saw Montelongo close one eye and then she felt her fingers burning.R. 5:47-48. After the shot, her ears started to ring, she no longer felt Jesse's hands on her, and she heard something hit the floor. R. 5:49.

Parra saw Rodriguez on the floor bleeding. R. 5:49. Montelongolowered the gun and pointed at her midsection. R. 5:50. She heard a click but the gun did not fire. R. 5:51. At that point, she grabbed the slide of the pistol with one hand and put her other hand on top of Montelongo's hand.R. 5:51. Montelongo told her to let

the gun go and they fought for the gun. R. 5:52-53. Their struggle led them to the kitchen.R. 5:54. Once in the kitchen, Montelongo opened two drawers and found the kitchen knives in the second drawer.R. 5:56-57. When Montelongo grabbed one of the knives, Parra let go of the gun and grabbed Montelongo's hand, which was holding the knife.R. 5:57. While they were struggling for the knife, they heard the noise andMontelongo said he thought it was the police who were going to enter.R. 5:60. Montelongo then stated that they were going to shoot him and grabbed the gun with one hand and pointed it at his head, while still holding on to the knife with his other hand.R. 5:61. Parra said that at that point, they stopped fighting.R. 5:61. When asked where Rodriguez was during all of this, Parra recalled that while they had been struggling for the pistol, she had seen Rodriguez staggering andholding his head.R. 5:62.

Montelongotalked about getting shot by cops and not being afraid to die.R. 5:64. She offered to help him escape and tried to convince him to let go of the knife but he would not.R. 5:65. Montelongo said he could not go to jail and he could not live seeing her with someone else. R. 5:66. Eventually, Parra saw an opportunity and ran out of the house.R. 5:68. Parra said that after she managed to escape, Montelongo stayed in the house about another hour.R. 5:73.

Parra agreed that while at the Border Patrol Academy, Montelongo helped her

a lot throughout the whole academy.R. 5:76-77. Parra agreed that she was on the website plentyoffish.com while she was still married to Montelongo.R. 5:78-79. She knew Georg Mendez, Sergio Martinez, and Jorge Landeros. She admitted having a sexual relationship with George Mendez.R. 5:81. She told Montelongo about the sexual relationship but after it got very ugly, she told him it was a lie.R. 5:81. Parra acknowledged that the house on 13926 Bradley was as much Montelongo's as it was hers.R. 5:82. They had owned the property for over a year but Montelongo had only lived in the house for about six weeks.R. 5:83. Parra could not explain how she got the injuries to her face on January 2[9,] 2015 whenMontelongo was slamming the back of her head on the headboard.R. 5:91. Parra could not tell if the muzzle of the gun was hot or not when she grabbed it after Montelongo had shot Rodriguez.R. 5:98-100. Parra said Montelongo threatened to kill her and himself.R. 5:106.

Jeffrey Kelly

Kelly was a firearms examiner with the Department of Public Safety.R. 5:109. He said there were markings on the bullet casing found in the gun chamber that indicated somebody had tried to fire it.R. 5:130-131. He could not say why the gun misfired. He also could not say that the circular marks on the casing were from the firing pin on the gun although the shape was the same. R. 5:134 Kelly agreed that

the barrel of a weapon warms up when fired.R. 5:150.

Jesus Rodriguez

Rodriguez met Parra through a social media dating application called Plenty of Fish.R.6:7. Parra never told him she was married but did tell him she was separated.R.6:9. On February 2nd, he and Parra were sitting in the kitchen playing a game, when the front door flung open and Montelongo walked in.R.6:14. Montelongo walked over to him and demanded to know why he was in the house.R.6:15-16. Montelongo said this is going to finish right nowandpulled out a gun.R.6:16-17. Montelongo pointed the gun at their chest area from about five or six feet away.R.6:19. A short time later, the gun went off and he felt blood dripping from his forehead but he could not recall falling to the ground.R.6:20. Rodriguez crawled into a restroom in the hallway.R.6:21.

Once in the bathroom, Rodriguez immediately looked at himself in the mirror to see where he had been hit.R.6:21-22. He saw an entry wound above his right eye and he grabbed a towel and applied direct pressure to his forhead.R.6:22. Rodriguez called 911 and he was told that the sheriff's officers were already there waiting to enter the residence and that one of the deputies was going to be calling him.R.6:24.The SWAT team got Rodriguez out of the house and he was taken to Del Sol Medical Center, where he underwent surgery.R.6:26-27. Based on what

Rodriguez saw and heard, he said that the February 2nd incident had not been an accident.R.6:29.

THE DEFENSE'S CASE

Alberto Montelongo

On February 2, 2015, Montelongo was employed by the United States Border Patrol.R.6:43. When he met Parra, it was as classmates and study partners at the Border Patrol Academy. R.6:43. Parra joined the Academy on the same day as Montelongo.R.6:45. While at the Academy, their relationship became romantic and intimate.R.6:45-46. After he and Parra graduated from the Academy in 2004, Montelongo left his family and Parra became his girlfriend.R.6:46. Their relationship was sometimes good and sometimes horrible. R.6:46. They dated for about 11 years and ultimately got married in 2014.R.6:46-47. They had disputes about kids, family, finances, and just about everything.R.6:47. Montelongo stated that they also had arguments about other men getting involved in their relationship.R.6:47. Over the years, they spoke about divorcing at least 20 times but Montelongo's position was to just split up, take what you own, and part ways.R.6:48.

On the 29th, Montelongo went to the Bradley house because that is what had been arranged two days before.R.6:48-49. The arrangement they had made was to

talk about fixing their marriage.R.6:49. When he went over, he had dinner with Parra, Parra's daughter Daisy, and Daisy's Boyfriend.R.6:49. After dinner, they played Clash of Clans for about 30 minutes and then decided to move to the bedroom.R.6:49. In the bedroom, Parra laid down on the bed, put a pillow on her lap, an iPad on top of the pillow, and started playing Clash of Clans.R.6:49-50. They talked about reconciling for about 20 minutes but when they could not see eye to eye, they started talking about getting a divorce instead.R.6:50.

Montelongo brought up the issue of a $50,000 loan he had obtained for her and Parra started ignoring him.R.6:50. He became aggravated and after about two minutes he tried to take the iPadaway from Parra. She grabbed the pillow and put it up against her face with the iPad in between. R.6:51. He tugged at it a few times but then it slipped and her head bounced back on the headboard.R.6:51. Montelongostated that he did not purposely strike Parra.R.6:51. He denied inflicting any of the injuries shown on Parra that night. R.6:51. On January 30th, Montelongo went to jail and was released about six to eight hours later.R.6:54.

Once released from jail, he went to his workstation where he was served with paperwork telling him he was being placed on administrative leave.R.6:54-55. He was asked to relinquish his badge, credentials, duty belt, holster, handcuffs, and service weapon. R.6:55. On the morning of Monday, February 2nd, the day of the

shooting, Montelongowent to work at 7 a.m.R.6:56-57. That evening, he went to Parra's home because he needed to get some things from her house and give her the mortgage money.R.6:57.

Earlier that day, before he went over, he had spoken to Parra and they were talking about making plans to talk about trying to fix their relationship again.R.6:58. While they were talking on the phone, Parra answered another phone call and when she got back to Montelongo, she had changed her mind.R.6:58. She told Montelongo, "Let's let the courts handle it."R.6:58. Since Montelongo still needed to pick up his things he went over anyway.R.6:58. When he got there, he parked in an empty lot behind the house because he knew that if Parra saw his car, she might not talk with him.R.6:59. He wanted to give her the mortgage money, get his things and talk to Parra about why she had called the cops.R.6:59.

As Montelongo was walking towards the house, he saw a vehicle that he did not recognize pull into the driveway.R.6:59. Montelongo went to the front of the house and he could see Parra and Rodriguez inside the house hugging and kissing.R.6:60. Montelongo tried to unlock the front door but then he remembered that the lock on the front door was broken because a key had previously broken inside the lock and the door could not be opened.R.6:60. Because of this, he went around through the garage.R.6:60. While inside the garage, Montelongo

remembered that Parra kept an old pistol in a box in the garage.R.6:60. He grabbed the gun and put it in his sweater's pocket.R.6:63.

Once inside the house, he went to the front door, unlocked it from the inside, opened it and closed it.R.6:63. He then turned around and both Parra and Rodriguez were looking at him.R.6:63. Montelongo asked Rodriguez if Parra had told him that he taught her that game.R.6:63-64. Rodriguez and Parra both stood up and took a couple of steps towards Montelongo and that is when Montelongo took a couple of steps back, drew his pistol, and began with the foul language.R.6:64. Rodriguez then tried to grab the gun from Montelongo but missed.R.6:65.

After that, Rodriguez grabbed Parra and put her in front of him.R.6:66. They started moving back towards the hallway through the kitchen.R.6:66-67. Montelongo was yelling at Rodriguez to get away from his wife and get out of his house.R.6:66-67. After they went into the hallway, Montelongo could not see them well because it was dark.R.6:67. Before Parra and Rodriguez started to move, Montelongo heard Daisy, Parra's daughter come out of her room.R.6:68. He called her over to her because he did not want her to call the police.R.6:68. He wanted to diffuse the situation and leave without any trouble.R.6:68. Daisy said no and walked back into her bedroom.R.6:68.

When Parra and Rodriguez turned the corner, all he could see was black

silhouettes.R.6:68-69. He heard someone say, “I’ll get out of here.” At that point everyone stopped. He then felt a tug on the gun and it went off.R.6:69. He believed it was Parra who tugged on the gun. R.6:69. When the gun went off, Montelongo was shocked.R.6:70. Montelongo did not know he had hit Rodriguez until he saw him fall to the ground.R.6:70. Montelongo just stood there and then Parra went at him and grabbed the gun.R.6:70-71. He struggled with Parra for the gun but did not attempt to discharge it again during their struggle.R.6:71.

Montelongosaid he attempted to go for a knife because, at that point, he did not want to live anymore—he wanted to kill himself.R.6:71. He went for a knife a second time and that time he was able to grab a knife, along with Parra, who grabbed it with both hands and cut herself.R.6:72. After the first shot went off, the gun jammed and Montelongo hit it to try to make it load another round.R.6:72. He was successful in getting the gun to load again and held it to his throat. R.6:73. Montelongo never struck Parra with the gun and he never tried to shoot her.R.6:73.

While Montelongo and Parra were struggling with the knife, they went towards the front door, past the first hallway. R.6:173. At some point, police officers or sheriffs started arriving.R.6:74. Montelongo and Parra started arguing about their entire relationship and about who had been at fault.R.6:74-75. Montelongo said he never kept Parra from leaving and, in fact, he told her to leave

him, to go, to get away, to leave the house.R.6:75. Parra told Montelongo to leave, to hide, to run away, and to hide in the attic.R.6:75. While he was in the house with Parra, he talked to the police through the robot they sent in.R.6:76. He was in the house about four or five hours after the police arrived.R.6:76. After three times of standing up and going to the front door, Parra left the house.R.6:76. Montelongo's intention when he went to the Bradley house was to try to talk to Parra and to calm her down about the previous arrest.R.6:77.

Montelongo knew how to use firearms but did not believe he was very good at it until he got training and experience with the Border Patrol.R.6:84-85. With the Border Patrol, he became a firearms instructor and a range safety officer.R.6:85. During his 11-year career with the Border Patrol, Montelongo figured he had taught between 200 and 500 people how to shoot.R.6:86.On February 2nd, Montelongo went to the Bradley house to give Parra the mortgage payment, pick up some of his things and to try to talk to Parra about dropping the charges against him.R.6:97. When he picked up the gun in the garage, Montelongo wasn't really thinking about whether the gun was loaded and ready to fire—he just put it in his pocket.R.6:99. He had picked up the gun because he had seen that there was a guy he did not know with his wife.R.6:98. Montelongo did not pull the gun out of his pocket until Rodriguez came at him.R.6:102-103.

When Rodriguez tried to reach for the gun, Montelongo took a step back and Rodriguez missed the gun.R.6:105. When the gun went off, Montelongo had not meant to shoot—it was an accident.R.6:105. He saw Rodriguez go down and stood there in shock.R.6:105-106. Montelongo did not check on Rodriguezbecause he was struggling with Parra for the gun.R.6:06-107. During the struggle for the gun, Montelongo banged the gun on the kitchen table to try to clear the gun because he was preparing to kill himself.R.6:110-111.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion when it failed to hold a hearing on Appellant's properly presented motion for new trial. The motion was timely filed, it was properly supported by an affidavit specifically showing the truth of the grounds for attack and it was timely presented to the trial court. Appellant seeks an abatement for the purpose of holding a hearing on Appellant's motion for new trial.

2 and 3. Defense counsel was held in contempt at the conclusion of voir dire. He was also threatened with contempt throughout the trial. Because counsel was concerned with his own welfare, he was operating under an actual conflict of interest and was incapable of providing effective assistance of counsel. Consequently, Appellant was denied the right to effective assistance of counsel and his right to due process.

4. Appellant was denied the right to a fair and impartial trial by the trial court's badgering of jurors that responded affirmatively on questions related to their jury service. Several jurors that responded to questions regarding their ability to judge were ridiculed for their responses. As a result, the truthful exchange of information between the jurors and the litigants was chilled and Appellant's right to a fair and impartial jury was impinged.

ARGUMENT–ISSUE 1

1. The trial court abused its discretion when it failed to hold a hearing on his motion for new trial.

A. Relevant Facts.

A jury found Montelongo guilty of attempted capital murder and assault on a family member, 2 within 12 months. R. 7:131. On September 30, he was sentenced to 99 years and 10 years respectively, for each count. R. 7:131. Montelongo filed a timely motion for new trial on October 30, 2015, which specifically requested that the court grant him a hearing on his motion for new trial. CR. 263. The matter was set for a hearing by the court but subsequently, the hearing was cancelled without an explanation. CR. 29. The court did not reset the matter for a hearing and the motion was overruled by operation of law.

B. Legal authority.

"When an accused presents a motion for new trial raising matters not determinable from the record, which could entitle him to relief, the trial judge abuses his discretion in failing to hold a hearing." *King v. State*, 29 S.W.3d 556, 569 (Tex.Crim.App.2000). The purpose of the hearing is to fully develop the issues raised in the motion. *Jordan v. State,* 883 S.W.2d 664, 665

(Tex.Crim.App.1994).[1]As a prerequisite to obtaining a hearing, the motion must be supported by an affidavit specifically showing the truth of the grounds for attack. *King v. State,* 29 S.W.3d at 569; *Reyes v. State,* 849 S.W.2d 812, 816 (Tex.Crim.App.1993).[2] The affidavit need not reflect each and every component legally required to establish relief, but rather must merely reflect that reasonable grounds exist for holding that such relief could be granted. *Jordan v. State,* 883

[1] The State argues that the trial court could determine the issue based on affidavits citing *Holden v. State*, 201 S.W. 3d 761, 762-764 (Tex. Crim. App. 2006), for this proposition. In Holden, the trial court had conflicting affidavits from trial counsel and appellant. The Court determined that the trial court could make its decision solely off of the affidavits. In this case, there are no conflicting affidavits. The affidavits supporting the motion for new trial are uncontroverted. Trial counsel admits to being ineffective. The State's argument that the trial court could have disbelieved trial counsel's admissions that he was ineffective, thus leaving a silent record as to the issue of trial strategy is ludicrous. Based on the State's rational, Appellant is never able to prove ineffective assistance of counsel because it claims trial counsel is not credible. According to the State, because the trial court could have found trial counsel not credible, he would then be left with a silent record as to trial counsel's reasons for his actions. And, based on a silent record, he cannot prevail on ineffective assistance of counsel. Essentially, a non-credible defense attorney means that Appellant will never prevail on his ineffective assistance of counsel claim.

[2] The State in its "Reply to Appellant's Motion to Abate Appeal" cites *Lara v. State,* No. 01-15-00472-CR, 2016 WL 2342769, at *2 (Tex. App. – Houston [1st Dist.], May 3, 2016, no pet.)(mem. op.)(not designated for publication) for the proposition that Appellant waived his right to a hearing by not objecting to the trial court's cancellation of the new trial hearing. In that case, the trial court set the hearing outside the 75 day period and the defendant did not object. The appellate court found waiver by Appellant's failure to correct the error while the court still had jurisdiction. In this case, the hearing that was initially set was within the 75-day period allowed for the determination of a motion for new trial. A hearing was set and then cancelled by the court without a motion by the State or the defense. The defense request for a hearing was unequivocal and the trial court's decision to cancel the hearing was contrary to that request. Having timely requested a hearing from the trial court and having been denied a hearing by the trial court, the defendant was not required to take any additional steps in order to preserve his request for a new trial. See *Rozell v. State,* 176 S.W. 3d 228, 230 (Tex. Crim. App. 2005)(Presenting the motion for new trial and the request for a hearing is akin to objecting to the erroneous admission of evidence.)

S.W.2d at 665; *Reyes v. State,*849 S.W.2d at 816.

C. Argument.

In this case, Appellant raised ineffective assistance of counsel as one of several grounds for the granting of a new trial. CR. at 263-274.The motion was accompanied by an affidavit from Appellant's trial attorney, which contained sufficient facts supporting a claim that counsel had been ineffective. CR. at 271-273.It was also sworn to by appellate counsel. In the affidavit, trial counsel admitted that he was intimidated by the trial court into limiting his voir dire and that he failed to conduct a full and thorough voir dire, out of fear of being held in contempt.CR. at 271-274.[3]

In addition, trial counsel stated in his affidavit that because he was held in contempt early on by the trial court, trial counsel did not zealously cross examine witnesses, he was reluctant to make objections during trial and his overall performance was lacking.*Id.*In essence, defense counsel admitted there was a conflict of interest that prohibited him from providing effective assistance of counsel. *See Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980)(finding violation of the Sixth Amendment's right to effective assistance of counsel if there is an actual

[3] Despite counsel's attempts to avoid contempt, he was ultimately held in contempt at the conclusion of voir dire. R. 3 :109. He was also threatened or reminded of possible contempt on many other occasions. R. 3:76; 4:10; 5:100; 7:46.

conflict of interest that adversely affects defense counsel's performance.)

Trial counsel further admitted that he failed to investigate Appellant's mental health issues despite being aware that Appellant was depressed, suicidal and had seen combat duty. *Id.* Trial counsel also admitted that he did not interview and/or present relevant punishment witnesses to include Appellant's parents, siblings, and other family members and friends, all of which were present and available at Appellant's trial. *Id.See Milburn v. State,* 15 S.W.3d 267, 270-71 (Tex. App. – [14th Dist] 2000, pet. ref'd)(finding trial counsel ineffective for failing to investigate and present mitigating evidence that consisted of at least twenty witnesses available to testify on appellant's behalf regarding matters such as appellant's fitness as a father and as an employee). See also *Ex parte Welborn,* 785 S.W.2d 391, 393 (Tex.Crim.App.1990)(explaining that a criminal defense lawyer has a duty to make an independent investigation of the facts of a case, which includes seeking out and interviewing potential witnesses). Finally, trial counsel cited personal health concerns and fear of incarceration for contempt, as reasons for his deficient performance in his representation of Appellant. CR. at 271-273.

From defense counsel's affidavit, it was abundantly clear that his main concern was self-preservation. Trial counsel was not functioning as counsel envisioned by the Sixth Amendment as he candidly admitted in his affidavit, that he

was not zealously defending his client. Many of these admissions are borne out by the record. Beginning with voir dire, the State's voir dire was 57 pages long while defense counsel's voir dire was 17 pages long. R. 2:10-67; 67-85. Defense counsel was threatened with contempt during voir dire and was told unequivocally that the court would take voir dire away from him if he continued with what the court considered objectionable behavior. R. 2:76. Immediately after this threat, defense counsel side-stepped a question by a juror requesting a more detailed explanation of the question being asked. R. 2:77. A short while later, defense counsel was admonished to refrain from asking inappropriate questions. R. 2:81. The trial court then questioned that particular juror itself, in essence beginning the process of taking voir dire away from defense counsel. R. 2:81.

A review of defense counsel's voir dire reveals no salient defensive strategy. Defense counsel failed to address any punishment issues, simply asking the jury panel, if they stood by their original answers to the State regarding the range of punishment. R. 2:85. Defense counsel made no effort to discuss issues related to theories of punishment, jurors' ability to be fair to a law enforcement officer accused of a crime, jurors that might be biased because they or someone they knew were victims of crimes and, whether jurors could be fair in a case that involved the attempted killing of more than one person. Defense counsel's limited voir dire

supports his statement in his affidavit that he did not cover areas of law that were relevant because he feared being held in contempt. CR. at 272.

During the trial, State's exhibits were admitted without objection. These included inadmissible and highly inflammatory photos of one of the victims in his hospital bed along with photos of this victim showing the effects of surgical procedures performed on him. SX-1, SX-2, SX-5, SX-6 and SX-7.The surgical procedure involved removing a portion of the victim's scalp thus leaving a significant indentation in the head. In addition to the photos, the victim displayed his scars and injuries to the jury. R. 6:29. The victim also testified, without objection, as to the specifics of his surgeries, the possible complications associated with his surgeries and, the possible complications resulting from being shot in the head. R. 6:26-29. Appellant asserts that this evidence was not relevant and it was also inadmissible under Ruler 403 of the Texas Rules of Evidence. *See Kelly v. State*, 22 S.W. 3d 642, 645(Tex. App. – Waco, 2000 pet. ref'd)(finding gruesome photos of gunshot had little probative value when it was undisputed the victim was shot. Consequently, the court erred in admitting such photos.)

During punishment, defense counsel called two witnesses aside from Montelongo. The only substantive question asked of these witnesses was whether Montelongo had a reputation for being peaceful and law abiding or for being a good

person. R. 7:85, 89. At one point, Montelongo's sister appeared to be attempting to provide additional background information regarding Montelongo but the State objected. R. 7:89. Defense counsel then simply asked the sister about his reputation for being a good person. R. 7:89. Consequently, defense counsel's affidavit admitting that he was deficient in presenting mitigating and character evidence at the punishment stage of the trial is borne out by the record. Mitigating evidence clearly would have been admissible. *Milburn v. State,* 15 S.W.3d 267, 271 (Tex. App. 2000). Defense counsel's failure to search out and present any mitigating character evidence constituted ineffective assistance of counsel. See, *Ex parte Felton,* 815 S.W.2d 733, 737 n. 4 (Tex.Crim.App.1991).

Appellant further alleged in his motion for new trial, that the trial court's comments during voir dire improperly chilled the honest exchange of information between the potential jurors and the litigants. CR. 271-273. As a result, Appellant claimed that he was deprived of due process, trial by an impartial jury and the right to counsel. This allegation was supported by trial counsel's affidavit in which he described the manner in which he believed the trial court intimidated the jurors. CR. at 271-272.These allegations are also borne out by the record, which at times, shows the trial court intimating to jurors that any indication by them that they could not be fair would not be acceptable. R. 3:54-60; 3:66.

The affidavits that accompanied the motion for new trial, specifically showed the truth of the grounds asserted and reflected that reasonable grounds existed for a finding of ineffective assistance of counsel, a violation of due process, deprivation of the right to a fair and impartial jury and, the deprivation of the right to counsel. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994). As such, Appellant was entitled to a hearing on the issues raised in sections 3 and 4 of his motion for new trial. *King v. State,* 29 S.W.3d 556, 569 (Tex.Crim.App.2000).

D. Remedy.

A court of appeals must not affirm or reverse a judgment or dismiss an appeal if:

(1) the trial court's erroneous action or *failure or refusal to act prevents the proper presentation of a case to the court of appeals;* and

(2) the trial court can correct its action or failure to act.

Tex.R.App. P. 44.4(a) (emphasis added).

In such circumstances, the appellate court "must direct the trial court to correct the error" and "then proceed as if the erroneous action or failure to act had not occurred." Tex.R.App. P. 44.4(b).Texas Rule of Appellate Procedure 43.6 further provides that an appellate court "may make any other appropriate order that the law and nature of the case require." Tex.R.App. P. 43.6. *See alsoMcIntire v. State,* 698 S.W.2d 652, 662 (Tex.Crim.App.1985) (op. on reh'g) (abating to determine

feasibility of hearing on three-year-old motion for new trial) and *Crosson v. State,* 36 S.W.3d 642, 294 (Tex.App.-Houston [1st Dist.] 2000, order) (abating for suppression hearing, listing many similar situations for which abatement has been ordered). In this case, the complained of error may be corrected by directing the trial court to hold a hearing on Appellant's motion for new trial. Appellant requests that this Court abate the appeal and order the trial court to hold a hearing on his motion for new trial.

ARGUMENT–ISSUES2 AND 3

2. Appellant was denied his 6th Amendment right to the effective assistance of counsel and his right to due process, when the trial court repeatedly threatened to hold defense counsel in contempt.

3. Appellant was denied his 6th Amendment right to the effective assistance of counsel and his right to due process, when the trial court erroneously held defense counsel in contempt after the conclusion of voir dire. R. 3:109.

During voir dire, defense counsel was admonished by the trial court to refrain from asking a juror if there was anything the judge could do to change the juror's mind about being fair and impartial. R. 3:75.Defense counsel was told by the trial court that if he continued with such questions, the trial court would finish his voir dire for him. R. 3:76. At the conclusion of voir dire, while the trial court was discharging the jurors that were not chosen, defense counsel was held in contempt by the trial court because he attempted to offer an explanation regarding a statement made by the judge to the excused jury panel members. R. 3:109. Defense counsel was immediately silenced and summarily held in contempt for speaking up during the trial judges discourse with the excused panel members. R. 3:109. He was then fined $500 due and payable the following day of trial. R. 3:119. The trial court also warned defense counsel that if he engaged in similar conduct again, he would be dealt with severely.

The next day of trial, defense counsel was reminded to pay the contempt fine. R. 4:10. The trial court then continued to intermittently threaten to hold defense counsel in contempt throughout the trial. R. 5:100, 7:46. During guilt innocence, the trial

court told defense counsel "I sustained that question two times. The next one, hold you in contempt, and I will. I'm telling you right now, I'm going to find you in contempt" R. 5:100. Then during punishment, the following exchange occurred: "Mr. Cervantes, next time I repeat an instruction to you, I'm holding you in contempt, and don't plan on going home. This is your third admonishment. Do it again, you're not going home." R. 7:46. The admonishment continued with "I have told you six times today . . . It's going to cost you. Do you understand?" R. 7:46. Based on the statements made on the record, it appears that additional threats of contempt not contained in the record had been previously made by the trial court.

A. Legal Authority.

The essence of "contempt" is that the conduct obstructs or tends to obstruct the proper administration of justice. *Ex parte Taylor,* 807 S.W.2d 746, 748 (Tex. Crim. App. 1991).Although an attorney's conduct might not be commendable and might be irritating to a judge, it does not constitute contempt if it does not hinder the forward progress of the trial or obstruct or tend to obstruct the administration of justice. *Ex parte Pink,* 746 S.W.2d 758 (Tex. Crim. App. 1988); *Ex parte Jacobs*, 664 S.W.2d 360 (Tex. Crim. App. 1984)."The fact that counsel pursues a method at variance with that which the court deems correct, with no intended disrespect to the court, should not be subject to a penalty for contempt. *See Ex parte Heidingsfelder,* 206

S.W. 351 (Tex. Crim. App.1918). Whether applicant's statement offended the court is not the test in contempt actions but the act itself must be shown as intentionally disrespectful. “Trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.” *Brown v. United States,* 356 U.S. 148 (1958).Although the trial judge has the inherent power to control orderly proceedings in the courtroom, the judge should always be careful not to jeopardize the rights of the parties by criticizing or embarrassing counsel unnecessarily. See *Gonzales v. State,* 2 S.W.3d 600 (Tex. App. -- Texarkana 1999 pet. ref’d).

Furthermore, it is a violation of the Sixth Amendment’s right to effective assistance of counsel if there is an actual conflict of interest that adversely affects defense counsel’s performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). While most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of co-defendants, the constitutional principle is not narrowly confined to instances of that type. The cases reflect the sensitivity of the judiciary to an obligation to apply the principle whenever counsel is so situated that the caliber of his services may be substantially diluted. *United States v. Hurt,* 543 F.2d 162 (D.C. Cir. 1976). Competition between the client's interests and counsel's own interests plainly threatens that result, and there is no doubt that the conflict corrupts

the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid.*Id.*

B. Argument.

During voir dire, Appellant's defense counsel was admonished by the court to watch his questions or risk having voir dire taken away from him. Defense counsel was then summarily held in contempt when he attempted to voice his opinion on an issue, during the trial court's discourse with the panel members that had been excused. He was fined $500 by the trial court, due and payablethe following day. The actions by defense counsel were not contemptuous as they did not hinder the forward progress of the trial or obstruct or tend to obstruct the administration of justice. *See Ex Parte Pink.*

Once counsel was held in contempt, he could not effectively represent Appellant due to a conflict of interest between protecting himself and defending Appellant. This is supported by defense counsel's affidavit in support of Appellant's motion for new trial wherein, he admits to not zealously representing Appellant for fear of being held in contempt and jailed. CR. 271-273.

"If attorneys must fear that momentary antagonism, inadvertent insults, and the occasional lapses of decorum that inevitably result from zealous advocacy in the heat of courtroom battle might result in punishment for contempt, they will have

little choice but to practice a more hesitant brand of advocacy, to avoid the personal jeopardy for such excesses."Raveson, L.S.[ADVOCACY AND CONTEMPT: CONSTITUTIONAL LIMITATIONS ON THE JUDICIAL CONTEMPT POWER; PART ONE: THE CONFLICT BETWEEN ADVOCACY AND CONTEMPT], 65 Wash. L. Rev. 477 (July 1990). These fears were exacerbated by the trial court's repeated threats to hold him in contempt for actions that were not legally subject to contempt. As previously noted in Issue 1, not only is defense counsel's deficient performance supported by his affidavit in support of Appellant's motion for new trial but also by his deficient performance throughout the trial. Defense counsel failed to present any meaningful punishment evidence, he failed to make objections throughout the trial, he agreed to admit all of the State's proffered exhibits, he failed to make objections to improper parole arguments during the State's punishment closing, and he failed to make objections to improper non victim impact evidence presented by the State.This in addition to conducting a deficient voir dire that failed to cover any punishment issues with the jury.

C**. Conclusion.**

A defendant alleging ineffective assistance of counsel is entitled to the presumption of prejudice in instances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a

presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *United States v. Cronic,* 466 U.S. 648, 658-660(1984). A conflict of interest occurs when counsel's regard for on duty tends to lead to the disregard of another duty. *Hurt*, 543 F.2d 162. Such is the case here as defense counsel did not zealously represent Appellant because he feared that by doing so, he might be fined or jailed or both. Consequently, Appellant was denied the effective assistance of counsel and his right to due process,by the trial court holding him in contempt during voir dire and continuing to threaten contempt throughout the trial. See *Brumit v. State,* 206 S.W. 3d 639, 645 (Tex. Crim. App. 2006)(Due process requires a neutral and detached hearing body or officer. This ensures that a party has a fair trial in a fair tribunal.)

ARGUMENT–ISSUE 4

4. Appellant was denied his right to a fair and impartial trial when the trial judge severely admonished two jurors who claimed they could not judge another person and accused another juror of trying to get out of jury duty when she spoke up. R. 3:54-60; 66.

During the State's voir dire, Juror Number 5 answered affirmatively to the question who felt that for religious reasons they could not judge the credibility of

another. R. 3:54. The judge then began to question the juror himself. He pointed out that the juror sat on a grand jury and was judging 20 to 30 people every session. R. 3:54. The judge asked the juror if she had just said she could not judge someone and the juror attempted to respond but was cut off. R. 3:54-55. The judge then continued to badger the juror about her answer by repeatedly reminding her that she was on a grand jury and was essentially judging 20 to 30 people each session. R. 3:55. A short while later, another juror responded to this question affirmatively. R. 3:59. This juror was also questioned about whether or not she judged people in her everyday activities. The juror insisted that she did not want to pass judgment on another and the trial court continued to harass the juror. R. 3:59. Finally, the juror agreed to judging people under certain circumstances and she was promptly mocked by the trial court for her answer and then told to sit down. R. 3:60. A short while later, a juror volunteered that she might have an excuse to not serve and the judge asked her if she was trying to get out of jury service. R. 3:66. The juror began to answer but was promptly cut off by the judge and told to sit down. R. 3:66.

A. Legal authority.

The Sixth Amendment to the United States Constitution guarantees a trial before an "impartial jury." U.S. Const. amend. VI. A defendant's right to a trial before an impartial jury is ingrained within our fundamental precepts of justice. *Armstrong v.*

State, 897 S.W.2d 361, 368 (Tex.Crim.App.1995).The voir dire process is designed to effectuate a defendant's right to a fair trial by insuring, to the fullest extent possible, that the jury will be intelligent and impartial. *Armstrong,* 897 S.W.2d at 368; *Salazar v. State*, 562 S.W.2d 480, 482 (Tex.Crim.App. [Panel Op.] 1978).

Punishing a juror for speaking truthfully and expressing bias has a chilling effect on the jury's ability to respond affirmatively to questions asked during voir dire. *See Price v. State,* 626 S.W.2d 833, 835(Tex. App. – Corpus Christi 1981, no pet.)(stating that the trial judge's comment on juror's religious beliefs "cannot help but chill the honest exchange of information so necessary in the selection of a fair and impartial jury.") In*United States v. Rowe,* a juror told the judge that she could not be fair in a drug case because her brother was an undercover narcotics officer and her father was a police officer. 106 F.3d 1226, 1230 (5th Cir.1997).In retaliation for the juror's response, the judge stated that the juror was going to be placed on jury panels in February, March, and April so that she could "figure out how to put aside [her] personal opinions." Id. The exact same encounter occurred between the judge and one other juror, and resulted in the same threat of punishment. Id. at 1228–29. The Rowe court held that because the jurors were punished for responding truthfully about their biases, the trial judge's actions "cut off the vital flow of information from venire to court." Id. at 1230. The court reasoned that the "district court simply lost

any opportunity to explore panel members' views and educate them" and as a result it "became impossible for counsel to get the information from potential jurors necessary for jury selection." Id.

B. Argument.

Two jurors stated that they could not judge others because of religious beliefs and they were both mocked and criticized bv the judge. The second juror attempted to agree with the judge after a few questions but she was still mocked and ridiculed by the judge and rudely told to sit down. A short while later, a juror attempted to ask a question that might affect her jury service and she was promptly accused of trying to get out of jury service by the judge. Under these circumstances, jurors were unlikely to answer the litigants' questions in a truthful manner for fear of reprisal from the judge. While it is presumed that potential jurors answer truthfully the questions of voir dire, this presumption does not apply when jurors are given reason to fear reprisals for truthful responses. *Drake v. State,* 465 S.W.3d 759, 764 (Tex. App.—Houston, [14thDist] 2015 no pet.). This type of error is reversible fundamental error and can be raised for the first time on appeal. *Id.* at 763. The trial judge's actions and remarks in this case cut off the vital flow of information from the jury to the court in such a way that it prevented Appellant from having a fair and impartial trial.Consequently, this court should reverse his conviction and sentence

and remand his case for a new trial.

PRAYER

Appellant prays that his conviction and sentence be reversed and that he be granted a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Brief was delivered to the Office of the District Attorney at 500 E. San Antonio, El Paso, Texas 79901 on September 26, 2016.

/s/Ruben P. Morales
Ruben P. Morales

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 8,431 words and complies with the applicable

Rules of Appellate Procedure.

/s/ Ruben P. Morales
Ruben P. Morales

Appendix 2 – State’s Brief

NO. 08-16-00001-CR
IN THE COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS

ALBERTO MONTELONGO **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF

ON APPEAL IN CAUSE NO. 20150D02224
IN THE 243RD JUDICIAL DISTRICT COURT, EL PASO, TEXAS

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STATEMENT OF THE CASE

Appellant, Alberto Montelongo (hereinafter "Montelongo") was indicted for one count of Attempt to Commit Capital Murder of Multiple Persons, four counts of Aggravated Assault With a Deadly Weapon, and one count of Assault Causing Bodily Injury, Family/Household Member, Two or More Times Within 12 Months. CR 9-15.[1] After a jury trial, Montelongo was found guilty of Attempt to Commit Capital Murder of Multiple Person, and he was sentenced to 99 years imprisonment and a $10,000.00 fine. CR 251. Montelongo was also found guilty of Assault Causing Bodily Injury, Family/Household Member, Two or More Times Within 12 Months. CR 253. For this crime, Montelongo was sentenced to 10 years imprisonment and a $10,000.00 fine.[2] *Id*.

On October 30, 2015, Montelongo filed a motion for new trial alleging ineffective assistance of trial counsel. CR 263. The motion included a request for a hearing. CR 269. On November 19, 2015, the trial court entered an order setting a December 8, 2015, hearing on Montelongo's motion for new trial. CR

[1]Throughout this brief, references to the record will be made as follows: references to the trial court clerk's record will be referred to as "CR" and page number; references to the two volume of supplemental clerk's record will be referred to as CR Supp(Month) and page number; references to the eight-volume reporter's record will be referred to as "RR#" and page number; and, references to the exhibits, if any, will be made either as "SX" or "DX" and exhibit number.

[2] Montelongo was not tried on the four counts of Aggravated Assault with a Deadly Weapon, and those charges were eventually dismissed. CR 258.

Supp(December) 5. But then on November 23, 2015, the trial court entered an order cancelling the December 8, 2015 hearing. CR Supp(December) 8. No written order was entered deciding Montelongo's motion for new trial. Therefore, the motion was overruled by operation of law on December 14, 2015 (75 days after Montelongo was sentenced in open court). *See* Tex.R.App.P. 21.8. Montelongo timely filed his notice of appeal of December 29, 2015. CR 277.

STATEMENT CONCERNING ORAL ARGUMENT

Because Montelongo has requested oral argument, the State will protectively request the same.

STATEMENT OF FACTS

Montelongo and Blanca Angelica Parra (hereinafter "Parra"), husband and wife[3], had a relationship that was, in Montelongo's own words, "at times, good; at times, horrible." RR6 46. Montelongo and Parra met in October 2003, when both were cadets at the United States Border Patrol academy in Glencoe, Virginia.[4] RR5 10-11. They were classmates and study partners. RR6 43. At that time, Montelongo was married and had two children. RR5 77; RR6 43.

Parra admitted that Montelongo helped her during their time at the academy. RR5 76. As part of their weapons training at the academy, Montelongo and Parra were taught how to select proper ammunition, load a magazine, insert the magazine into the weapon, use the safety, chamber the first round, assume a proper shooting stance, and aim and fire the weapon. RR5 9-10; RR6 81-83. Eventually, Montelongo became a firing-range instructor for Border Patrol. RR6 85. Montelongo estimated that he trained between 200 to 500 agents. RR6 86.

While still attending the academy, their relationship became romantic and physical. RR6 45. After completing the academy, Montelongo left his wife and family. RR6 46.

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[3] Their current marital status is unknown.

[4] At the time of trial, Parra was still employed by the United States Border Patrol as a supervisor at the Las Cruces, New Mexico station. RR5 6.

Montelongo and Parra had an on again/off again relationship from 2003 through 2014. RR5 11. They married on February 18, 2014. RR5 12. They separated in July 2014. *Id*.

Montelongo and Parra attempted reconciliation from July 2014 through December 2014. *Id*. But, the reconciliation failed because Montelongo would not move back into the marital home. RR5 13. Montelongo had a separate home, and, during the post-marriage separation, Parra learned that Montelongo had a lover the past three years. RR5 13.

In the beginning of December 2014, Parra decided that she did not "want to work it out anymore." RR5 14. Eventually, Parra created a profile on a dating website, plentyoffish.com. RR5 15. She met three men from that website in person. RR5 16. One of those men was Jesus Rodriguez (hereinafter "Rodriguez"). RR6 7.

Parra and Rodriguez first started chatting online in mid-December 2014. RR5 18; RR6 7. They first met in person for a movie date in January 2015. RR5 19; RR 8. On their second date, Parra met Rodriguez at a local bar for some drinks. RR5 19-20; RR6 9. They kissed on this date. RR5 20; RR6 9-10. Their third date occurred on January 29, 2015, when Parra invited Rodriguez and his children to her house for a "get-together." RR5 20; RR6 10. Parra and Rodriguez never had sexual relations. RR 5 17; RR6 8-9, 10, 11.

Later in the evening of January 29, 2015, Parra was sleeping in her bed. RR5 21. Parra heard her bedroom door open, and she observed Montelongo standing in her bedroom. RR5 21. Parra and Montelongo were not living together at that time. RR5 23. Montelongo said that he wanted to reconcile. RR5 22. Montelongo told Parra that God wanted them back together and that he had received a revelation from God. RR5 23-24. Montelongo claimed that "God told him to get his woman to submit to him." RR5 24. Parra laughed at Montelongo, and Montelongo became angry. RR5 24.

Parra ignored Montelongo and started looking at her iPad. RR5 25. Montelongo then grabbed Parra by the hair and started striking her head against the bed's headboard. RR5 26. Parra said that the attack "hurt a lot" and that she thought she was going to black out. RR5 26-27. While attacking Parra, Montelongo said that she deserved the attack because she was unfaithful to him.[5] RR5 27. The attack lasted about one minute. RR5 28.

Soon after the attack, Montelongo left Parra's home. RR5 28-29. Montelongo went home to his girlfriend. RR6 93-94. Parra looked in a mirror and noticed that she had a swollen upper lip and that she was red and swollen around her eye. RR5

[5] The record does reflect that Parra had a one-night stand with a man she met online in December 2014, long after the parties had separated. RR5 17-18; RR7 43.

31; DX1-4. Parra called the sheriff. RR5 32. Montelongo was arrested the following morning. RR6 54. After being released, Montelongo reported to work at the Ysleta Border Patrol Station. RR6 54. Montelongo was placed on administrative leave, and he surrendered his badge, credentials, and service weapon. RR6 55. On January 31, 2015, Parra sought a protective order. RR5 93. Montelongo said that he was never served with a protective order. RR6 54.

Parra and Rodriguez made plans for Rodriguez to come to her home on February 2, 2015, to watch movies with Parra and her daughter, Daisy (hereinafter "Daisy"). RR4 115; RR5 33. Rodriguez arrived around 10 pm. RR5 34. Montelongo had parked his car in the desert (571 feet from Parra's garage door) and was walking toward the house when Rodriguez arrived. RR4 172; RR6 68. Montelongo testified that he wanted to give Parra mortgage money, retrieve some personal items, and ask Parra why she called the police after his January 29, 2015, assault. RR6 58. He planned only to be there five minutes. *Id*. Montelongo testified that he parked far away in the desert because he believed that, if Parra saw his car, she would not talk with him. *Id*.

When Montelongo reached the front door of Parra's home, he could see Parra and Rodriguez inside the house. RR6 60. Montelongo saw them hug and kiss. *Id*. Claiming that the front-door lock was broken, Montelongo decided to enter the house

through the garage. *Id*. He remembered there was an old handgun in the garage. *Id*; RR6 98.

After seeing Parra with Rodriguez, Montelongo's first inclination was to retrieve the handgun. RR6 98. Montelongo claimed that he had never previously fired the handgun. RR6 61. Despite all of his training in weapon safety as a Border Patrol firing-range instructor, Montelongo claimed that he did not check to see if the handgun was loaded and ready to fire. RR6 99. Instead, he just put it in his pocket. *Id*. Montelongo denied loading a round into the handgun's firing chamber. RR6 63.

Montelongo entered Parra's home. RR5 37. Parra and Rodriguez were sitting at the kitchen counter, and Parra was showing him a game on her phone. RR6 13. Daisy was in her bedroom. RR4 115; RR6 14. Parra froze and looked scared. RR6 14. Montelongo walked within two feet of Rodriguez. RR6 15. Several times, Montelongo asked Rodriguez why he was in the house and how many times he had sex with Parra. RR5 37, 38; RR6 15, 16.

Thinking a fight was imminent, Parra walked between Montelongo and Rodriguez. RR5 38. Rodriguez was standing directly behind Parra. RR6 16. Rodriguez had his hands on Parra's shoulders or waist. RR5 46; RR6 38. Rodriguez was taller than Parra, and he was wearing boots. RR6 36. During this time, Montelongo had his hands in his pockets. RR5 40. Eventually, Montelongo took his

hands out of his pocket; he was holding a gun. RR5 41; RR6 17. Montelongo pointed the handgun at Parra and Rodriguez. RR5 41; RR6 17. Montelongo held the gun with both hands, one finger on the trigger. RR6 17.

Hearing a commotion, Daisy left her bedroom and came to the general area of the kitchen. RR4 119. Daisy saw Montelongo holding the handgun with both hands, his finger on the trigger. RR4 123, 137. Rodriguez's hands were raised in the air. RR4 119. Montelongo ordered Daisy to "Get over here." RR4 125. Montelongo was afraid that Daisy would call the police. RR6 68. Instead, Daisy fled to her bedroom and called 911. RR4 126-127. When the sheriff arrived, Daisy escaped through her bedroom window. RR4 129.

Parra felt Rodriguez's hands on her shoulder, moving her, and using her as a shield. RR5 46. Montelongo said, "What a brave man." RR5 46. Parra, too, had her hands raised in the air. RR5 47. Montelongo was 5-6 feet from Rodriguez. RR6 17. Before firing his handgun, Montelongo said that he was going to kill Parra and Rodriguez. RR6 20. Montelongo closed one eye, took aim, and fired the handgun. RR5 48. Parra felt a burning sensation to her hand. RR5 48-49; SX 54-58. Rodriguez was shot in the forehead, above his right eye. RR6 20.

Despite claiming that the shooting was accidental, Montelongo admitted that he did not call 911 after shooting Rodriguez, nor dd he check to see if Rodriguez was

okay. RR6 105-06.

Rodriguez survived and crawled to a nearby bathroom. RR6 21. Therein, he used a towel to apply pressure to his wound. RR6 21-22. Rodriguez called 911 from the bathroom. RR6 24. Rodriguez was eventually removed from the bathroom by the SWAT team. RR6 25. Rodriguez was taken to a local hospital, where cranial surgery was performed. RR3 26-49. Bullet fragments remain lodged in Rodriguez's brain. RR6 27.

After shooting Rodriguez in the head, Montelongo aimed the handgun at Parra's sternum. RR5 50. Parra then heard a "click." *Id*. The handgun did not fire; it jammed and misfired. RR5 51. The cartridge of the spent round that struck Rodriguez was properly ejected from the semi-automatic handgun. SX 13. However, the next round–intended for Parra–did not properly load. SX 9, SX 48, SX 51. The jammed round was "pretty mangled." RR5 127. But, the jammed round did bear a "slight firing pin impression." RR5 130-31.

After Montelongo attempted to kill Parra, Parra stepped forward and grabbed the slide of the handgun with one hand and the top of Montelongo's hand with her other hand. RR5 51. They struggled for control of the handgun, and this struggle continued into the kitchen. RR5 53-54. There, Montelongo released one hand from the handgun and opened a kitchen drawer. RR5 56-57. He removed a knife from the

drawer. RR5 57. Parra released her hold on the gun and grabbed his hands on the knife. RR5 57. Montelongo started hitting the handgun on the kitchen counter in an attempt to clear the jammed round. RR5 59; RR6 72.

Then, the sheriffs arrived. RR5 60. Parra and Montelongo, both still holding the knife, went into the living room. RR5 64. Montelongo sat on the couch while Parra kneeled on the floor. *Id*. Montelongo threatened murder-suicide, saying "This is going to end today. We're leaving tonight." RR5 106. Montelongo elaborated that he would stab Parra and that the sheriffs would then shoot him. *Id*.

Eventually, the sheriffs sent a communications robot inside the home. RR5 66. The robot took a picture of Montelongo holding the knife while Parra was holding his hands atop the knife. RR5 72; SX 58.

Later, the sheriffs threw a phone inside the house. RR5 67. Montelongo allowed Parra to retrieve the phone. *Id*. Parra brought the phone back to Montelongo and placed the phone on the floor. *Id*. Instead of taking a seat, Parra ran out the door. RR5 67-68. After Parra fled, Montelongo remained inside the house for another hour. RR 5 73. Parra suffered cut wounds to her hands as a result of the struggle for control of the knife. RR5 69-70; SX 56-58.

Based on this overwhelming evidence of guilt, the jury found Montelongo guilty of Attempt to Commit Capital Murder of Multiple Persons and sentenced him

to 99 years imprisonment and a $10,000.00 fine. CR 251. The jury also found Montelongo guilty of Assault Causing Bodily Injury, Family/Household Member, Two or More Times Within 12 Months. CR 253. For this crime, Montelongo was sentenced to 10 years imprisonment and a $10,000.00 fine. *Id*.

SUMMARY OF THE STATE'S ARGUMENT

I. Montelongo initially presented his motion for new trial, as required by Tex.R.App.P. 21.6. However, when the trial court cancelled the December 8, 2015 hearing, Montelongo failed to object, thereby failing to preserve his claim of error. In the alternative, Montelongo waived a hearing on his motion when he failed to object to the cancellation or ask for a new hearing. *See* Tex.R.App.P. 21.6; *Tello v. State*, 138 S.W.3d 487, 496 (Tex.App.–Houston [14th Dist.] 2004), *aff'd*, 180 S.W.3d 150 (Tex.Crim.App. 2005), and *Lara v. State*, No. 01-15-00472-CR, 2016 WL 2342769, at *2 (Tex.App.–Houston [1st Dist.], May 3, 2016, no pet.)(mem. op.)(not designated for publication). In the second alternative, the trial court did not abuse its discretion when it cancelled the hearing.

II. and III. Montelongo was not denied effective assistance of counsel when his counsel was held in contempt after the conclusion of voir dire and when counsel was later twice warned about contempt. Despite trial counsel's claims that he "felt very intimidated" and was "reluctant to make objections for fearing of angering the

judge" and Montelongo's claim that counsel labored under a conflict of interest, the record shows that trial counsel presented a vigorous defense. Counsel objected 16 times during trial. Defense counsel was objected to 37 times. Defense counsel also successfully obtained jury charges for aggravated assault as lesser-included offenses of Attempt to Commit Capital Murder of Multiple Persons. Further, Montelongo failed to show specific instances where trial counsel's alleged conflict of interest adversely affected his performance. And, most important, Montelongo failed to show any prejudice from counsel's actions or inactions.

IV. Montelongo did not object to the trial court's complained-of questions and comments during voir dire. Thus, his claim of judicial misconduct was not preserved for appellate review. In the alternative, the relevant jurors were not punished, sanctioned, or subjected to reprisals for their statements. The other jurors were not chilled in their responses to questions. Thus, no judicial impropriety occurred. But, even if there was judicial impropriety, any error was harmless.

ARGUMENT

I.

MONTELONGO FAILED TO PRESERVE HIS FIRST POINT OF ERROR FOR APPELLATE REVIEW. IN THE ALTERNATIVE, MONTELONGO WAIVED A HEARING ON HIS MOTION FOR NEW TRIAL WHEN HE FAILED TO OBJECT TO THE TRIAL COURT'S CANCELLATION OF THE DECEMBER 8, 2015, HEARING. IN THE SECOND ALTERNATIVE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CANCELLED THE HEARING.

A. Introduction. As his first point of error, Montelongo argues that the trial court abused its discretion when it cancelled the December 8, 2015, hearing on his motion for new trial.

B. Relevant facts. On or about October 30, 2015, Montelongo filed his motion for new trial. CR 263. Montelongo requested a hearing on his motion. CR 269. Montelongo raised several grounds in support of his motion: that the evidence was legally insufficient to support the verdict (CR 263); that he received ineffective assistance of counsel (CR 263-67); that he was deprived of his right to a fair trial when his trial counsel was held in contempt and threatened with contempt two other times (CR 267-69); and, that a new trial was required "in the interest of justice" (CR 269).

Montelongo initially presented the motion to the trial court. Tex.R.App.P. 21.6. Presentment is acknowledged when the trial court enters an order setting a hearing on the motion for new trial. *Carranza v. State*, 960 S.W.2d 76, 79 (Tex.Crim.App. 1998).

On November 19, 2015, the trial court issued an order setting a hearing on Montelongo's motion for new trial. CR Supp(December) 5. This hearing was set for December 8, 2015. *Id*. However, on November 23, 2016, the trial court issued an order cancelling the hearing. CR Supp(December) 8. Montelongo did not file any objection. The record indicates that Montelongo did not re-present his motion and/or ask for a new hearing date. The record does not contain any request from Montelongo asking for findings of fact and conclusions of law.

C. Montelongo Failed to Preserve His Complaint For Appellate Review. To preserve an issue for appellate review, an issue must be raised before the trial court by motion and/or timely objection. Tex.R.App.P. 33.1(a); *Pena v. State*, 285 S.W.3d 459, 463-64 (Tex.Crim.App. 2009). It is well-settled that Rule 33.1(a) applies to motions for new trial. *See Cozzi v. State*, 160 S.W.3d 638, 640 (Tex.App.–Fort Worth 2005, pet. ref'd) (Right to hearing on motion for new trial not preserved for appellate review when appellant failed to "present" the motion to the trial court.); *Rozell v. State*, 137 S.W.3d 106, 108-09 (Tex.App.–Houston [1st Dist.]

2004), *aff'd,* 176 S.W.3d 228 (Tex.Crim.App. 2005) (Failure to request hearing on motion for new trial waives any claim of error relative to the trial court failing to hold a hearing.); *Boudin v. State*, 100 S.W.3d 355, 356 (Tex.App.–San Antonio 2002, no pet.) (Appellant did not object to the "truncated" nature of hearing on motion for new trial, and the complaint was not preserved for appellate review.).

The record does not show that Montelongo made any objection to the trial court cancelling the December 8, 2015, hearing. The record does not show that Montelongo made any attempt to reschedule the hearing.

Moreover, before a trial court is required to hold a hearing, certain procedural rules must be satisfied. One of those rules is Tex.R.App.P. 21.6. This rule provides that the defendant must "present" his motion for new trial to the trial court within 10 days of filing the same. The defendant must put the trial judge on actual notice that he desires the judge to take some action. *Gardner v. State*, 306 S.W.3d 274, 305 (Tex.Crim.App. 2009). Simply filing the motion for new trial is not enough. *Jenkins v. State*, 495 S.W.3d 347, 353 (Tex.App.–Houston [14th Dist.] 2016, no pet.). Presentment must be apparent from the record. *Gardner,* 306 S.W.3d at 305. Presentment may be shown by proof such as the trial court setting a hearing date. *Carranza,* 960 S.W.2d at 79.

Montelongo initially met the requirements of Rule 21.6. The trial court entered a hearing date. CR Supp(December) 5. However, the hearing was cancelled. CR Supp(December) 8. The State argues that, once the hearing was cancelled, Montelongo had an obligation to re-present his request for a hearing. Since Montelongo failed to request a hearing after the initial hearing was cancelled, he waived his right to a hearing.

Support for the State's argument is found in *Tello v. State*, 138 S.W.3d 487, 496 (Tex.App.–Houston [14th Dist.] 2004), *aff'd*, 180 S.W.3d 150 (Tex.Crim.App. 2005). In *Tello*, the appellant claimed "that the trial court erred in not holding a hearing on appellant's motion for new trial after the initial hearing was cancelled." *Id*. The Court noted "[t]here is no indication in the record that appellant rescheduled the hearing." *Id*. at 497. The Court then held, at p. 497:

> Although appellant complains in his third point of error that the trial court should have reset his motion for a new trial for a hearing, appellant did not develop a record of his efforts to reschedule the hearing. In the absence of a record showing appellant's efforts to reschedule the hearing on his motion for new trial, he cannot complain about the overruling of his motion for new trial by operation of law. *See, e.g., Johnson v. State*, 925 S.W.2d 745, 748 (Tex.App.–Fort Worth 1996, pet. ref'd) (stating that it was incumbent upon defendant to "develop some record, before the expiration of the court's jurisdiction, which demonstrated his efforts to reschedule the hearing" on the defendant's motion for new trial).

The defendant must take steps to assure that the hearing is held within the 75-day period provided in Tex.R.App.P. 21.8(c). In *Lara v. State*, No. 01-15-00472-CR, 2016 WL 2342769, at *2 (Tex.App.–Houston [1st Dist.], May 3, 2016, no pet.)(mem. op.)(not designated for publication), the defendant timely filed a motion for new trial. The motion was supported by affidavits. The defendant presented the motion to the trial court and specifically requested a hearing. The trial court set a hearing, but the hearing was after the expiration of the 75-day period provided in Tex.R.App.P. 21.8(c). Because the defendant failed to object to the hearing date or otherwise bring the error to the trial court's attention, the defendant waived any complaint:

> After receiving notice that the hearing date on the new trial motion was set for a date outside the trial court's 75-day window to rule upon the motion, appellate counsel bore the burden to object to the untimely hearing date. Because he did not so object or otherwise bring the error to the trial court's attention, appellant has waived any complaint concerning the trial court's failure to hold a hearing on the motion.

See Lara, 2016 WL 2342769 at *3-4.

The record does not show any effort by Montelongo to reschedule the hearing on his motion for new trial before the expiration of the 75-day period contained in Tex.R.App.P. 21.8(c). For all of these reasons, Montelongo failed to preserve his complaint for appellate review, and his first point of error should be overruled.

D. Standard of Review. Should this Court decide that Montelongo properly preserved his first point of error for appellate review and fully complied with Rule 21.6, it must decide whether the trial court erred in cancelling the hearing on Montelongo's motion for new trial. The Court reviews a trial court's denial of a hearing on a motion for new trial for an abuse of discretion. *Rozell v. State*, 176 S.W.3d 228, 230 (Tex.Crim.App. 2005). The denial of a hearing will be reversed only when the trial judge's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *State v. Gonzalez*, 855 S.W.2d 692, 695 n. 4 (Tex.Crim.App. 1993). An abuse of discretion exists when the movant meets the criteria but the trial court fails to hold a hearing. *Smith v. State*, 286 S.W.3d 333, 340 (Tex.Crim.App. 2009).

E. When a Hearing is Required. It is well-settled that a defendant does not have an absolute right to a hearing on a motion for new trial. *Reyes v.State*, 849 S.W.2d 812, 815 (Tex.Crim.App. 1993). A hearing is required only if the motion presents matters that are not determinable from the record. *Id.* at 816; *Rozell,* 176 S.W.3d at 230. The motion for new trial must be supported by an affidavit specifically showing the truth of the grounds alleged. *Reyes,* 849 S.W.2d at 816. Affidavits that are unsupported by facts do not put the trial court on notice that reasonable grounds for relief exist. *Jordan v. State*, 883 S.W.2d 664, 665

(Tex.Crim.App. 1994).

The affidavit must state more than opinions and conclusions. *Id*. The affidavit must provide specific facts. For instance, if the defendant claims that counsel's investigation was deficient, he must aver, specifically, what a proper investigation would have revealed. *Id*. Or, if a defendant claims that counsel failed to present exculpatory witnesses, the defendant must aver "what the two witnesses would have said to exculpate him." *Id*.

Further, a hearing is not required when the affiant–including the defense attorney–appeared before the court during trial. *Holden v. State*, 201 S.W.3d 761, 764 (Tex.Crim.App. 2006). This is because "the trial judge had already had an opportunity to evaluate the affiants." *Id*. Of course, this opportunity to evaluate includes evaluation of counsel's credibility and counsel's conduct during trial.

F. Analysis. Montelongo has failed to show that the trial court abused its discretion when it cancelled the hearing. Montelongo's motion for new trial raised four grounds for relief. His first ground for relief before the trial court was a conclusory statement that the "State failed to present legally sufficient evidence that Defendant had specific intent to kill two people during the same criminal episode." CR 263. Conclusory statements do not constitute grounds for relief and do not merit an evidentiary hearing. *Jordan,* 883 S.W.2d at 665. Further, a hearing is not required

on claims of insufficient evidence, since sufficiency of the evidence can be determined from the record. *Mizell v.* State, 70 S.W.3d 156, 162 (Tex.App.–San Antonio 2001), *aff'd*, 119 S.W.3d 804 (Tex.Crim.App. 2003); *State v. Daniels*, 761 S.W.2d 42, 44-45 (Tex.App.–Austin 1988, pet. ref'd). A hearing was not required for this conclusory claim that could be determined from the record.

For his second claim for relief before the trial court, Montelongo claimed ineffective assistance of trial counsel. Montelongo claimed counsel was ineffective in four ways: failure to zealously represent Montelongo; failure to present psychological or psychiatric evidence regarding Montelongo's mental status; failure to adequately cross-examine and/or present expert testimony regarding the difference between a handgun misfiring and a handgun jamming; and, failure to present mitigation evidence at the punishment phase of trial.

Montelongo presented an one-paragraph argument before the trial court that counsel failed to zealously represent him. CR 265. In *Green v. State*, the defendant complained in his affidavit supporting his motion for new trial that his trial counsel "ignored" him. 264 S.W.3d 63, 68 (Tex.App.–Houston [1st Dist.] 2007, no pet.). The Court noted that the defendant "conclusorily states that he was 'ignored' by counsel, but does not demonstrate how the alleged conduct of trial counsel was deficient or how appellant was harmed." *Id*. The same is true here. Montelongo only made a

conclusory statement that counsel did not zealously represent him. Montelongo did not aver how this alleged lack of zeal was deficient or how he was harmed.

Nonetheless, the trial court observed the actions, strategy, and arguments of defense counsel during trial. The trial court observed defense counsel's direct- and cross-examinations. The trial court observed defense counsel's numerous objections. The trial court observed defense counsel successfully argue for a lesser-included offense instruction relative to Criminal Attempt to Commit Capital Murder of Multiple Persons. And, the trial court observed defense counsel's strategic choices that resulted in objections from the State. The trial court was ideally situated to determine the credibility of trial counsel and the allegations contained in his affidavit. Thus, no hearing was mandated. *Reyes,* 849 S.W.2d at 816*; Rozell,* 176 S.W.3d at 230; *see also Courtney v. State*, 39 S.W.3d 732, 735-737 (Tex.App.–Beaumont 2001, no pet.) (Defendant failed to meet his burden of proving ineffectiveness of counsel where the trial court observed defense counsel and the defendant at trial and no evidence indicated that counsel's advice was not strategic).

Montelongo also claimed that trial counsel was ineffective for failing to obtain psychological/psychiatric expert witness testimony and ballistics/weapons expert testimony (either as direct evidence or to better prepare counsel to cross-examine the State's experts). Montelongo did not attach any affidavits from such experts to his

motion for new trial, nor did he even make a proffer of their purported testimony.

The motion for new trial and supporting affidavits must set forth **specific** facts to support the grounds alleged in the motion for new trial. *Reyes*, 849 S.W.2d at 816; *Jordan,* 883 S.W.2d at 665; *Jabari v. State*, 273 S.W.3d 745, 759 (Tex.App.–Houston [1st Dist.] 2008, no pet.). These affidavits must be submitted by "the accused or someone else specifically showing the truth of the grounds of attack." *Reyes,* 849 S.W.2d at 816. The purpose of this rule is to prevent "limitless fishing expeditions." *McIntire v. State*, 698 S.W.2d 652, 659 (Tex.Crim.App. 1985).

Generally, when a defendant claims counsel was ineffective for failing to present expert testimony (psychological, psychiatric, ballistics, etc), that claim should be supported by an affidavit from an expert detailing the probable expert testimony. *Rodriguez v. State*, 82 S.W.3d 1, 3 (Tex.App.–San Antonio 2001, pet. ref'd); *see also Lemmons v. State,* 75 S.W.3d 513, 526 (Tex.App.–San Antonio 2002, pet. ref'd) (motion for new trial relative to DNA expert testimony should have included an affidavit proffering the DNA expert's testimony); *Porter v. State*, 623 S.W.2d 374, 381 (Tex.Crim.App. 1981) (appellant did not perfect appeal by timely filing a motion for new trial supported with an affidavit from a ballistics/weapons expert).

Thus, the trial court did not abuse its discretion in failing to hold an evidentiary hearing on Montelongo's inefffective-assistance-of-counsel claims relative to expert

testimony because Montelongo failed to provide the trial court with affidavits from psychological/psychiatric and/or weapons/ballistics experts. *Rodriguez,* 82 S.W.3d at 3; *Lemmons,* 75 S.W.3d at 526; *Porter,* 623 S.W.2d at 381. Since expert affidavits (nor even a proffer as to their expected testimony) were not provided, an evidentiary hearing was not mandated.

Montelongo also claimed that trial counsel was ineffective for failing to call mitigation witnesses. "To show the requisite harm from a defense attorney's failure to contact or call a mitigation witness, a defendant must demonstrate that a particular witness was available to testify and that this testimony would have been beneficial." *Rodriguez v. State*, No. 14-05-00875-CR, 2006 WL 1911484 at *1 (Tex.App.–Houston [14th Dist.], July 13, 2006, no pet.) (mem. op.) (not designated for publication.). In *Lewis v. State,* ___ S.W.3d ____, 2016 WL 93760 at *8 (Tex.App.–Houston [14th Dist.] January 7, 2016, pet. ref'd) (not yet reported), the defendant moved for a new trial claiming that trial counsel was ineffective for failing to call mitigation witnesses. The motion was supported by an affidavit from trial counsel and an affidavit from the defendant's mother. The mother stated that, had trial counsel reached out to her, she "would have told the jury good things about" the defendant." *Id*. The Court held that the mother's affidavit did not warrant an evidentiary hearing or relief because the affidavit did not "provide further detail about

these 'good things'." *Id*.

Likewise here, the trial court did not abuse its discretion for failing to hold an evidentiary hearing on Montelongo's claim of ineffective assistance of counsel for failure to call mitigation witnesses. While Montelongo did identify possible mitigation witnesses, he did not include any affidavits from those witnesses. An affidavit or some proffer of their expected testimony was required. *Id*. Since Montelongo failed to offer a proper affidavit (or even a proffer of expected testimony) in support of this claim, an evidentiary hearing was not required.

For his third ground for relief before the trial court, Montelongo claimed that the trial court's actions deprived him of his right to a fair trial by an impartial jury. CR 267. Particularly, Montelongo complained of the trial court holding his counsel in contempt and the trial court's comments to the venire about trying to avoid jury duty.

In *Rodriguez v. State*, 552 S.W.2d 451, 456 (Tex.Crim.App. 1977), the Court held that the defendant was not deprived of a fair trial and effective assistance of counsel when counsel was "continually threatened" with contempt during trial. Here, defense counsel was held in contempt. However, the jury who heard this case did not see or hear the exchange that led to the finding of contempt and was thus unaware that defense counsel had been found in contempt. RR3 101. The jury was

not influenced or impacted in any way by counsel being held in contempt.

As a general rule, trial courts should avoid venturing into broad fields of lectures about a jury's duties, other than upon necessary topics. *Thomas v. State*, 262 S.W. 84, 85 (Tex.Crim.App. 1924). Un-preserved claims of improper judicial comments may be reviewed if a fundamental right was violated. *Marin v. State*, 851 S.W.2d 275, 280 (Tex.Crim.App. 1993). A verdict cannot be reversed upon a claim of improper judicial comments unless it is found that the trial court's comments during jury selection were both improper and that prejudice to the defendant probably resulted. *Johnson v. State*, 452 S.W.3d 398, 405 (Tex.App.–Amarillo 2014, pet. ref'd) Montelongo cites no case law holding or suggesting that the trial court's comments were improper. Montelongo cites no case law suggesting that he was prejudiced in any manner.

Nonetheless, everything related to this claim could be resolved from the record. The contempt hearing was on the record, outside the presence of the seated jury. RR3 117-119. The trial court's comments to the remaining jury panel (those not selected to serve on the jury) were likewise on the record and outside the presence of the seated jury. RR3 101-117. Since all relevant facts were on the record, there was no legal requirement for a hearing. *Reyes,* 849 S.W.2d at 816*; Rozell,* 176 S.W.3d at 230.

For his fourth ground for relief before the trial court, Montelongo presented a one-sentence argument that a new trial was required in the interest of justice: "Defendant requests that the court grant a new trial in the interest of justice." CR 269. "Justice" means "in accordance with the law." *State v. Herndon*, 215 S.W.3d 901, 907 (Tex.Crim.App. 2007). "A defendant must allege specific grounds as to why he is entitled to a new trial; asserting 'in the interest of justice' is not enough." *Easter v. State*, No. 01-14-00450-CR, 2016 WL 6648812 at *14 (Tex.App.–Houston [1st Dist.], November 10, 2016, no pet.) (mem. op. on reh'g) (not designated for publication). While a defendant need not show reversible error *per se* before obtaining a new trial, the defendant must allege "serious flaws" with "sufficient grounds to appraise the trial judge" and the State why he should receive a new trial in the interest of justice. *State v. Dominguez*, No. 08-14-00011-CR, 2015 WL 4134562 at *6 (Tex.App.–El Paso, July 8, 2015, no pet.) (mem. op.) (not designated for publication).

Montelongo's one-sentence request for a new trial in the interest of justice fails to meet the requirements of *Easter* and *Dominguez*. Montelongo did not allege any specific grounds for relief. Montelongo failed to allege or show any serious flaws. A hearing was not required on this claim. Montelongo's first point of error should be overruled.

II.

MONTELONGO WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL WAS TWICE WARNED ABOUT CONTEMPT.

III.

MONTELONGO WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL WAS HELD IN CONTEMPT AFTER THE CONCLUSION OF JURY SELECTION.

A. Introduction. For his second point of error, Montelongo argues that he was denied effective assistance of counsel when his trial counsel was twice warned about possible contempt. For this third point of error, Montelongo argues that he was denied effective assistance of counsel when his trial counsel was held in contempt of court after the conclusion of jury selection (and after the seated jury had been removed from the room). Montelongo argued both points of error in a combined argument. The State will respond in kind.

B. Relevant Facts. Montelongo's trial counsel began his voir dire with the following statement:

> Now, I want you to consider something before I begin my voir dire, and that is that Judge Aguilar, former Marine, prosecutor, defense lawyer, excellent district judge, is a little gruff and a little–how should I say–rough around the shoulder–around the edges, but he's a wonderful judge. But I want you to consider that his purpose here today is not to put a chilling effect either on my questions or on your answers. Okay?

RR3 67.

After the jury had been selected **and** left the courtroom (RR3 101), the trial judge began lecturing the remaining venire (those who were not selected to serve in this case) about the importance of jury duty. RR3 101-17. The trial judge said that he did this every Friday. RR3 101. The judge lamented that "nobody wants to even come up here anymore." RR3 102. The judge continued, "I find that offensive. I take exception to it." *Id*. The judge makes this lecture because "every single Friday I hear the most ridiculous asinine excuses why" people cannot serve on juries. RR3 103. One venireman apparently found the lecture humorous and smiled. RR3 104. The judge then cautioned, "Don't smile or I will pick on you. Ain't no smiling up here." RR 104-05.

Near the end of his lecture, the trial judge said:

> A correction here for Mr. Cervantes [defense counsel]. I do not decide self-defense. I don't. You [venire] think it's self-defense, it is self-defense. You [venire] think it's not self-defense, it isn't. I have nothing to say about that. Did you hear that?[6]

RR3 109.

Defense counsel then interrupted the judge: "I think, Judge, I meant to say–." *Id.* The trial court then twice demanded "silence." *Id*. Defense counsel continued:

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[6] The State believes that the trial court was referring to a voir dire exchange that occured at RR3 75-76.

"I meant to say–." *Id*. The trial court then stated: "Sit down, Mr. Cervantes. Sit down, Mike, right now. I'm holding you in contempt right now. Count 1. Sit down." *Id*. The remaining venire left the courtroom. RR3 117.

Thereafter, a contempt hearing was conducted. RR3 117-119. Defense counsel stated that he "didn't realize we were still in a judicial proceeding" when he interrupted the judge. RR3 118. Defense counsel continued, "I was just making a comment. I thought we were having a conversation, exercising my right to freedom of speech and, jokingly around, was telling the Court, 'I didn't mean direct; I meant instruct.' And that's why maybe there was a misunderstanding." RR3 118. Defense counsel was fined $500.00 and admonished not to "engage in that type of conduct again" or be "dealt with severely." RR3 119. During trial, defense counsel was twice warned that he was approaching contempt. RR5 100; RR7 46.

Montelongo presented a defense that he did not intentionally shoot Rodriguez. Rather, Rodriguez was shot accidentally when Parra and Montelongo struggled for control of the handgun. And, Montelongo offered a defense that he did not pull the trigger a second time in an attempt to murder Parra.

To support his defense, Montelongo testified that Parra grabbed the handgun immediately before Rodriguez was shot. RR6 68-69. Montelongo testified that, as a result of the struggle for the weapon, he felt pressure on the handgun, and it fired.

RR6 69. Montelongo also testified that he did not pull the trigger a second time. RR6 71.

In further support of Montelongo's defense, defense counsel vigorously cross-examined Parra. RR5 74-108. The following, relevant exchange occurred, resulting in the first contempt warning from the judge:

Q: And at that point, if he'd already fired that muzzle, that muzzle would be–would be hot?
A: If after I shot it?
Q: If I shoot a weapon–
A: Uh-huh
Q: –like he did that day, and he approached him, he was pointing the weapon, and I would have grabbed the weapon, then that muzzle would be hot?
Prosecutor: I'm going to object. Assuming facts not in evidence.
The Court: Sustained.
Q: Correct?
The Court: Sustained
Q: That's my theory, Judge.
The Court: Sustained, Mr. Cervantes.
Q: So what you're telling the ladies and gentlemen of the jury is that you never reached for the weapon before he fired it?
A: No.
Q: Okay.
A: After.
Q: After. But you're telling the jury that it was after the weapon fired that you grabbed the weapon, correct?
A: Correct.
Q: And that–and you're saying that at that time–was the muzzle hot or not?
A: I don't remember, sir.
Q: Well, you touched it.
A: Yeah, I did.
Q: You grabbed it.

A: Right.
Q: So was it hot or not?
A: I didn't feel–
Prosecutor: Objection. Assuming facts not in evidence.
The Court: Sustained.
Q: It was your testimony that at some point you did have that gun in your hands while he had it in his hands too, correct?
A: Correct.
Q: And you're telling the jury that you don't remember whether the muzzle was hot or not?
The Court: Counsel, approach the bench.
The Court: I sustained that question (sic) two times. The next one, holding you in contempt, and I will. I'm telling you right now, I'm going to find you in contempt. Do you understand me?

RR5 98-100.

After the direct testimony of the State's second-to-last punishment phase witness, defense counsel received his second contempt warning. It was based upon the following exchange:

Prosecutor: I pass the witness at this time. May I approach the witness?
The Court: Return the exhibits to the court reporter. Sit down, Mr. Cervantes. You may proceed, Mr. Cervantes
Mr. Cervantes: No questions, Your Honor.
The Court: Please be seated.

RR7 45. After the witness was excused, counsel were instructed to approach the bench. RR7 46.

The Court: Mr. Cervantes, next time I repeat an instruction to you, I'm holding you in contempt, and don't plan on going home. This is your third admonishment. Do it again, you're not going home.
Mr. Cervantes: You don't want me to stand at all?

> The Court: I have told you six times today, wait until he sits down. Okay. You insist on jumping up and going to the podium. It's going to cost you. Do you understand?
> Mr. Cervantes: Yes, sir.
> The Court: Be seated.

Id.

The defense called three punishment-mitigation witnesses: Montelongo (RR7 70-85), Jorge Montelongo (RR7 85-87), and Patricia Martinez (RR7 87-89).

C. The Standard of Review. The standard of review for evaluating claims of ineffective assistance of counsel is provided in *Strickland v. Washington*, 466 U.S. 668, 683-86, 104 S.Ct. 2052, 2062, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.Crim.App. 1986). To be successful, Montelongo must show that: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 683-86; *Peralta v. State*, 338 S.W.3d 598, 610 (Tex.App.–El Paso 2010, no pet.). Prejudice requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the trial, either guilt or punishment, would have been different. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex.Crim.App. 2002); *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex.Crim.App. 1992). Reasonable probability is defined as a "probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

Montelongo bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex.Crim.App. 1998). But, it must be remembered that defendants are not entitled to errorless representation. *Calderon v. State*, 950 S.W.2d 121, 126 (Tex.App.–El Paso 1997, no pet.). And this Court must begin with the strong presumption that counsel acted competently. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex.Crim.App. 1999). The reviewing court must be "highly deferential" to trial counsel's performance. *Strickland,* 466 U.S. at 689. And the defendant must overcome the strong presumption that his attorney's actions, or inactions, were the result of sound trial strategy. *Id*.; *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex.Crim.App. 1999).

Montelongo claims that a conflict of interest existed between himself and his trial counsel, i.e., the trial court's finding of contempt and two later contempt warnings made counsel act in his own interest rather than Montelongo's interest. An actual conflict exists if counsel is required to make a choice between advocating his client's interest in a fair trial or advancing another interest, including his own, to the detriment of the client's interest. *James v. State*, 763 S.W.2d 776, 779 (Tex.Crim.App. 1989). To prevail, the defendant must show that his counsel was burdened by an actual conflict of interest and that the conflict had an adverse effect on **specific** instances of counsel's performance. *Monreal v. State*, 947 S.W.2d 559,

564 (Tex.Crim.App. 1997); s*ee also Acosta v. State*, 233 S.W.3d 349 (Tex.Crim.App. 2007).

A defendant, such as Montelongo, who did not complain at trial of a conflict of interest involving counsel, may demonstrate a "violation of the right to reasonably effective assistance of counsel if the defendant can show that defense counsel was burdened by an actual conflict of interest that had an adverse effect on **specific instances** of the attorney's performance. (Added emphasis.)" *Pina v. State*, 29 S.W.3d 315, 317 (Tex.App.–El Paso 2000, pet. ref'd).

D. Analysis. In his affidavit, trial counsel stated that, after being found in contempt after the conclusion of voir dire, he "felt very intimidated." CR 271. Trial counsel said that he was "reluctant to make objections for fear of angering the judge." CR 271. Trial counsel failed to identify the objections he "was reluctant to make." And, trial counsel failed to mention the at-least 16 objections he made during the trial.[7]

Trial counsel also stated that he "limited [his] cross-examination so as to avoid being held in contempt by the judge[.]" CR 271. Trial counsel does not specifically state (or give examples) how his cross-examination was limited, nor does he

[7] RR 4 41, 45, 49, 98, and 168. RR5 13, 26, 68, 122, 123, 147. RR7 11, 44, 76, 23 and 109.

specifically state how his cross-examination of any witness would have differed.[8]

The record shows that trial counsel presented a vigorous defense. Counsel certainly was not afraid of asking potentially objectionable questions that were helpful to the defense. By the State's count, the State objected to trial counsel's voir dire, cross- or direct examination, and arguments at least **37** times.[9] The State's objections were sustained at least **32** times.[10]

Trial counsel certainly was not intimidated and afraid of angering the judge when he requested and obtained jury charges for the lesser-included offenses of aggravated assault. RR6 114 - 125. That the jury found Montelongo guilty of the greater offense of Attempt to Commit Capital Murder of Multiple Persons does not mean that counsel was ineffective.

Montelongo has failed to overcome the strong presumption that trial counsel's actions, and inactions, were the result of sound trial strategy. *Strickland,* 466 U.S. 689; *Busby,* 990 S.W.2d at 268-69. Further, counsel being threatened with contempt,

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[8] But see RR5 98-100. Defense counsel aggressively cross-examined Parra, asking the same question three times despite objections being sustained each time.

[9] RR3 84. RR4 46, 46, 86, 87, 88, 92, 92, 104, 105, 106, 108, 108, and 158. RR5 80, 85, 86, 99, 100, 105, and 150. RR6 32, 38, 47, 53, 61, 75, 77, 151, 153, 155, and 157. RR7 23, 72, 89, 113, and 116.

[10] RR3 84. RR4 46, 86, 87, 88, 92, 92, 105, 106, 108, and 158. RR5 80, 85, 86, 99, 100, 105, and 150. RR6 32, 38, 47, 53, 61, 75, 77, 151, 153, and 157. RR7 72, 89, 113, and 116.

or even being held in contempt, does not lead "invariably to the conclusion" that Montelongo received ineffective assistance of counsel. *Samuels v. State*, No. 05-03-00683-CR, 2004 WL 1120043 at *1 (Tex.App.–Dallas, May 20, 2004, pet. ref'd) (mem. op.) (not designated for publication) (Counsel repeatedly warned for various reasons, including "asking the same questions after objections to the questions had been sustained[,]" and counsel held in contempt for failing to heed the trial court's warnings.); *Hansley v. State*, Nos. 01-12-01023-CR, 01-12-01024-CR, and 01-12-01025-CR, 2014 WL 60960 at *3 (Tex.App.–Houston [1st Dist.], January 7, 2014, pet. ref'd) (mem. op.) (not designated for publication) (Trial counsel twice held in contempt of court. Trial counsel's behavior suggested a want of professionalism, but defendant made no attempt to explain how his counsel's behavior might have impacted the result of his trial.).

Like the counsel in *Samuels,* Montelongo's counsel was warned about contempt after he asked the same objectionable question to Parra, three times. RR5 98-100. Unlike the counsel in *Samuels*, Montelongo's counsel did not persist in asking the question and suffering a finding of contempt. The State argues that, if the contempt holding in *Samuels* did not rise to the level of being ineffective, then Montelongo's counsel only being warned for the same conduct certainly does not rise to the level of being constitutionally ineffective.

Likewise, Montelongo's counsel's conduct did, at times perhaps, suggest a want of professionalism. *Hansley,* 2014 WL 60960 at *3. Counsel began his voir dire by telling the venire that the trial judge was "a little gruff . . . around the edges." RR3 67. The trial court did not respond to this statement. *Id*. While the trial court was delivering its weekly lecture to the remaining panel not selected to serve on the jury, trial counsel interrupted the trial court after the court twice demanded "silence." RR3 109. Counsel was held in contempt for his interruption. RR3 117-19. Later, after the State concluded direct examination of its next-to-last punishment-phase witness, trial counsel was admonished by the trial court to remain seated until the prosecutor sits down. RR7 46. The trial court stated that trial counsel had breached that protocol six times that day. *Id*. Unlike the counsel in *Hansley*, trial counsel was not twice held in contempt. Counsel was only once held in contempt. But, like the defendant in *Hansley*, Montelongo made no attempt to explain how his trial counsel's alleged want of professionalism impacted the result of his trial.

Instead, all Montelongo offered was an affidavit from trial counsel stating that he felt "intimidated" and "fear[ful] of angering the judge." CR 271. Montelongo failed to satisfy the first prong of the *Strickland* test, i.e., deficient performance. Points of error 2 and 3 should thus be overruled.

Further, even if this Court determines that counsel's performance was deficient, Montelongo fails to show any resulting prejudice. *Mitchell,* 68 S.W.3d at 642. It was undisputed that Montelongo shot Rodriguez. The only question was whether the shooting was intentional or accidental. The jury chose to believe Parra and Rodriguez and disbelieve Montelongo's self-serving testimony. Trial counsel is not ineffective when, like here, there is overwhelming evidence of guilt; the appellant's testimony was not credible; and the appellant fails to establish that the result of the trial would have been different. *My Thi Tieu v. State*, 299 S.W.3d 216, 228 (Tex.App.–Houston [14th Dist.] 2009, no pet.).

Here, the evidence of guilt was overwhelming. Montelongo was not a credible witness. Montelongo has failed to show that the result of the guilt phase of trial would have been different had trial counsel not been held in contempt or warned about contempt on other occasions.

Likewise, Montelongo has failed to show any prejudice relative to the punishment phase of trial. General factors to consider in determining prejudice for purposes of sentencing include whether the defendant received the maximum sentence, any disparity between the sentence imposed and the sentence recommended, the nature of the offense charged, the strength of the evidence presented at trial, the egregiousness of the error, and the defendant's criminal history. *Morrow v. State*, 486

S.W.3d 139, 152 (Tex.App.–Texarkana 2016, pet. ref'd).

Montelongo did receive the maximum sentence of 99 years for Attempt to Commit Capital Murder of Multiple Persons. Tex.Penal Code Sec. 12.32. However, the evidence of guilt was exceptionally strong. *Morrow,* 486 S.W.3d at 152.

By Montelongo's own admission, he came to Parra's house unarmed, but he armed himself in her garage after seeing Parra and Rodriguez hug and kiss. RR6 60. Montelongo believed that Parra (from whom he had been separated since July 2014) and Rodriguez were having sexual relations. RR5 12, 38. But Montelongo himself had been having a sexual relationship with another woman since 2013. RR5 12-13; RR6 79-80. In fact, after beating Parra on January 29, 2015, Montelongo returned to his home and slept in the same bed with the other woman. RR6 93-94.

Montelongo did not have a criminal history. *Morrow*, 486 S.W.3d at 152. But, the jury was certainly cognizant of the fact that Montelongo was a sworn law-enforcement officer. RR6 85. Not only did Montelongo break the law, he betrayed the public's trust. Montelongo committed violence and attempted to commit the ultimate violence...twice. The jury certainly did not look favorably upon this juxtaposition. Montelongo fails to show any prejudice relative to sentencing. *Morrow,* 486 S.W.3d at 152. Montelongo's second and third points of error should be overruled.

IV.

MONTELONGO'S CLAIM THE HE WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY BECAUSE OF THE TRIAL COURT'S ALLEGED IMPROPRIETY DURING VOIR DIRE WAS NOT PRESERVED FOR REVIEW. IN THE ALTERNATIVE, THERE WAS NO JUDICIAL MISCONDUCT, AND MONTELONGO WAS NOT PREJUDICED.

A. Introduction. For this fourth point of error, Montelongo claims that the trial court's alleged impropriety during voir dire denied him his right to a fair trial by an impartial jury.

B. Relevant Facts. The trial court began voir dire by informing the venire that the case before them was a criminal case. RR3 4. The trial court next reviewed the qualifications for serving as a juror. RR3 4-5. The trial court told the venire that they may wish to claim certain exemptions to serving on this jury, including having served on a jury in El Paso County during the preceding 24-month period. RR3 5-6. Juror Number 5 then asked, "Did you mention something about serving in the grand jury?" RR3 8. The trial court answered in the negative. *Id*.

Montelongo's fourth point of error involves the voir dire of Jurors Number 5, 51, and 40. During the State's voir dire, the prosecutor asked, "Is there anyone here that feels that they cannot judge the credibility of another for religious reasons?" RR3 53. Juror Number 5 answered in the affirmative. RR3 54. After another juror

answered in the affirmative, the following exchange occurred:

> The Court: Excuse me. Juror Number 5?
> Venireperson Rivera: Yes, sir.
> The Court: Are you not serving on a grand jury?
> Venireperson Rivera: Yes, I am.
> The Court: Do you not judge 20 to 30 people every session? Did you just tell him you can't judge someone on–
> Venireperson Rivera: Yes, but–
> The Court: –religious grounds?
> Venireperson Rivera: Right.
> The Court: You do it every day.
> Venireperson Rivera: Yeah, but this is a murder.
> The Court: No, it's not.
> Prosecutor: No. It's an attempted murder.
> Venireperson Rivera: Okay
> The Court: Ma'am, you are on a grand jury.
> Venireperson Rivera: Yes.
> The Court: Do you realize what happens when you guys sign that?
> Venireperson Rivera: Yes.
> The Court: That means you just passed judgment and you indicted somebody. And every day that you go up there, you're doing 20 to 30 felony indictments.
> Venireperson Rivera: Uh-huh.
> The Court: And you're sitting there? Are you aware of what's going on?
> Venireperson Rivera: Yes. I –I thought it was a murder.
> The Court: You have indicted murders in the grand jury.
> Venireperson Rivera: No.
> The Court: Ma'am, do you understand his question and what you're doing in the grand jury?
> Venireperson Rivera: Yes.
> The Court: Do you realize that whether you're looking at the defendant or not you are passing judgment and ordering a defendant to be standing trial for a felony? Do you realize what you're doing, or are you just signing off everything they stick in front of you?
> Venireperson Rivera: No. It's just, like, different cases.
> The Court: So as long as you don't know the defendant, you don't–you

don't have a problem passing judgment? Have a seat, ma'am.

CR3 54-56.

Not chilled by the trial court's statements to Juror Number 5, Jurors Number 51 and 55 also claimed inability to judge others for religious reasons. RR3 57. The trial court noted that people pass judgment on other people every day. RR3 57. The trial court then gave an example of a single lady being asked out on a date but declining because the man was "kind of ugly" or "[n]ot my type" or "[d]oesn't have a car." RR3 57. The following exchange then occurred with Juror Number 51.

> The Court: Did you understand that? You've never passed judgment on a human being?
> Venireperson Danielle Hernandez: I honestly try not to.
> The Court: What?
> Venireperson Danielle Hernandez: I said I honestly try not to.
> The Court: Did you ever apply for a job?
> Venireperson Danielle Hernandez: Yes, sir.
> The Court: Did you pass judgment on the person interviewing you?
> Venireperson Danielle Hernandez: Try not to.
> The Court: I didn't ask you if you try. I try to do a lot of things I don't know. Try not to. You're telling me you can't pass judgment on a human being?
> Venireperson Danielle Hernandez: I shouldn't.
> The Court: Ma'am, one of these days you're going to have children and you're gonna pass judgment two, three times an hour. Mothers, turn around, let her know, it's coming. It's coming. I don't–did you understand the question?
> Venireperson Danielle Hernandez: Yes, sir.
> The Court: How about your sister? You like the way she dresses?
> Venireperson Danielle Hernandez: Yes, sir.
> The Court: How about the other women at the mall? See the way they

> dress?
> Venireperson Danielle Hernandez: Yes, sir.
> The Court: Pass judgment on them?
> Venireperson Danielle Hernandez: Not my place.
> The Court: I didn't ask you if it's your place. I know it's not your place. Do you ever go to a club?
> Venireperson Danielle Hernandez: Rarely.
> The Court: Pass judgment on the way people act in there? Excuse me?
> Venireperson Danielle Hernandez: Yes, sir.
> The Court: Why would you pass judgment on other people? They've got a right to act any way they want in a club. Sit down, 51.

RR3 58-60.

Near the conclusion of its voir dire, the State asked, "Is there anything or anyone that I missed that would like to address the Court about serving on this jury, before I sit down, that maybe you might not be the appropriate juror for this particular case?" RR3 65. Not chilled by the trial court's previous discourse with Jurors Number 5 and 51, Juror Number 2 and an unknown juror raised issues. RR3 65-66. Juror Number 40 also raised an issue:

> Venireperson Rivera: Number 40. Did you say if we had served before 24 months?
> Prosecutor: I'm sorry?
> Venireperson Rivera: There was a statement saying that if we had served in the last 24 months.
> Prosecutor: That was a question that the judge asked. So I guess that's something that we can approach on later if you'd like, ma'am?
> The Court: Ma'am, you're not trying to get out of jury, are–jury duty, are you?
> Venireperson Rivera: I–
> The Court: Then have a seat. Thank you.

RR3 66.

The defense then conducted its voir dire. RR3 67-85. Juror Number 16 agreed that not every act is criminal. RR3 70-71. An unidentified juror agreed with defense counsel's description of the grand-jury process. RR3 71-72. Juror Number 10 stated that she heard about the case in the press. RR3 75. And Juror Number 10 volunteered that she had already formed an opinion about the case. *Id*. Juror Number 16 asked defense counsel to clarify his question about pre-trial publicity. RR3 77. Juror Number 50 then stated that she remembered the case from local publicity. RR3 78. Juror Number 50, who was previously married to a Border Patrol agent, then said that she could not be unbiased. RR3 78. Regarding defense counsel's questions concerning experts, Juror Number 16 initially stated that he could not rely on expert testimony. RR3 80-81. After clarification by the trial court, Juror Number 16 said that he could accept or reject expert testimony. RR3 81.

After voir dire concluded, the jury was selected. Jurors Number 5, 51, and 40 were not selected and did not serve on the jury, not even as alternates. RR3 94.

C. Standard of Review. Montelongo argues that the trial court's statements during voir dire constitute judicial impropriety. To reverse a judgment on the ground of improper conduct or comments of the trial judge, this Court must find: (1) that judicial impropriety, in fact, occurred, and (2) probable prejudice to Montelongo.

Dockstader v. State, 233 S.W.3d 98, 108 (Tex.App.–Houston [14th Dist.] 2007, pet. ref'd).

Further, Montelongo must show facts sufficient to establish that a reasonable person, knowing all of the attending facts and circumstances, would harbor doubts as to the trial judge's impartiality. *Kemp v. State*, 846 S.W.2d 289, 305 (Tex.Crim.App. 1992). Bias may be a ground for disqualification only when it is shown to be of such nature, and to such extent, as to deny the defendant due process of law. *Id*.

A judge should not act as an advocate or adversary for any party. *Dockstader,* 233 S.W.3d at 108. But judicial remarks that are critical or disapproving of, or even hostile to the parties, their counsel, or their cases, ordinarily do not support a finding of bias or impropriety. *Id*. In reviewing a claim of judicial bias or impropriety, the reviewing Court must review the claim in context of the entire record. *Fields v. State*, Nos. 05-13-01399-CR and 05-13-01400-CR, 2015 WL 4112277 at *2 (Tex.App.–Dallas, July 8, 2015, no pet.) (mem. op.) (not designated for publication.). Judges are presumed impartial, and a claim of bias or impropriety by a judge will rarely succeed. *Conner v. State*, Nos. 05-15-01004-CR and 05-15-01005-CR, 2016 WL 3144180 at *2 (Tex.App.–Dallas, June 2, 2016, no pet.) (mem. op.) (not designated for publication).

It must be remembered that the trial court has broad discretion over the process of selecting a jury. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex.Crim.App. 2002). Judicial impropriety can occur during voir dire. For example, judicial impropriety can occur when a trial court has a juror arrested for contempt for expressing his religious beliefs. *Drake v. State*, 465 S.W.3d 759, 765 (Tex.App.–Houston [14th Dist.] 2015, no pet.). And judicial impropriety can occur when a juror is struck from the venire for expressing her religious views, described by the trial court as "screwball ideas about religious beliefs in enforcing the laws of Texas[.]" *Price v. State*, 626 S.W.2d 833, 835 (Tex.App.–Corpus Christi 1981, no pet.).

Even so, claims of judicial impropriety during voir dire are subject to a harmles- error analysis. The Court in *Price* held that "[r]effering to a member of the voir dire panel as a 'screwball' for only doing that which justice requires, and for which our Constitution guarantees, cannot help but chill the honest exchange of information so necessary in the selection of a fair and impartial jury." *Id.* at 835.

Nonetheless, the Court in *Price* held that reversible error did not occur and that the error was harmless. "This type of remark by a trial judge reflects unfavorably upon the jury selection and our judicial system. It cannot be condoned. It could have caused a reversal of this trial. However, a thorough review of the entire voir dire examination in this appeal does not demonstrate that this defendant did not have a fair

trial because of the judge's remarks. The voir dire examination extended for quite some time thereafter. Other jurors expressed themselves, and religious beliefs were not again mentioned." *Id.* at 836.

And, like most claims of error, claims of judicial impropriety are subject to the error-preservation dictates of Tex.R.App.P. 33.1(a). *McLean v. State*, 312 S.W.3d 912, 915 (Tex.App.–Houston [1st Dist.] 2010, no pet.) (Defendant failed to preserve claim of error relative to trial court's voir dire comments when objection was made after completion of said comments.); *Marshall v. State*, 213 S.W.3d 741, 743-44 (Tex.App.–Houston [1st Dist.] 2009, pet. ref'd) (Defendant failed to object to trial court's voir dire statement concerning burden of proof, and the issue was not preserved for appellate review.).

D. Analysis. Montelongo argues that the trial court engaged in reversible misconduct during its discourse with Jurors Number 5, 51, and 40. Montelongo did not object at any time during the trial court's exchanges with these jurors. Montelongo failed to preserve this issue for appeal. Tex.R.App.P. 33.1(a); *Pena v. State*, 285 S.W.3d 459, 463-64 (Tex.Crim.App. 2009); *McLean*, 312 S.W.3d at 915; *Marshall*, 213 S.W.3d at 743-44. The claim is thus not properly before this Court and Montelongo's fourth point of error should be overruled.

In the alternative, the State will address the merits of Montelongo's fourth point of error. Montelongo cites a decision of the United States Court of Appeals for the Fifth Circuit in support of his argument that the trial court engaged in prejudicial misconduct. *United States v. Rowe*, 106 F.3d 1226 (5th Cir. 1997). In *Rowe,* the trial court conducted the entire voir dire. A juror stated that she did not believe that she could be impartial because her brother was an undercover narcotics officer and her father was a police officer. *Id.* at 1228. The juror stated that she was not refusing to set aside her bias: "I'm just saying that I think it will affect my decision as far as, you know, the verdict is concerned." *Id*. In response, the trial court stated, "All right. Put her on February, March and April's panel to come back. And you will be coming back again, and again, and again....And see if you can figure out how to put aside your personal opinions and do your duty to your country as a citizen, because this kind of answer which is clearly made up for the occasion is not really great. You are excused." *Id*. The Fifth Circuit noted that the exchange was heard by another panel member. *Id*.

The Fifth Circuit held that the trial court's conduct constituted reversible misconduct. "This assumption [that potential jurors truthfully answer the questions of voir dire] does not hold, however, when jurors are given reason to fear **reprisals** for truthful responses. Each panel member responding affirmatively to the court's

questions about bias was accused by the court of refusing to follow instructions and attempting to avoid jury service, and then **sanctioned**. The district court's message was clear: remarks such as 'you will be coming back again, and again, and again ... and see if you can figure out how to put aside your personal opinions and do your duty to your country as a citizen' can be interpreted only as **punishment** for responding in the affirmative to questions about bias. The fact that the court got no response when it later asked the panel whether anyone had been intimidated is not surprising; we can also presume that members of the panel are not fools. (Added emphasis.)" *Id.* at 1230.

In this case, Jurors Number 5, 51, and 40 were not subjected to reprisals or sanctions. They were not punished. They were not arrested or held in contempt for their answers. *Drake,* 465 S.W.3d at 765. They were not dismissed from the venire by the court because of their answers or religious beliefs. *Price,* 626 S.W.2d at 835. The trial court did not make inflammatory remarks, such as calling their answers "screwball." *Id*. And they were not threatened with, or subjected to, months of jury duty because of their responses. *Rowe*, 106 F.3d at 1228.

Because the three jurors were not sanctioned or punished in any way, there was no judicial impropriety. Further, the trial court's comments to Jurors Number 5, 51, and 40 did not chill the participation or answers of other jurors. The record shows

continuing participation and voluntary responses by the venire, even during Montelongo's voir dire. RR3 67-85. Montelongo has failed to show any judicial misconduct.

Moreover, Montelongo has failed to show any "probable prejudice." *Dockstander,* 233 S.W.3d at 108. Montelongo admitted shooting Rodriguez. Montelongo claimed that the shooting was accidental, but the jury rejected his self-serving testimony. The jury, exercising its sole province, accepted the testimony of the victims and found that Montelongo intentionally shot Rodriguez, intending to kill him. Likewise, the jury found that Montelongo pointed the handgun at Parra and pulled the trigger, intending to kill her. The jury also found that Montelongo committed assault against his wife, Parra, twice within the previous 12 months. This verdict was not the product of the trial judge's comments during voir dire. As discussed in the State's reply to Montelongo's second and third points of error, this verdict was the sole product of powerful, overwhelming evidence of guilt. Montelongo was not prejudiced in any manner by the trial court's statements during voir dire. Montelongo's fourth point of error must be overruled.

PRAYER

WHEREFORE, the State prays that Montelongo's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 11,242 words, as provided in Tex.R.App.P. 9.4(i)(1).

/S/David W. Barr
DAVID W. BARR

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing brief was sent by email, through an electronic-filing-service provider, on December 20, 2016, to appellant's attorney, Ruben P. Morales, rbnpmrls@gmail.com.

/S/David W. Barr
DAVID W. BARR

Appendix 3- Appellant’s Reply Brief

No. 08-16-00001-CR

IN THE

EIGHTH COURT OF APPEALS OF TEXAS

EL PASO, TEXAS

ALBERTO MONTELONGO,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

On Appeal in Cause No. 20150D02224
in the 243rd District Court
El Paso County, Texas
The Honorable Luis Aguilar, Judge Presiding

APPELLANT'S REPLY BRIEF

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Submitted: March 6, 2017

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APPELLANT'S REPLY ON ISSUE 1

In Issue 1, Appellant sought an abatement for the purpose of holding a hearing on his timely filed, properly presented motion for new trial.

Appellee responds that Appellant waived a hearing on the motion because he did not file a formal objection after the trial court sua sponte cancelled the hearing that it had originally set. (Appellee's Brief p. 14.) This argument is without merit.

The State cites to two cases in support of this argument. *Lara v. State* is a case where the trial court set Appellant's motion for a hearing but set it outside the 75-day window for ruling on such motions. The defense attorney mistakenly believed the hearing was set within the 75-day window and did nothing. The appellate court held that because counsel failed to bring the issue to the trial court's attention, he waived the issue. *Tello v. State* is an intermediate court case that makes a conclusory statement that failure to reset a cancelled hearing waives the right to a hearing, relying on *Johnson v. State*, 925 S.W. 2d 745, 748(Tex. App. – Ft. Worth 1996, pet. ref'd). *Johnson* is similar to *Lara*. In *Johnson,* a hearing was timely held but it was cut short because of a bomb scare. *Id*. Afterwards, Appellant failed to take steps to continue the hearing within the 75-day timeframe. *Id*. Under those circumstances, it was held that Appellant waived his right to a hearing. *Id*.

This case is different because Appellant complied with all the requisites of Rule 21, timely filing, timely presenting and timely obtaining a hearing before the trial court that was within the 75-day time frame. See *Rozelle v. State,* 176 S.W. 3d 228, 230(Tex. Crim. App. 2005)(Presenting the motion for new trial and the request for a hearing is akin to objecting to the erroneous admission of evidence.) The trial court's sua sponte cancellation of the hearing cannot undo Appellant's proper and timely preservation of an appellate complaint. The State argument assumes that the hearing was cancelled pending a reset. However, there is nothing in the record to indicate that the trial court intended to reset the hearing or was willing to reset the hearing as was the case in *Lara* and *Johnson*. Appellant's point 4 on his motion for new trial alleged a "Due Process deprivation of right to trial by impartial jury and deprivation of right to counsel based on court's actions." In this point, Appellant complained about the trial court holding defense counsel in contempt and, the trial court improperly chilling the honest exchange of information between potential jurors and the parties, during voir dire. It is unlikely these complaints were well received by the trial court. The obvious import of the cancellation of the hearing was that the trial court was unwilling to grant Appellant relief on his motion for new trial. Appellants are not required to object to the overruling of a motion for new trial or, to the trial court's failure to hold a hearing on a motion for new trial. See *King v.*

State, 29 S.W. 3d 556, 569(Tex. Crim. App. 2000); *Reyes v. State,* 849 S.W. 2d 812, 816(Tex. Crim. App. 1993). Absent such a requirement, it cannot be said that Appellant waived his right to a hearing.

Regarding Appellant's right to a hearing, it is undeniable that he was entitled to a hearing. When an accused presents a motion for new trial raising matters not determinable from the record, which could entitle him to relief, the trial judge abuses his discretion in failing to hold a hearing." *King v. State,* 29 S.W.3d 556, 569 (Tex.Crim.App.2000). As a prerequisite to obtaining a hearing, the motion must be supported by an affidavit specifically showing the truth of the grounds for attack. *King v. State,* 29 S.W.3d at 569; However, the affidavit need not reflect each and every component legally required to establish relief, but rather must merely reflect that reasonable grounds exist for holding that such relief could be granted. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994); *Reyes v. State,* 849 S.W.2d 812, 816 (Tex.Crim.App.1993). The purpose of the hearing itself is to fully develop the issues raised in the motion. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994).

The State argues that a hearing was unnecessary because the trial court could determine the issues based on affidavits alone citing *Holden v. State*, 201 S.W. 3d 761, 762-764 (Tex. Crim. App. 2006). In *Holden,* the trial court had conflicting

affidavits from trial counsel and appellant. The Court determined that the trial court could make its decision solely off of the affidavits. There were no conflicting affidavits in this case. Exhibit A to the motion for new trial was an affidavit from attorney Mike Cervantes in which he admitted that he was "fearful of being held in contempt and incarcerated". CR. 271. He admitted that he failed to make objections, he limited his cross examination, and, he limited his voir dire examination because he feared he would anger the judge and be held in contempt. *See Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980)(Violation of the Sixth Amendment's right to effective assistance of counsel if there is an actual conflict of interest that adversely affects defense counsel's performance.) He also admitted that he failed to present additional mitigating evidence and character evidence at the punishment stage of trial, because he was having trouble doing so. And, he admitted that he failed to interview available punishment witnesses to include Appellant's parents, siblings and, several other friends and family. See *Ex parte Welborn,* 785 S.W.2d 391, 393 (Tex.Crim.App.1990)(A criminal defense lawyer has a duty to make an independent investigation of the facts of a case, which includes seeking out and interviewing potential witnesses). This affidavit was supported by the affidavit of Jesus Diaz de Leon which listed the numerous witnesses that were present at the trial and willing to testify on Appellant's behalf. CR. 274. These matters were also supported by the

record. See Appellant's Brief p. 24-27.

Some of the more glaring deficiencies necessitating a hearing were trial counsel's deficient voir dire, trial counsel's inability to present character witnesses at punishment and, trial counsel's failure to interview available punishment witnesses. CR. 263-274. In his affidavit, trial counsel admitted that he performed deficiently in these particular areas and he explained that his deficient performance was related to his fear of being held in contempt and/or being jailed. CR. 271-273. During voir dire counsel did not cover any punishment issues, he failed to address Appellant's status as a law enforcement officer, and he failed to inquire about bias based on previous experiences with violent crime. R. 2:67-85. During punishment counsel only presented two character witnesses. Appellant's sister testified that Appellant was peaceful and law abiding. R. 7:86. Appellant's brother testified that Appellant had a good reputation in the community. R. 7:89. Counsel did not present any other relevant information about Appellant through these two witnesses. At one point, Appellant's brother attempted to provide more detailed information about Appellant. However, the State lodged an improper objection and trial counsel moved on. R. 7:89. Appellant's motion raised several valid issues. He should have been given a hearing on his motion for new trial. This Court should abate Appellant's appeal and order the trial court to hold a hearing on his motion for a new trial.

APPELLANT'S REPLY ON ISSUE 4

In Issue 4, Appellant argues that he was denied the right to a fair and impartial trial by the trial court's badgering of jurors that responded affirmatively on questions related to their jury service. Several jurors that responded to questions regarding their ability to judge were ridiculed for their responses. As a result, the truthful exchange of information between the jurors and the litigants was chilled and Appellant did not receive a fair trial before a fair and impartial jury.

In its reply to Appellant's Issue Four Appellee first argues that error was not properly preserved. In doing so, it does not address *Drake v. State,* cited by Appellant, which holds that this type of error is reversible fundamental error that can be raised for the first time on appeal. 465 S.W.3d 759, 763 (Tex. App.—Houston, [14th Dist] 2015 no pet.). Or Texas Rule of Evidence 103(d) which states "In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court." TEX. R. EVID. 103(d). See also *Blue v. State,* 41 S.W. 3d 129, 132(Tex. Crim. App. 2000)(Judge's comments to the venire that he would have preferred the defendant plead guilty were fundamental constitutional error and required no objection to be preserved for appeal.)

The cases cited by the State deal with potential judicial bias or alleged misstatements of the law by the judge. (Appellee's Brief P. 45 citing *Mclean* and *Marshall.)* Appellant's claim in this case does not encompass either. Instead, Appellant is concerned with the chilling effect of the judges rude and belittling responses to potential jurors' responses during voir dire.

Next, the State includes argument and case law regarding what must be shown by Appellant in order to show that a judge is impartial or biased against a party. (See Appellee's Brief p. 43.) However, Appellant does not claim in Issue 4 that the judge was biased against Appellant or his counsel. Instead, Appellant's concern is that because the judge attacked jurors who answered relevant questions regarding their fitness to serve as jurors, other jurors were likely to remain silent on relevant issues or, risk being attacked themselves.

The State then claims that because Jurors Number 5, 51, and 40 were not subjected to reprisals, sanctions, or punishment, there was no judicial impropriety. (Appellee's Brief p. 47) First off, Appellant would disagree that the jurors were not subject to reprisals. Juror 5 was ridiculed by the judge for claiming to not pass judgment on others. Juror 51 was also ridiculed for her beliefs and after many contemptuous questions, the court told her "Sit down, 51". Finally, Juror 40 was

rudely dismissed and cut off when she asked for simple clarification regarding the issue of prior service. R. 3:57, 60, 66.

If a trial court discourages prospective jurors from being truthful, he simultaneously destroys the purpose of the voir dire and erodes the foundation upon which a fair and impartial jury can be selected. *Price v. State,* 626 S.W.2d 833, 835–36 (Tex. App. – Corpus Christi 1981, no pet.). The fact that the judge in this case attempted to be subtle about his obvious dislike for jurors that did not agree with his opinions is no less dangerous than a judge who outwardly threatens jurors with contempt, arrest or some other kind of obvious punishment. Jurors are oftentimes reluctant to speak during voir dire. While some jurors are more than willing to answer questions, the real difficulty in voir dire is getting quiet jurors to respond to questions asked. Creating an atmosphere where jurors are ridiculed for their beliefs and their questions, serves no other purpose than to instill fear in the minds of jurors that it is in their best interest to remain silent, or run the risk of being publicly humiliated by a district court judge. *See Drake v. State,* 465 S.W. 3d at 8764(While it is presumed that potential jurors answer truthfully the questions of voir dire, this presumption does not apply when jurors are given reason to fear reprisals for truthful responses.) Based on the State's argument, unless a juror is punished in some obvious manner, there can be no error, no matter how inappropriate the judge's

comments may be. This misses the point of *Drake, Price, Rowe,* and other cases where the trial judges' actions were found to have violated a defendant's right to a fair and impartial jury. "The purpose of the voir dire examination is to expose any bias or interest of the prospective jurors which might prevent full consideration of the evidence presented at trial. The term "voir dire" literally means "to speak the truth." Black's Law Dictionary (5th Ed. 1979). When one member of the panel does indeed speak the truth, and exposes a personal bias, the interests of justice are served. Such honesty should be complimented and encouraged .... not ridiculed." *Price* at 835.

Finally, the State claims no probable prejudice because the evidence was overwhelming. (Appellee's Brief p. 48.) As is often the case, the State urges this Court to ignore errors and misconduct because "he's guilty anyway". However, the type of error in this case does not require a showing of prejudice because, as the courts have acknowledged, this type of error defies harm analysis. *Drake* at 767(Because determining what effect the trial judge's actions and remarks had on the jury would leave this court to speculate, Drake does not need to point to specific prejudice.) Defendants need not show specific prejudice from a voir dire procedure that cuts of meaningful responses from the venire. *Rowe,* 106 F. 3d at 1230. Consequently, Appellant is entitled to a new trial.

PRAYER

Appellant prays that his appeal be abated and his case remanded to the trial court for a hearing on his motion for new trial.

Appellant prays that his conviction and sentence be reversed and that he be granted a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Reply Brief was delivered to the Office of the District Attorney at 500 E. San Antonio, El Paso, Texas 79901 on March 6, 2017 by electronic mail to DAappeals@epcounty.com.

/s/ Ruben P. Morales
Ruben P. Morales

CERTIFICATE OF COMPLIANCE

I certify that this reply brief contains 2,230 words and complies with the applicable Rules of Appellate Procedure.

/s/ Ruben P. Morales
Ruben P. Morales

Appendix 4 – Appellate Court Opinion

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ALBERTO MONTELONGO,	§	No. 08-16-00001-CR
Appellant,	§	Appeal from
v.	§	243rd District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20150D02224)

O P I N I O N

A jury convicted Appellant Alberto Montelongo of attempted capital murder of multiple persons and assault with bodily injury of a family member twice within twelve months. A jury sentenced Appellant to confinement for a period of 99 years and 10 years, respectively. On appeal, Appellant raises four issues for our consideration that arise in significant part from the trial court's acts and failure to act. We affirm the trial court's judgment.

BACKGROUND

Appellant and Blanca Parra met while attending the United States Border Patrol Academy, and eventually married on February 18, 2014. Appellant eventually became a firing-range instructor for Border Patrol, and estimated that he trained between 200 to 500 agents.

In July 2014, Appellant and Parra separated, and their subsequent attempts at reconciliation

failed, in part because Appellant declined to move into the marital home. Appellant had a separate home, and as Parra later learned, a lover.

In December 2014, Parra concluded that she did not want to seek reconciliation and met Jesus Rodriguez through an online website. They first met in January 2015 and went on several dates during that month but never had sexual relations. After her third date with Rodriguez on January 29, 2015, Parra was sleeping in her bed when Montelongo entered her bedroom, and announced that God had told him to "get his woman to submit to him," and that he wanted to reconcile. Appellant became angry when Parra laughed, and when she began looking at her tablet and ignoring Appellant, he grabbed her by the hair, and struck her head against the bed headboard to the extent that Parra thought she would lose consciousness. During the one-minute attack, Appellant informed Parra that she deserved this treatment because she had been unfaithful. Appellant left and went home to his girlfriend.

Parra suffered visible injuries to her face, called the sheriff, and subsequently sought a protective order. Appellant was arrested, and was placed on administrative leave at the Border Patrol, where he surrendered his service weapon.

On the evening of February 2, 2015, after parking his car where Parra could not see it and after observing Rodriguez arrive at Parra's residence, Appellant approached the front door of the house, observed Parra and Rodriguez hug and kiss, and then proceeded to enter the house through the garage where he retrieved a handgun that he stated he had never fired. When Appellant walked within two feet of Rodriguez, Parra walked between them. Appellant asked Rodriguez how many times he had sex with Parra, pulled a gun out of his pocket and, holding the gun with both hands and one finger on the trigger, pointed it at Parra and Rodriguez.

When Parra's daughter heard a commotion, entered the kitchen area and saw Appellant holding the gun, and Rodriguez' hands in the air, she returned to her bedroom and called 9-1-1. She eventually escaped through her bedroom window.

Appellant announced that he was going to kill Parra and Rodriguez, closed one eye, aimed, fired the gun, and shot Rodriguez in the head above his right eye. Rodriguez crawled to a nearby bathroom, and Appellant aimed the gun at Parra's sternum, but the gun jammed and misfired. Parra grabbed the gun and as she and Appellant struggled for control of the gun, they entered the kitchen. Appellant released one hand from the gun, and removed a knife from a kitchen drawer. Parra grabbed Appellant's hand that was on the knife, while Appellant attempted to hit the gun on the kitchen counter for the purpose of clearing the jammed round.

After Sheriff's Office personnel arrived, a communications robot was deployed which took a photo of Appellant holding the knife while Parra held his hand that was bearing the knife. Appellant allowed Parra to retrieve a phone that the Sheriff's Office personnel had thrown inside the house, she ran outside.

Rodriguez underwent cranial surgery and bullet fragments remain lodged in his brain. Parra suffered cuts to her hands.

DISCUSSION

I.

In Issue One, Appellant contends the trial court abused its discretion by failing to hold a hearing on his motion for new trial. We disagree.

Motion for New Trial

A defendant seeking a new trial must present his motion for new trial to the trial court

within 10 days after the motion is filed. TEX.R.APP.P. 21.6. The presentment must result in actual notice to the trial court and may be evidenced by a hearing date set on the docket. *See Carranza v. State*, 960 S.W.2d 76, 79 (Tex.Crim.App. 1998). To be entitled to a hearing on his motion for new trial, a defendant must first request it. *Rozell v. State*, 176 S.W.3d 228, 230-31 (Tex.Crim.App. 2005). When a motion for new trial is presented to the trial court, the burden of ensuring that the hearing thereon is set for a date within the trial court's jurisdiction is properly placed on the party presenting the motion, not on the trial judge. *See Oestrick v. State*, 939 S.W.2d 232, 235-36 (Tex.App.--Austin 1997, pet. ref'd); *Crowell v. State*, 949 S.W.2d 37, 38 (Tex.App.--San Antonio 1997, no pet.). The trial court must rule on the motion within 75 days after imposing or suspending sentence in open court. TEX.R.APP.P. 21.8(a). A motion not timely ruled on by written order within the prescribed 75-day period will be deemed denied. TEX.R.APP.P. 21.8(c).

"It is the duty of the appellate courts to ensure that a claim is preserved in the trial court before addressing its merits." *Obella v. State*, 532 S.W.3d 405, 407 (Tex.Crim.App. 2017), *quoting Wilson v. State*, 311 S.W.3d 452, 473 (Tex.Crim.App. 2010). To preserve a complaint for appellate review, the record must show that the complaining party made a timely motion to the trial court and the trial court ruled on the motion either expressly or implicitly or refused to rule on the motion and the complaining party objected to the refusal. TEX.R.APP.P. 33.1(a).

In this case, the trial court entered judgment in open court on September 30, 2015. Appellant filed his motion for new trial, which requested a hearing, on October 30, 2015. On November 19, 2015, the trial court issued an order scheduling the motion to be heard on December 8, 2015. The scheduling order is evidence that Appellant's motion was presented to the trial court. *See Carranza*, 960 S.W.2d at 79.

On November 23, 2015, the trial court issued an order canceling the hearing on Appellant's motion for new trial, and facsimile transmission logs show that the order was sent to Appellant's trial and appellate counsel on that date. The record does not show or indicate the reason for the trial court's cancellation of the hearing, nor that the trial court expressly ruled or refused to rule on the motion. The motion for new trial was overruled by operation of law. TEX.R.APP.P. 21.8(b).

In the absence of a record showing appellant's efforts to reschedule the hearing on his motion for new trial, he cannot complain about the overruling of his motion by operation of law. *See Tello v. State*, 138 S.W.3d 487, 496 (Tex.App.--Houston [14th Dist.] 2004), *aff'd*, 180 S.W.3d 150 (Tex.Crim.App. 2005), *citing Johnson v. State*, 925 S.W.2d 745, 748 (Tex.App.--Fort Worth 1996, pet ref'd)(defendant had burden to "develop some record, before the expiration of the court's jurisdiction, which demonstrated his efforts to reschedule the hearing" on his motion for new trial). Nothing in the record on appeal shows that Appellant rescheduled or attempted to reschedule the hearing on the motion for new trial, and Appellant has not developed a record of any effort to reschedule the hearing. "Where a motion for new trial is overruled by operation of law, the trial court's failure to conduct a hearing, without more, is simply a 'failure to rule' on the request for a hearing." *Oestrick*, 939 S.W.2d at 235.

Appellant did not obtain a ruling on his motion for new trial and did not object to a lack of a ruling on his motion. *See Oestrick*, 939 S.W.2d at 235; *see also Baker v. State*, 956 S.W.2d 19, 24-25 (Tex.Crim.App. 1997)(appellant who failed to object to the untimely setting of a motion-for-new-trial hearing within the 75-day jurisdictional period failed to preserve his complaint that the trial judge should have held timely hearing). Consequently, Appellant has failed to preserve this complaint for our review. Issue One is overruled.

II.

Appellant next complains that his "6th Amendment right to the effective assistance of counsel and his right to due process" were denied, in Issue Two, when the trial court repeatedly threatened to hold defense counsel in contempt, and in Issue Three, when the trial court erroneously held defense counsel in contempt after the conclusion of voir dire. In Issues Two and Three, which Appellant presents together, he contends that after the trial court's contempt ruling, defense counsel "could not effectively represent Appellant due to a conflict of interest between protecting himself and defending Appellant." He asserts that defense counsel did not zealously represent him because defense counsel feared that "he might be fined or jailed or both."

Appellant also argues that defense counsel's performance was ineffective at trial because defense counsel conducted a deficient voir dire that failed to address punishment issues, and failed to present any meaningful punishment evidence, failed to make objections throughout trial, failed to make objections to improper parole arguments during the State's closing punishment argument, failed to make objections to improper non-victim impact evidence, and because he agreed to admit all of the State's proffered exhibits. We first consider whether an actual conflict of interest is shown.

Ineffective Assistance of Counsel Based on Conflict of Interest

An actual conflict of interest which adversely affects a lawyer's performance is one way in which a counsel's assistance may be rendered constitutionally ineffective. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel due to counsel's conflict of interest, an appellant must show that counsel had an actual conflict of interest, and the conflict actually colored counsel's actions during

trial. *Acosta v. State*, 233 S.W.3d 349, 356 (Tex.Crim.App. 2007)(adopting the rule set out in *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). The appellant bears the burden of proof by a preponderance of the evidence on a claim of conflict-of-interest ineffective assistance, which is to say that if "no evidence has been presented on the issue" or in the event that "the evidence relevant to that issue is in perfect equipoise," the appellant's claim will fail. *Odelugo v. State*, 443 S.W.3d 131, 136-37 (Tex.Crim.App. 2014)(citations omitted).

"[A]n 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest." *Acosta*, 233 S.W.3d at 355, *citing Monreal v. State*, 947 S.W.2d 559, 564 (Tex.Crim.App. 1997), *quoting James v. State*, 763 S.W.2d 776, 779 (Tex.Crim.App. 1989). A defendant who did not object at trial must demonstrate by a preponderance of the evidence that an actual conflict of interest adversely affected counsel's performance. *Cuyler*, 446 U.S. at 348; *Odelugo v. State*, 443 S.W.3d 131, 136-37 (Tex.Crim.App. 2014).

A mere possibility of a conflict of interest is insufficient to overturn a criminal conviction. *See Cuyler*, 446 U.S. at 345, 350. In a conflict-of-interest claim, there is a limited presumption of prejudice, i.e., "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692, *quoting Cuyler v. Sullivan*, 446 U.S. at 350, 348, 100 S.Ct. at 1719 (footnote omitted)(until defendant shows counsel actively represented conflicting interests, he does not establish constitutional predicate for claim of ineffective

assistance). Where no actual conflict of interest exists, we analyze the appellant's ineffective-assistance claim under the *Strickland* test. *See Acosta v. State*, 233 S.W.3d 349, 355-56 (Tex.Crim.App. 2007); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Contempt and Threats of Contempt

The trial court held defense counsel in contempt at the conclusion of voir dire, but did so after the twelve jurors selected to hear Appellant's case had left the courtroom, and while the judge was speaking to the venirepersons who remained present in the courtroom. On the third day of trial, the trial court sustained the State's objection when defense counsel asked Blanca Parra during cross-examination, "If I shoot a weapon . . . like he did that day, and he approached him, he was pointing the weapon, and I would have grabbed the weapon, then that muzzle would be hot?" After the trial court sustained the objection, defense counsel immediately asked Parra, "Correct?," and the trial court again stated, "Sustained." When Defense counsel noted to the trial court, "That's my theory, Judge," the trial court replied, "Sustained, Mr. Cervantes." Defense counsel asked Parra, "[Y]ou're saying that at that time -- was the muzzle hot or not?," and Parra stated that she did not remember. Defense counsel again asked whether the gun was hot, the State objected, and the court again sustained the State's objection. When defense counsel subsequently asked Parra, "And you're telling the jury that you don't know whether the muzzle was hot or not?," the trial court instructed counsel to approach and advised defense counsel, "I sustained that question two times. The next one, hold you in contempt, and I will. I'm telling you right now, I'm going to find you in contempt. Do you understand me?"

Two days later, on the fifth day of trial, after the State had passed a State's witness for

cross examination, the trial court instructed the prosecutor to return the exhibits to the court's reporter, instructed defense counsel to sit down, and thereafter informed defense counsel that he was permitted to proceed. Defense counsel did not cross-examine the witness, a person who Parra had met on an internet dating website. After excusing the witness, the trial court instructed counsel to approach the bench, and then instructed defense counsel, "Mr. Cervantes, next time I repeat an instruction to you I'm holding you in contempt, and don't plan on going home. This is your third admonishment. Do it again, you're not going home."[1] When defense counsel asked, "You don't want me to stand at all?," the trial court informed trial counsel, "I have told you six times today, wait until [the prosecutor] sits down. Okay. You insist on jumping up and going to the podium. It's going to cost you. Do you understand?" Defense counsel acknowledged that he understood the trial court's instruction.

Analysis

To support his contentions, Appellant relies on the affidavit he filed in support of his motion for new trial. However, in addressing Issues Two and Three, we do not consider the affidavits Appellant filed in support of his motion for new trial.

A motion for new trial is not self-proving. *Rouse v. State*, 300 S.W.3d 754, 762 (Tex.Crim.App. 2009); *Jackson v. State*, 139 S.W.3d 7, 20 (Tex.App.--Fort Worth 2004, pet. ref'd), *citing Lamb v. State*, 680 S.W.2d 11, 13 (Tex.Crim.App. 1984). During a hearing on a motion for new trial, a trial court may receive evidence by affidavits. TEX.R.APP.P. 21.7; *Jackson*, 139 S.W.3d at 20. However, an affidavit attached to the motion is merely "a pleading that authorizes the introduction of supporting evidence" and is not evidence itself. *Dugard v.*

[1] Appellant's brief does not direct us to a third admonishment in the record, and we have found none.

State, 688 S.W.2d 524, 528, 529 (Tex.Crim.App. 1985), *overruled on other grounds by Williams v. State*, 780 S.W.2d 802, 803 (Tex.Crim.App. 1989); *Jackson*, 139 S.W.3d at 20, *quoting Stephenson v. State*, 494 S.W.2d 900, 909-10 (Tex.Crim.App. 1973). To constitute evidence, the affidavit must be introduced as evidence at the hearing on the motion. *Rouse*, 300 S.W.3d at 762; *Stephenson*, 494 S.W.2d at 909-10; *Jackson*, 139 S.W.3d at 20. Because the affidavits in support of Appellant's motion were not introduced in evidence at a hearing, they constitute mere pleadings, and are not evidence. *Jackson*, 139 S.W.3d at 21.

We do not find Appellant's complaints to be well-founded in the trial record on appeal. We find nothing in the record that supports Appellant's contention that the trial court's contempt ruling created an actual conflict of interest between defense counsel's interests and those of Appellant. The trial court's post-voir dire contempt ruling was made outside the presence of the jury at a time when the judge was addressing the non-selected venire panel regarding the importance of jury service. Defense counsel was not advocating on behalf of Appellant and had no advocacy role during the time the trial court addressed the remaining venirepersons after voir dire had concluded and the jury had been selected and removed from the courtroom.

Regarding the trial court's two other contempt admonishments occurring on the third and fifth days of trial, Appellant presents no evidence on the issue to show an actual conflict of interest, that is, that counsel was required to make a choice between advancing Appellant's interest in a fair trial or advancing other interests to the detriment of Appellant's interest. *See Odelugo*, 443 S.W.3d at 136-37; *Acosta*, 233 S.W.3d at 355; *Monreal*, 947 S.W.2d at 564; *James*, 763 S.W.2d at 779. Nothing in the record shows that defense counsel did not zealously represent Appellant because defense counsel harbored fear that "he might be fined or jailed or both" as asserted in

Appellant's brief. The record bears no information showing what interest, if any, defense counsel may have had that conflicted with and may have been detrimental to Appellant's interests. Because no actual conflict of interest is demonstrated in the trial record, we analyze the appellant's ineffective-assistance claim under the two-pronged *Strickland* test. *See Acosta*, 233 S.W.3d at 355-56; *Strickland*, 466 U.S. at 687.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the appellant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "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." *Id.* at 686, 104 S.Ct. 2064. The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). Whether an appellant received effective assistance of counsel is founded on the facts of each case. *Id.*

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. "It is not sufficient that the appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence. Instead, the record must affirmatively demonstrate trial counsel's alleged ineffectiveness." *Mata v. State*, 226 S.W.3d 425, 430 (Tex.Crim.App. 2007). The defendant must overcome "the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" and that the conduct constituted sound trial

strategy. *Prine v. State*, 537 S.W.3d 113, 116-17 (Tex.Crim.App. 2017), *quoting Thompson*, 9 S.W.3d at 813; *Miniel v. State*, 831 S.W.2d 310, 323 (Tex.Crim.App. 1992).

To defeat this presumption, "[a]ny allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness." *McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App. 1996). Trial counsel should generally be given an opportunity to explain his actions before being found ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex.Crim.App. 2003).

Courts will not speculate to find counsel ineffective. *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex.Crim.App. 2012). We presume a reasonable trial strategy if any can be objectively plausible. *Id.* In the absence of evidence of counsel's reasons for the challenged conduct, we commonly will assume a strategic motivation if any can possibly be imagined and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it. *See Ex parte Saenz*, 491 S.W.3d 819, 828 (Tex.Crim.App. 2016), *quoting Garcia v. State*, 57 S.W.3d 436, 440 (Tex.Crim.App. 2001)(internal citations omitted); *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App. 2005)(faced with undeveloped record, court should find counsel ineffective only if conduct was so outrageous that no competent attorney would have engaged in it).

To effectively argue an issue of ineffective assistance of counsel, a record focused on the conduct of trial or appellate counsel should be developed. This is often best achieved in the context of a hearing held in relation to an application for writ of habeas corpus. *See Jackson v. State*, 877 S.W.2d 768, 772 n.3 (Tex.Crim.App. 1994)(Baird J. concurring)(noting also that although such record may be developed during a hearing on a motion for new trial, doing so is

most often impractical because of the time constraints under the rules of appellate procedure, and because the trial record generally has not been prepared within the timeframe necessary to permit use of the trial record during the new-trial hearing). The record on direct appeal is generally insufficient to show that counsel's performance was deficient. *Bone v. State*, 77 S.W.3d 828, 833 (Tex.Crim.App. 2002).

Analysis

Although Appellant has phrased Issues Two and Three in terms of a denial of right to counsel and due process arising from the trial court's contempt ruling and threats of making additional contempt rulings, he also contends defense counsel's performance was deficient throughout trial. In support of his contention that defense counsel rendered ineffective assistance at trial, Appellant complains that during voir dire, defense counsel failed to address punishment issues, and that during trial defense counsel did not present meaningful punishment evidence, did not object throughout trial, failed to object to improper parole arguments during the State's closing punishment argument and to improper non-victim impact evidence, and also agreed to admit all of the State's proffered exhibits.

Appellant does not specify what punishment issues defense counsel should have addressed during voir dire, nor does he identify what meaningful evidence should have been presented during punishment. Appellant does not specify the objections he believes defense counsel should have made "throughout trial," and does not attempt to specify or direct us to the allegedly improper non-victim impact evidence and punishment arguments to which he suggests defense counsel should have voiced objection. Appellant does not suggest why defense counsel should not have agreed to the admission of the State's proffered exhibits. Moreover, at no time does Appellant attempt

to show that defense counsel's allegedly deficient performance prejudiced his defense, and after review, we conclude the record does not affirmatively demonstrate trial counsel's alleged ineffective assistance.

In light of this undeveloped record which does not include trial counsel's explanations for his acts or omissions or his trial strategy, we are unable to conclude that defense counsel's conduct was so outrageous that no competent attorney would have engaged in it. Simply stated, Appellant has failed to meet his burden of proving by a preponderance of the evidence that counsel was ineffective, and has failed to overcome the strong presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance and constituted sound trial strategy. Issues Two and Three are overruled.

III.

In Issue Four, Appellant complains he was denied his right to a fair and impartial trial when the trial judge admonished prospective jurors who asserted they could not sit in judgment of others, and accused another prospective juror of attempting to avoid jury duty.[2] Appellant asserts that because of the complained-of interactions, jurors were unlikely to answer the litigants' questions in a truthful manner for fear of reprisal by the trial court.

Preservation of Error

To preserve error regarding improper voir dire questions, a party must make a timely, specific objection at the earliest possible opportunity. TEX.R.APP.P. 33.1(a)(generally, to preserve an alleged error for appellate review, the record must show that the complaining party raised the issue with the trial court in a timely and specific request, objection, or motion and

[2] The venirepersons with whom the trial court interacted did not serve as jurors at Appellant's trial.

obtained a ruling or objected to the court's refusal to rule); *Ross v. State*, 154 S.W.3d 804, 807 (Tex.App.--Houston [14th Dist.] 2004, pet. ref'd); *see also Griggs v. State,* 213 S.W.3d 923, 927 (Tex.Crim.App. 2007); *McLean v. State,* 312 S.W.3d 912, 915 (Tex.App.--Houston [1st Dist.] 2010, no pet.). However, Texas Rule of Evidence 103(e) provides that, "In criminal cases, a court may take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX.R.EVID. 103(e); *see Jasper v. State*, 61 S.W.3d 413, 420 (Tex.Crim.App. 2001)(where appellant claimed that his right to fair trial by impartial jury was violated by comments of the trial judge, but appellant did not object at trial, it is within province Court to "take notice of fundamental errors affecting substantial rights although they were not presented to the court," pursuant to Texas Rule of Evidence 103(d), now Rule 103(e)); *McLean v. State*, 312 S.W.3d 912, 915 (Tex.App.--Houston [1st Dist.] 2010, no pet.)(applying former Rule 103(d), which provided, "In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.").

As the State correctly observes, Appellant did not object to the trial court's comments during voir dire. TEX.R.APP.P. 33.1(a). Therefore, the alleged error is not preserved for our consideration unless the error was fundamental and affected a substantial right. TEX.R.EVID. 103(e).

The Sixth Amendment to the United States Constitution guarantees a trial before an impartial jury. U.S. CONST. amend. VI. The process of voir dire is designed to effectuate a defendant's right to a fair trial by insuring, to the fullest extent possible, that the jury will be intelligent and impartial. *Armstrong v. State*, 897 S.W.2d 361, 368 (Tex.Crim.App. 1995); *see*

also Barajas v. State, 93 S.W.3d 36, 38 (Tex.Crim.App. 2002)(trial court has broad discretion over the process of selecting a jury).

In *Blue v. State*, 41 S.W.3d 129, 132 (Tex.Crim.App. 2000)(plurality op.), a plurality of the Court held that a trial judge's comments "which tainted [the defendant's] presumption of innocence in front of the venire, were fundamental error of constitutional dimension and required no objection." In *Jasper*, 61 S.W.3d at 421, the Court of Criminal Appeals subsequently determined that even if its plurality opinion in *Blue* was binding, the trial court's comments in *Jasper* had failed to rise to "such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." The Court therefore concluded that the trial court's alleged improper comments were not fundamental error. *Id*.

In this case, the trial court questioned Veniremember 5 after she affirmatively answered the State's question which asked whether anyone felt he or she could not "judge the credibility of another" for religious reasons. When asked by the trial court, Veniremember 5 acknowledged that she was serving on a grand jury. The trial court asked whether the juror judged 20-30 people every day during grand jury, noted that this meant she was passing judgment and indicting someone who would stand trial, and asked whether she understood the prosecutor's question and what she does as a member of the grand jury. The juror's response indicated her awareness of her role in the grand jury, and although the trial court had clarified that Appellant's charge was for attempted murder, the juror noted that she had not indicted murder cases. The trial court then commented, "So as long as you don't know the defendant, you don't . . . have a problem passing judgment? Have a seat, ma'am."

After this exchange, Veniremember 40 voiced her feeling that she could not "judge the

credibility" of another. She was followed by Veniremember 51 who also acknowledged an inability to "judge the credibility" of someone. When Veniremember 55 next stood in response to the same question by the State, the trial court interjected:

> Let me -- did you people understand that question? Because it seems to me you pass judgment on people every single day.
>
> Single ladies, let me see your hands. Ever been asked out before in your life? Did you pass judgment? 'He's kind of ugly.' 'Not my type.' 'Doesn't have a car.' Did you not pass judgment on another human being? Now, look, ladies, I'm not saying it's going to be -- you know, have Smiling Jack pick you up and take you to the bus stop, have a nice dinner, McDonalds, come back home. Did you or did you not pass judgment on him? Did you understand the question? Can you judge another person?
>
> Stranger walks up to you. 'I don't' want to talk to you. I don't want to talk to you.' Did you not pass judgment? All right.

The trial court then asked Veniremember 51 whether she understood the question, and she answered, "Yes, sir." When the trial court asked whether she had never passed judgment, Veniremember 51 stated, "I honestly try not to." The trial court asked Veniremember 51 whether she had ever applied for a job and had judged the person interviewing her, and Veniremember 51 repeated that she tries not to judge others. When the trial court noted that it had not asked her whether she tries not to judge others and asked, "You're telling me you can't pass judgment on a human being?" Veniremember 51 stated, "I shouldn't." The trial court asked whether Veniremember 51 passes judgment regarding the manner in which her sister and other women dress. Veniremember 51 answered, "Not my place," and when the trial court asked Veniremember 51 whether she ever passes judgment on the way people act in clubs, she answered, "Yes, sir." The trial court then asked, "Why would you pass judgment on other people? They've got a right to act any way they want in a club. Sit down, 51."

Prior to concluding its voir dire, the State asked the venire, "Is there anything or anyone that I missed that would like to address the Court about serving on this jury, before I sit down, that maybe you might not be the appropriate juror for this particular case?" Five veniremembers raised issues, including Veniremember Number 40 who asked whether an inquiry had been made regarding jury service in the preceding 24 months. The State's prosecutor clarified that the trial court had asked the question and noted that the veniremember could approach on that matter later in the proceedings. The trial court asked, "Ma'am, you're not trying to get out of jury, are -- jury duty, are you?" and as Veniremember Number 40 began to answer, the trial court responded, "Then have a seat. Thank you." When defense counsel posed questions of the venire during voir dire, veniremembers responded to questions posed.

In support of his contention that the trial court's comments rendered jurors unlikely to answer the litigants' questions honestly for fear of reprisal, such the comments constitute reversible error that may be raised for the first time on appeal, Appellant directs us to *Drake v. State*, 465 S.W.3d 759, 764 (Tex.App.--Houston [14th Dist.] 2015, no pet.). In *Drake*, our sister court determined that a trial judge's comments on the case and its decision to arrest a veniremember who stated that his religious beliefs prevented him from viewing certain evidence had a chilling effect on the jury that prevented a meaningful and substantive voir dire, which precluded a fair and impartial trial. *Drake*, 465 S.W.3d at 764.

Here, no veniremember was subjected to arrest, sanction, reprisal, or dismissed on religious grounds. The record does not reveal that the trial court's comments had a chilling effect on the jurors or deprived Appellant of a fair and impartial trial. Despite the trial court's comments, veniremembers continued to respond to questions posed by the State and defense counsel during

voir dire.

We conclude the trial court's comments in this case did not rise to "such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *See Jasper*, 61 S.W.3d at 421. Accordingly, because the trial court's voir dire comments do not constitute fundamental error, Issue Four is overruled.

IV.

The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX.R.APP.P. 25.2(d). The certification is defective, and has not been corrected by Appellant's attorney or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to Rule 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. Appellant's attorney is further ORDERED, to comply with all of the requirements of Rule 48.4.

CONCLUSION

The trial court's judgment is affirmed.

August 31, 2018

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.

(Do Not Publish)