

**COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT
HOUSTON**

Barfield v. State

No. 14-13-00518-CR, 2015 Tex. App. LEXIS 3251 (Tex. App.—Houston [14th Dist.] Apr. 2, 2015) (mem. op.) ·
No. 14-13-00518-CR · Decided June 17, 2015

SUMMARY

This document is a Petition for Discretionary Review filed by Lisa Ann Barfield in the Texas Court of Criminal Appeals following affirmance of her DWI conviction by the Fourteenth Court of Appeals. It challenges the denial of a continuance based on trial counsel's head injury, admission of evidence referencing prior offenses, references to a prior trial, display of a MADD plaque, alleged judicial bias, and the definition of reasonable doubt in the jury charge.

CASE DETAILS

COURT	Court of Appeals for the Fourteenth District of Texas at Houston
WRITING FOR THE COURT	Martha Hill Jamison; William J. Boyce; Jeffrey V. Donovan
JURISDICTION	Texas
DECIDED	June 17, 2015
DOCKET	14-13-00518-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a misdemeanor DWI conviction following a second jury trial. The Fourteenth Court of Appeals considered nine issues, including ineffective assistance of counsel, denial of a continuance, judicial impartiality, the display of a MADD plaque, the reasonable-doubt instruction, and the judgment's blood-alcohol-content notation.
STANDARD OF REVIEW	Ineffective-assistance claims are reviewed under Strickland v. Washington, requiring deficient performance and affirmative proof of prejudice. Denial of a continuance is reviewed for abuse of discretion, and the defendant must show actual prejudice. Judicial-bias claims require a clear showing of judicial impropriety and probable prejudice; absent a clear showing of bias, the court presumes the trial court acted properly. Preservation issues are reviewed under Texas Rule of Appellate Procedure 33.1. A properly preserved jury-charge error is reviewed for some harm under Almanza and related authority. A

	judgment modification is authorized under Texas Rule of Appellate Procedure 43.2(b) when necessary to make the record speak the truth.
PRECEDENTIAL VALUE	Unpublished memorandum opinion; not designated for publication
PARTIES	Lisa Ann Barfield v. The State of Texas

TOPICS

appellate procedure criminal procedure ineffective assistance due process reasonable doubt

PRACTICE AREAS

criminal procedure appellate procedure ineffective assistance of counsel evidence constitutional law

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying a continuance requested because defense counsel had recently suffered injuries and was taking medication.
2. Whether trial counsel was ineffective for failing to timely object to dispatcher notes containing references to prior DWI and evading-arrest incidents.
3. Whether trial counsel was ineffective for introducing or failing to object to evidence of Barfield's invocation of her right to counsel.
4. Whether trial counsel was ineffective for failing to object to references to Barfield's prior trial.
5. Whether displaying a MADD plaque in the courtroom constituted reversible fundamental error or demonstrated judicial bias.
6. Whether the trial judge's other alleged actions demonstrated bias and denied Barfield a fair trial.
7. Whether the trial court erred by defining reasonable doubt in the jury charge and, if so, whether the error caused actual harm.
8. Whether the judgment should be modified to remove a notation of a .08 blood-alcohol content that was unsupported by the evidence.

HOLDINGS

1. The trial court did not abuse its discretion in denying the motion for continuance because Barfield failed to show specific actual prejudice to her defense or that she was substantially deprived of counsel.
2. Barfield failed to establish prejudice from counsel's failure to object to dispatcher notes referring to prior arrests and evading arrest because the record did not show that the jury actually saw or considered the notes.
3. Barfield failed to establish ineffective assistance because counsel had a reasonable defensive strategy for introducing and using the evidence of her repeated requests for counsel.
4. Barfield failed to show that counsel was ineffective for not objecting to the reference to the prior trial because she did not demonstrate that the trial court would have committed harmful error by overruling

an objection to the mere reference.

5. The visible MADD plaque did not constitute fundamental error requiring reversal, and the record did not establish that the trial judge was biased or that judicial impropriety probably prejudiced Barfield.
6. The trial court erred by including the definition of reasonable doubt stating that reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of the evidence, but the preserved error caused no actual harm.
7. The court of appeals had authority to modify the judgment to remove the notation "BAC .08" because no evidence established a specific blood-alcohol content.

KEY QUOTATIONS

“To reverse a judgment based on improper comments or conduct by the judge, we must find (1) that judicial impropriety occurred and (2) prejudice probably resulted.” (2015 Tex. App. LEXIS 3251, at *32)

“We modify the trial court's judgment to remove the notation regarding appellant's blood-alcohol content. Having overruled all of appellant's other issues, we affirm the judgment as so modified.” (2015 Tex. App. LEXIS 3251, at *41)

FACTUAL BACKGROUND

Multiple motorists reported that Barfield was driving erratically, and responding officers observed signs of intoxication, including red or glassy eyes, an odor of alcohol, confusion, and poor performance on field-sobriety tests. Barfield denied intoxication and attributed her conduct to medication, stress, and other circumstances; she refused breath and sobriety testing at the police station and repeatedly requested an attorney. At the second trial, defense counsel sought a continuance because he had recently suffered head and other injuries and was taking medication, but the trial court denied the request. The court also permitted a MADD plaque to remain visible behind the judge's bench and included a definition of reasonable doubt in the jury charge.

PROCEDURAL HISTORY

Barfield was arrested for DWI and convicted at an initial trial, after which the trial court granted a new trial. At the second trial, a jury again convicted her, and the trial court assessed ninety days' confinement and a \$1,000 fine, both probated for one year. The Fourteenth Court of Appeals overruled Barfield's challenges to the conviction but modified the judgment to remove the notation "BAC .08" because no specific blood-alcohol content had been proven.

DISPOSITION

affirmed

CASES CITED

- Strickland v. Washington, 466 U.S. 668 (1984)
- Thompson v. State, 9 S.W.3d 808 (Tex. Crim. App. 1999)
- Janecka v. State, 937 S.W.2d 456 (Tex. Crim. App. 1996)

- Jimenez v. State, 717 S.W.2d 1 (Tex. Crim. App. 1986)
- DeLeon v. State, 322 S.W.3d 375 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd)
- Brumit v. State, 206 S.W.3d 639 (Tex. Crim. App. 2006)
- Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000)
- Simpson v. State, 447 S.W.3d 264 (Tex. Crim. App. 2014)
- Adkins v. State, 418 S.W.3d 856 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd)
- Paulson v. State, 28 S.W.3d 570 (Tex. Crim. App. 2000)
- Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1985)
- Ngo v. State, 175 S.W.3d 738 (Tex. Crim. App. 2005)
- Bigley v. State, 865 S.W.2d 26 (Tex. Crim. App. 1993)
- French v. State, 830 S.W.2d 607 (Tex. Crim. App. 1992)
- Crawford v. Washington, 541 U.S. 36 (2004)
- Griffith v. State, 55 S.W.3d 598 (Tex. Crim. App. 2001)
- Hardie v. State, 807 S.W.2d 319 (Tex. Crim. App. 1991)
- Bartlett v. State, 270 S.W.3d 147 (Tex. Crim. App. 2008)

OPINION

Barfield, Lisa Ann

PER CURIAM.

PD-0478-15

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

Transmitted 6/17/2015 11:57:18 AM June 17, 2015 Accepted 6/17/2015 1:25:24 PM

ABEL ACOSTA

PD-0478-15 CLERK

IN THE TEXAS COURT OF CRIMINAL APPEALS

AT AUSTIN

NO. 14-13-00518-CR

In the Court of Appeals for the Fourteenth District of Texas at Houston NO. 1714161 In the County Criminal Court at Law Number 2 of Harris County, Texas

LISA ANN BARFIELD

Petitioner V .

T H E S T A T E O F T E X A S

Respondent

PETITION FOR DISCRETIONARY REVIEW

B R I T T A N Y C A R R O L L A C A Y O

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ATTORNEYFORPETITIONER

ORAL ARGUMENT REQUESTED

TO THE COURT OF CRIMINAL APPEALS OF TEXAS; Comes now petitioner, Lisa Ann Barfield, by and through his undersigned counsel, and presents this Petition for Discretionary Review pursuant to Tex. R. App.P. § 5.

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

A complete list of the names of all interested parties is provided below so that the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case. Petitioner or Criminal Defendant: Lisa Ann Barfield Counsel for Petitioner: Brittany Carroll Lacayo Counsel for Petition for Discretionary Review 212 Stratford St. Houston, Texas 77006

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ARGUMENT AND AUTHORITIES.

PETITIONER'S FIRST QUESTION PRESENTED FOR REVIEW

Is it an abuse of discretion for a trial court to deny a motion for continuance where trial counsel was without the normal use of his physical and mental faculties after suffering a recent head injury and petitioner was prejudiced by counsel's ineffective assistance at trial. (C.R. at 174-77)(2 R.R. at

4-5, 124)(3 R.R. at 46-47)(6 R.R. at State's Exhibit 1).

PETITIONER'S SECOND QUESTION PRESENTED FOR REVIEW 1

Does a defendant have to show that the jury actually saw an exhibit admitted into evidence containing a previous DWI conviction and other unadjudicated offenses to demonstrate that she was prejudiced by trial counsel's ineffective assistance for failing to object when it was offered? (3 R.R. at 36-37)(4 R.R. at 164-68)(6 R.R. at Exhibit 1).

PETITIONER'S THIRD QUESTION PRESENTED FOR REVIEW 8

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Is it fundamental error for the trial court to display a MADD plaque behind the judge's chair, clearly visible to the jury during a DWI trial? (2 R.R. at 5).

PETITIONER'S FIFTH QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that that the trial court was not impartial? (2 R.R. at 5, 6-7, 116-24)(3 R.R. at 33-34, 45, 46, 90)(4 R.R. at 17-18, 34-36, 46, 49-51, 54, 73, 143, 145, 166).

PETITIONER'S SIXTH QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that that the trial court's error in defining reasonable doubt in the jury charge did not cause actual harm to appellant's rights? (4 R.R. at 143)(C.R. at 187).

PETITIONER'S SEVENTH QUESTION PRESENTED FOR REVIEW

Is error in defining reasonable doubt in the jury charge structural error? (2 R.R. at 22, 34, 54-55)(4 R.R. at 143)(C.R. at 187).

P R A Y E R F O R R E L I E F

C E R T I F I C A T E O F S E R V I C E 21

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I N D E X O F A U T H O R I T I E S

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568 (Tex. Crim. App. 1989) 19 Jimenez v. State, 717 S.W.2d 1 (Tex. Crim. App. 1986) 2 Kirk V. State, 32 S.W. 1045 (Tex. Crim. App. 1895) 10 Lagrone v. State, 209 S.W. 411 (Tex. Crim. App. 1919) 9 Paulson V. State, 28 S.W.3d 570 (Tex. Crim. App. 2000) 15, 16 Rey V. State, 897 S.W.2d 333 (Tex. Crim. App. 1995) 10 Rhodes v. State, 357 S.W.3d 796 (Tex. App. Houston [14th Dist.] 2011, no pet.) 14 Simpson v. State, 447 S.W.3d 264 (Tex.App.—^Houston [1st Dist.] 2013, pet. ref d) 10, 14 White V. State, 475 S.W.2d 927 (Tex. Crim. App. 1972) 2 Out of State Cases Jackson v. State,

464 So. 2d 11 8 1 (Fla. 1985) 3,4

State V. Franklin, 327 S.E.2d 449 (W. Va . 1985) 15 V I I

S T A T E M E N T R E G A R D I N G O R A L A R G U M E N T

Petitioner requests oral argument because the case presents novel legal issues. Argument would aid the judges of this court in assessing the case.

S T A T E M E N T O F T H E C A S E

On October 19, 2010, Petitioner was charged with driving while intoxicated (DWI). (C.R. at 7). The first trial resulted in a conviction, but a new trial was granted. (C.R. at 8-9, 10-25). The second trial also resulted in a conviction. (C.R. at 189). Punishment was assessed at ninety days confinement in the Harris County Jail and a \$1000 fine, both probated for one year. (C.R. at 201-02). The Fourteenth Court of Appeals affirmed the trial court's judgment in an opinion dated April 2, 2015. Appendix, Barfield v. State, No. 14-13-00518-CR, 2015 Tex. App. LEXIS 3251 (Tex. App. - Houston [14th Dist.] April 2,2015).

S T A T E M E N T O F P R O C E D U R A L H I S T O R Y

The court of appeals issued its opinion on April 2, 2015. Appendix, Barfield V. State, No. 14-13-00518-CR, 2015 Tex. App. LEXIS 3251 (Tex. App. - Houston [14"" Dist.] April 2,2015). Petitioner did not file a Motion for Rehearing. Appellant's petition for discretionary review is due on June 18, 2015. V I I I

Q U E S T I O N S P R E S E N T E D F O R R E V I E W

1. Is it an abuse of discretion for a trial court to deny a motion for continuance where trial counsel was without the normal use of his physical and mental faculties after suffering a recent head injury and petitioner was prejudiced by counsel's ineffective assistance at trial. (C.R. at 174-77)(2 R.R. at 4-5, 124)(3 R.R. at 46-47)(6 R.R. at State's Exhibit 1).
2. Does a defendant have to show that the jury actually saw an exhibit admitted into evidence containing a previous DWI conviction and other unadjudicated offenses to demonstrate that she was prejudiced by trial counsel's ineffective assistance for failing to object when it was offered? (3 R.R. at 36-37)(4 R.R. at 164-68)(6 R.R. at Exhibit 1).
3. Would the trial court have erred in overruling an objection to a reference to petitioner's first trial? (3 R.R. at 46-47).
4. Is it fundamental error for the trial court to display a MADD plaque behind the judge's chair, clearly visible to the jury during a DWI trial? (2 R.R. at 5).

5. Did the Court of Appeals err in holding that that the trial court was not impartial? (2 R.R. at 5, 6-7, 116-24)(3 R.R. at 33-34, 45, 46, 90)(4 R.R. at 17-18, 34-36, 46, 49-51, 54, 73, 143, 145, 166).
6. Did the Court of Appeals err in holding that that the trial court's error in defining reasonable doubt in the jury charge did not cause actual harm to petitioner's rights? (4 R.R. at 143)(C.R. at 187).
7. Is error in defining reasonable doubt in the jury charge structural error? (2 R.R. at 22, 34, 54-55)(4 R.R. at 143)(C.R. at 187). 1

ARGUMENT AND AUTHORITIES

First Question: Is it an abuse of discretion for a trial court to deny a motion for continuance where trial counsel was without the normal use of his physical and mental faculties after suffering a recent head injury and petitioner was prejudiced by counsel's ineffective assistance at trial. (C.R. at 174-77)(2 R.R. at 4-5, 124)(3 R.R. at 46-47)(6 R.R. at State's Exhibit 1). In the first issue on appeal, Petitioner complained that the trial court erred in denying Petitioner's motion for continuance. In the instant case, trial counsel clearly established that he was: (1) being forced to proceed without the normal use of his physical and mental faculties; (2) "too ill" to proceed to trial; (3) under the "disabling" influence of medication. (C.R. at 174)(2 R.R. at 4); (4) suffering from a head injury that required five staples to close the open wound; (5) suffering from an injured clavicle and sternum; (6) taking medication to alleviate the pain; and, (7) unable to "effectively" represent appellant because he was light-headed due to taking pain medicine along with cold medication. Compare with *White v. State*, 475 S.W.2d 927, 928 (Tex. Crim. App. 1972). Nevertheless, the trial judge summarily denied the motion for continuance. (2 R.R. at 5). Additionally, the record in the instant cause reflects that counsel provided ineffective representation in several respects. Compare with *Jimenez v. State*, 717 S.W.2d 1 (Tex. Crim. App. 1986). First, trial counsel allowed State's Exhibit I to be admitted into evidence without the appropriate objection which contained evidence of prior driving while intoxicated offenses and other unadjudicated 2 offenses. (6 R.R. at State Exhibit 1). Additionally, trial counsel failed to object when a witness repetitively referred to the first trial. (3 R.R. at 46-47). Finally, during voir dire proceedings, the trial court called trial counsel's speaking abilities into question in the following exchange: MR. THEISEN: I have to perfect the record. Now I'm going to have to strike Mr. Droke because Mr. Merla is getting one of my strikes, so Mr. Droke is going to get left off. THE COURT: I didn't hear what you're saying. Let's proceed. (2 R.R. at 124). It is not clear whether trial counsel is slurring his speech, not speaking clearly or having difficulty judging his volume due to his head injury, however, his attempts to "perfect the record" were fruitless as the trial court noted that he was unable to hear trial counsel and, therefore, did not rule on trial counsel's attempt to "perfect the record." Petitioner and the Court of appeals were unable to find a Texas case exactly on point. However, petitioner's appellate brief cited a Florida case that seems to be on all fours with the case at bar. In *Jackson v. State*, the motion for continuance

alleged that trial counsel suffered a head injury for which medication had been prescribed. Jackson v. State, 464 So. 2d 1181, 1182 (Fla. 1985). It was further alleged that the medication caused the side effect of slurred speech and drowsiness and that these temporary side effects could impair the effectiveness of his representation of the defendant before the jury. Id. The trial judge denied the motion upon his belief that defense counsel was adequately articulating matters then before the court. Id. Utilizing the abuse of discretion standard of review, the Jackson court stated: We realize that, in most circumstances, the trial court should be restrictive in granting motions for continuances and must always be watchful that counsel is not manipulating or improperly delaying the judicial process. Given the unrefuted facts in this record, however, we hold that continuance was required and, accordingly, we reverse appellant's conviction and remand for a new trial. 1182 - 1183. The record demonstrates that Appellant was harmed by trial counsel's condition.

Second Question: Does a defendant have to show that the jury actually saw an exhibit admitted into evidence containing a previous DWI conviction and other unadjudicated offenses to demonstrate that she was prejudiced by trial counsel's ineffective assistance for failing to object when it was offered? (3 R.R. at 36- 37)(4 R.R. at 164-68)(6 R.R. at Exhibit 1). During the State's case in chief, the State offered Exhibit 1 into evidence, which contained the 911 recording and dispatcher notes containing four (4) separate statements that Mrs. Barfield was arrested in 2009 for felony DWI, specifically described by case number, and two (2) separate indications that Mrs. Barfield was arrested "at the airport for trying to escape apprehension." (6 R.R. at State Exhibit 1). Mrs. Barfield's trial counsel admitted that he had not been aware at the time State's Exhibit 1 was offered that the "paperwork" was also a part of the exhibit and that he had not bothered to review the "paperwork" prior to its admission. The record demonstrates that trial counsel's failure to object to the extraneous statements referring to the prior DWI arrest and attempted flight to avoid apprehension was not motivated by sound trial strategy, but instead was attributable entirely to oversight. (4 R.R. at 164-67). The Court of Appeals found that even assuming counsel was ineffective, petitioner failed to demonstrate prejudice because petitioner did not cite any place in the record showing that the jury ever actually saw the dispatcher notes. No cases could be located requiring an appellant to show in the record when the jury actually saw an exhibit to show harm. See Cortez v. State, 571 S.W.2d 308 (Tex. Grim. App. 1978)(no discussion about whether or not the jury actually saw improperly admitted exhibits, but whether their erroneous admission could have affected the jury); Battee v. State, 543 S.W.2d 91 (Tex. Grim. App. 1976)(reversing the judgment of conviction where the trial court improperly admitted an evidence envelope containing hearsay); Green v. State, 899 S.W.2d 245 (Tex. App.—San Antonio, no pet.)(no discussion by the court of appeals about whether the jury actually saw the prior mug shots or bank records showing extraneous offenses when considering the ineffective assistance of counsel claim). Prejudice has resulted from counsel's deficient representation when there is a "reasonable probability" that the results of the proceedings might have been different but for counsel's errors. 466 U.S. 668, 689 (1984). A "reasonable probability" is defined as probability sufficient to

undermine the Court's confidence in the outcome of the adversarial process. Strickland, 466 U.S. at 694. Furthermore, the record demonstrates that the jury did see the notes attached to State's Exhibit 1. THE COURT: All right. It will be admitted. MISS MORRISON: Permission to publish, [y]our Honor? THE COURT: Yes, ma'am. Can you—all hear? Hold on a minute. (3 R.R. at 36-37). Although, the record does not specifically discuss the notes at this point, the record does indicate that State's exhibit 1, containing the notes, was admitted into evidence and published to the jury. (3 R.R. at 36-37). Additionally, during the jury deliberations, the following exchange occurred: T H E C O U R T: . . . N o w w e g o t a n o t e : C a n w e h a v e t h e transcripts of the 911 calls from October 18*", 2010 from the three witnesses. And what I'm going to send back is what's been admitted in evidence as State's Exhibit No. 1. 6 MR. THIESSEN: Judge, my objection is that State's Exhibit 1, under my understanding, was simply the 911 CD that included all the calls. What you included are the fifteen pages of computer-generated notes. These aren't the transcripts. These are computer-generated pieces of paper from the Houston Emergency Center. It was my understanding the State Exhibit 1 was simply the audio tape CD, and so I object to these pieces of paper coming in. One, they're not the actual transcripts; and two, that they weren't properly admitted because it was my understanding that only the audio CD was State Exhibit 1. MISS MORRISON: Well, they were filed with the district clerk on February of 2011, as required. Business Records Affidavit, you know, stapled together. It's marked State Exhibit No. 1. It was admitted in evidence, so I'm going to send it back. (IV R.R. at 167-68)(emphasis added). Notably, during voir dire, the trial court informed the jury that "obviously" if a person who is convicted of driving while intoxicated is shown to have a prior conviction, the range of punishment is higher. (2 R.R. at 40, 42). In light of the false evidence that Mrs. Barfield had been previously arrested for felony DWI, it is only natural to conclude that if a prior conviction for driving while intoxicated will "obviously" increase the punishment range in misdemeanor court, it must take more than one prior conviction for driving while intoxicated to be arrested for "felony DWI." 7 Third Question: Would the trial court have erred in overruling an objection to a reference to petitioner's first trial? (3 R.R. at 46- 47). A finding or verdict of guilt in the former trial must not be regarded as a presumption of guilt, nor may it be alluded to in the presence of the jury that hears the case on retrial of guilt. A finding of fact or an assessment of punishment in the former trial may not be alluded to in the presence of the jury that hears the case on retrial of punishment. Tex. R. App. P. 21.9(d). Trial counsel objected to the initial reference to the first trial, but failed to ask the trial judge to instruct the jury to disregard the remark. (3 R.R. at 46-47) Then trial counsel wholly failed to make any objection to the second reference to the first trial. (3 R.R. at 46-47) Rule 21.9 of the Texas Rules of Appellate Procedure exists due to the highly prejudicial nature of evidence being put before a jury that appellant had been previously tried and convicted. There can be no strategic explanation for trial counsel's failure to object the second time the witness alluded to the first trial. The Court of Appeals held that Tex. R. App. P. 21.9(d) addresses references to a "finding or verdict of guilt" and does not address the admissibility of a mere reference to a prior trial.

However, the Court of Appeals' opinion only addresses counsel's reference to "testimony from February 28, 2012." The Court of Appeals' opinion does not mention the witness's reference to his testimony at the "last trial." 8 (3 R.R. at 46-47). It only follows that if there is a subsequent trial petitioner was not acquitted at the first trial. The result of such information provided to the jury would undoubtedly prejudice petitioner. Fourth Question: Is it fundamental error for the trial court to display a MADD plaque behind the judge's chair, clearly visible to the jury during a DWI trial? (2 R.R. at 5). Prior to jury selection, defense counsel requested the trial judge to take down a Mother's Against Drunk Drivers' plaque, which was located behind the judge's chair that was clearly visible from the jury box. (2 R.R. at 5). The trial judge denied the request. (2 R.R. at 5). The Court of Appeals refused to hold that MADD plaque was fundamental error requiring reversal. Appellant's constitutional right to be tried by an impartial tribunal is sacrosanct, regardless of the evidence against him. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Consequently, the law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial. *Lagrone v. State*, 209 S.W. 411, 415 (1919). The Lagrone Court recognized that jurors are prone to seize with alacrity upon any conduct or language of the trial judge, which they may interpret as shedding light upon his view of the weight of the evidence or the merits of the issues involved. Moreover, the delicacy of the situation in which the trial judge is placed requires that he be alert in his communications with the jury, not only to avoid impressing them with any view that he has, but to avoid in his manner and speech things that they may so interpret. *Anderson v. State*, 202 S.W. 944, 946 (Tex.Crim.App. 1918); *Crook v. State*, 11 S.W. 444, 446 (1889); see *Kirk v. State*, 32 S.W. 1045, 1046(1895). The First Court of Appeals has addressed this precise issue involving the same judge and the same type of offense, DWI. *Simpson v. State*, 447 S.W.2d 264 (Tex. App.—Houston [1st Dist.] 2013, pet. ref d). The Simpson Court reached the unarguable conclusion that the trial judge erred by displaying a MADD plaque. *Id.* However, the Simpson court found the error harmless under Texas Rule of Appellate Procedure 44.2(b). *Id.* The Simpson court applied the non-constitutional error standard because the defendant couched her argument as a violation of statutory law and the Code of Judicial Conduct. *Id.* Mrs. Barfield specifically contends the error of displaying a MADD plaque in the instant case was error of constitutional magnitude and that such error is immune from a harm analysis. The court of appeals stated, "[t]he record does not contain any images of the plaque or its location in the courtroom." However, the record does contain information on the plaques location in the courtroom. It is located behind the bench, behind the judge's chair. (2 R.R. at 5). Petitioner relies upon the simple and well-recognized proposition that certain constitutional rights are so basic to a fair trial that their violation can never be treated as harmless. *Rey v. State*, 897 S.W.2d 333, 344 (Tex. Crim. App. 1995). 10 One such basic right is to be tried before an impartial judge. *Tumey*, *supra*. The United States Supreme Court has recognized numerous times that errors that undermine the structural integrity of the criminal tribunal itself are not amenable to harmless-error review. *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986), ("When constitutional error calls into question the objectivity of those charged with

bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm."). See also, *Arizona v. Fulminante*, 499 U.S. 279, 294, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Fifth Question: Did the Court of Appeals err in holding that that the trial court was not impartial? (2 R.R. at 5, 6-7, 116-24)(3 R.R. at 33-34, 45, 46, 90)(4 R.R. at 17-18, 34-36, 46, 49-51, 54, 73, 143,145,166). To avoid further erosions of confidence that our courts do, indeed, treat all litigants with equal fairness, judges must keep themselves above suspicion by scrupulously avoiding situations in which their fairness and integrity could appear to be compromised. *Tamminen v. State*, 644 S.W.2d 209, 218 (Tex. App.—San Antonio 1982), *aff'd*, 653 S.W.2d 799 (Tex. Grim. App. 1983); *Abdygaparova v. State*, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, *pet. ref d*). It is axiomatic that every person accused of a crime is guaranteed a fair trial. *Bethany v. State*, 814 S.W.2d 455, 456 (Tex. App.—Houston [14th Dist.] 1991, *pet. ref d*). As the Supreme Court and the Court of Criminal Appeals have noted, "the atmosphere essential to the preservation of a fair trial—the most fundamental of all 11 freedoms—must be maintained at all costs." *Id.* (citations omitted). In an appeal of this nature, it is the fundamental purpose of this Court to ascertain whether or not the convicted defendant received a fair trial in the court below. *Id.* In making this determination, any indication of prejudice or opinion of guilt on the part of the trial judge requires close scrutiny of his actions. *Id.* (emphasis added). In the instant cause, the trial judge was not impartial and created a coercive atmosphere, which operated to deny Mrs. Barfield a fair trial. In doing so, the trial judge did all but wear the State team colors and clearly displayed that he was "taking sides." *Abdygapporova v. State*, 243 S.W.Sd 191, 210 (Tex. App.—San Antonio 2007, *pet. ref d*). Specifically, the trial judge's actions include, but are not limited to, the following:

1. Declining to take down his MADD (Mothers Against Drunk Drivers) Plaque clearly visible to the jury (2 R.R. at 5);
2. Forcing Mrs. Barfield's trial counsel to try the instant cause in poor mental and physical health by denying his motion for continuance (2 R.R. at 5);
3. After calling for the jury to enter the courtroom, the trial judge ordered trial counsel to not speak to the jury about his injuries (2 R.R. at 6-7);
4. After calling for the jury to enter the courtroom, the trial judge threatened trial counsel with contempt and a 180 day jail sentence (2 R.R. at 7);
5. Trial counsel stated that his announcement of "not ready" for trial was while the jury panel was in the courtroom and his request to explain that announcement to the jury was denied (2 R.R. at 7);
6. Demonstrating his bias for the State and the police during his questioning of two venirepersons (2 R.R. at 116-124); 12
7. Coercing trial counsel, in the presence of the jury, to release a witness, Jolivet, from his subpoena rather than allowing the defense to reserve the witness on standby for the defense case in chief (3 R.R. at 33-34);

8. Directing trial counsel's direct examination of Clark (3 R.R. at 45);
9. Refusing to grant a mistrial after a witness, Clark, testified about Mrs. Barfield's first trial which resulted in a guilty verdict (3 R.R. at 46);
10. Refusing to allow the defense to publish evidence to the jury (3 R.R. at 90);
11. Permitting trial by ambush by allowing the State to use evidence without having given the defense notice (4 R.R. at 17);
12. Refusing to allow the defense to take a witness, Cuffy, on voir dire prior to testifying about scientific evidence, namely, horizontal gaze nystagmus (4 R.R. at 17-18);
13. Curtailing the defense's cross examination of Cuffy (4 R.R. at 34-36);
14. Refusing to allow the defense to publish evidence to the jury and controlling the defense's presentation of her evidence (4 R.R. at 46);
15. Curtailing the defense's cross examination of Cuffy (4 R.R. at 49-51);
16. Threatening to hold defense counsel in contempt for effectively cross examining Cuffy regarding horizontal gaze nystagmus (4 R.R. at 51);
17. Directing defense counsel's cross examination of Cuffy (4 R.R. at 54);
18. Refusing to allow the defense to take Downer on voir dire prior to testifying about alcohol "tolerance" (4 R.R. at 73);
19. Defining reasonable doubt (4 R.R. at 143, 145); and
20. Stating "Well, it really doesn't matter what you thought, does it?" when defense counsel attempted to state on the record the circumstances under which State's Exhibit 1 was admitted (4 R.R. at 166).

As the court of appeals noted, the "Court of Criminal Appeals has expressly reserved the question of whether a judge's comments can exhibit a bias to such a degree as to constitute fundamental error." (citing *Brumit*, 206 S.W.3d 639, 644- 45 (Tex. Crim. App. 2006)). Additionally, Judge Harmon holds the dubious distinction of being the only Harris County Court at Law judge to have a blanket policy of rejecting all negotiated agreements in DWI cases that would refer a criminal defendant to the 'DIVERT Program.' *Rhodes v. State*, 357 S.W.3d 796 (Tex. App.—Houston [C* Dist.] 2011, no pet.). Judge Harmon is also the only Harris County Judge to display a MADD Plaque in a Harris County courtroom. *Simpson v. State*, 447 S.W.3d 264 (Tex.App—Houston [C' Dist.] 2013, pet. ref d). These two notable positions demonstrate that Judge Harmon has a bias against DWI defendants in general. And when those positions are viewed in light of the 20 enumerated biased actions in the instant case, it is clear Judge Harmon was biased against Mrs. Barfield. Although the individual instances of conduct complained of, standing alone, might not require reversal of this cause, the cumulative effect of such conduct was to deny Mrs. Barfield a fair trial and the effective assistance of counsel. *Bethany*, 814 S.W.2d at 456. Any system of government that incorporates within its guarantees the idea of ordered liberty necessarily recognizes and appreciates the necessity of providing a process to litigate and resolve allegations of criminal conduct. *Id.* at 462. Under our system of

constitutional government, the ultimate aim of such a process must be fundamental fairness. *Id.* In pursuit of this aim, we rely on an adversarial system to produce just results. *Id.* Where a trial judge abandons his position as a neutral arbiter and takes on the role of an advocate, this system cannot function and fairness is lost. *Id.* See also *State v. Franklin*, 111 S.E.2d 449 (1985) (holding that the presence of 10 to 30 MADD demonstrators wearing MADD buttons operated to violate appellant's fair trial). Mrs. Barfield was denied a fair trial before an impartial judge. Sixth Question: Did the Court of Appeals err in holding that the trial court's error in defining reasonable doubt in the jury charge did not cause actual harm to appellant's rights? (4 R.R. at 143) (C.R. at 187). Trial counsel objected to the inclusion of a reasonable doubt definition. (4 R.R. at 143). The trial judge overruled the objection, and instructed the jury as follows: "A 'reasonable doubt' is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence." (C.R. at 187). The Court of Criminal Appeals has held that a judge should not define reasonable doubt without an agreement of the parties. *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000). The Fourteenth Court of Appeals previously held that providing the definition complained of in this case was error. *Adkins v. State*, 418 S.W.3d 856 (Tex. App.—Houston [14th Dist.] 2013, pet. refd). However, the *Adkins* Court held the error harmless. *Id.* Similarly, the Court of Appeals in the instant case found the error harmless. 15 Mrs. Barfield respectfully requests that this Honorable Court to find that this error is not harmless. First, the definition provided is insufficient to define reasonable doubt. As the *Paulson* Court stated: The first definition [i.e., the definition provided in the instant case] is useless. It is like saying "A white horse is a horse that is white." *Paulson*, 28 S.W.3d at 572. However, the *Paulson* Court failed to recognize that *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991), did not contain three separate definitions of reasonable doubt, but rather a holistic definition that was composed of more than a single sentence. The second sentence of the *Geesa* instruction states: "It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs." *Ibid.* The two sentences must be read together; by providing only the first definition, the trial judge authorized the jury to convict on a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990). That is why the Fifth Circuit provides the following definition: A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs.' ' Fifth Circuit 2012 Criminal Jury Instructions, Sec. 1.05, pg. 12. (Emphasis supplied). 16 Simply stated, once the trial judge undertakes the task of defining reasonable doubt, he must do so correctly. That was not done in Mrs. Barfield's case. Seventh Question: Is error in defining reasonable doubt in the jury charge structural error? (2 R.R. at 22, 34, 54-55)(4 R.R. at 143)(C.R. at 187). The United States Supreme Court has made it clear that failure to adequately instruct a jury on the reasonable doubt standard is "structural error," i.e., error that is not subject to

a harm analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993). Since the erroneous definition of reasonable doubt in this case presents structural error, reversal is required. The court of appeals recognized that a trial judge errs by including a reasonable doubt instruction in the jury charge. However, the court found the error was harmless *xxn&QX Almanza v. State*, 686 S.W.2d 157 (Tex. Grim. App. 1985) In this case, the trial judge said: "...I'll also give the jury a legal definition of what beyond a reasonable doubt means." (2 R.R. at 22). After visiting with several veniremembers regarding their prior jury service, the trial judge continued: Your decision as a juror] is one you will never forget. It is one that will always be upon the records of Harris County, Texas. It is a decision that concerns this individual that you've not seen before, will not see again. It's a decision you can never change. It's a decision that I cannot change. And I would submit to you that's what beyond a reasonable doubt means. In the interest of time and the lunch hour I am not going to read you-all the rather lengthy legal definition but when it shows up in the court's charge I think you will understand and agree it means the same thing that I've been talking to you-all about. (2 R.R. at 34). 17 As can be seen from these quotations, the trial judge twice mentioned that he would be providing a reasonable doubt definition in the court's charge. The trial judge provided a nonsensical reasonable doubt definition—the "you'll never forget your decision" definition. Counsel has seen and reviewed all manner of reasonable doubt definitions, e.g., "it must be such doubt as would give rise to a grave uncertainty,"^ "what is required is not an absolute or mathematical certainty, but a moral certainty,"^ "the mere possibility that the defendant may be innocent will not warrant an acquittal upon the ground of reasonable doubt,""* etc., but has never run across the "you'll never forget your decision" definition. Had such a definition been given to the jury in Mrs. Barfield's jury charge, any appellate court would have rejected it as being vague and falling below the requirements of the Due Process Clause. Clearly then, the remarks by Judge Harmon cannot serve to render the error in the instant case harmless. The Adkins Court also noted that reasonable doubt was discussed by the State as the highest standard in our legal system and made clear that the State bears the burden of proving guilt beyond a reasonable doubt. However, in the instant case, the State defined reasonable doubt in the negative: ^ *Cage*, supra. ^ *Ibid*. ^ *Abram v. State*, 35, S.W.389, 390 (Tex. Crim. App. 1896). 18 I want to talk to you guys about the burden of proof, cause it's my burden to prove to you at trial today. That is called beyond a reasonable doubt. Now, we can't define beyond ~ I can't define beyond a reasonable doubt to you, but what I can tell you is what it is not. Beyond a reasonable doubt does not mean that I prove this case to you beyond all doubt in the world. It does not mean that I prove it to you one hundred percent, because if I could prove it to you one hundred percent you would have been a witness and I would have called you to the witness stand. It's not an impossible burden to meet. (2 R.R. at 54-55). By defining reasonable doubt in the negative, the State lessened its burden. Accordingly, the State's voir dire cannot serve to render the error harmless.^ One factor raised but not discussed in the opinion by the court of appeals is whether declaring the error harmless would encourage the trial judge to repeat the error with impunity. The Court of Criminal Appeals stated twenty-five years

ago that an appellate court when conducting a harm analysis "should not focus on the propriety of the outcome of the trial [but] [i]nstead an appellate court should be concerned with the integrity of the process leading to the conviction. Harris v. State, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989). The error in the instant case arose from the same court and the same judge in Adkins. After having already declared the error harmless in Adkins, if this Honorable Court does so again in this case, the trial judge will feel emboldened to ^ Mrs. Barfield's trial counsel covered the various levels of proof beginning with reasonable suspicion and ending with reasonable doubt. (2 R.R. at 103-08). 19 continue committing error by defining reasonable doubt in his jury charges with the knowledge that the error will be implicitly sanctioned on appeal.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant this Petition for Discretionary Review. Following the grant of review. Petitioner prays that the judgment of the Court of Appeals be reversed. Petitioner's conviction be reversed, and the case remanded the case for a new trial. Respectfully submitted. Isl Brittany Carroll Lacayo

BRITTANY CARROLL LACAYO

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was delivered via facsimile on June 17, 2015 to the following persons: Devon Anderson District Attorney Harris County District Attorney's Office Appellate Division 1201 Franklin Street Suite 600 Houston, Texas, 7002 Telephone: (713) 755-5826 Facsimile: (713) 755-5809 Lisa McMinn State Prosecuting Attorney P. O. Box 13046 Austin, Texas 78711 Telephone: (512) 463-1660 Facsimile: (512) 463-5724 /s/ Brittany Carroll Lacavo

BRITTANY CARROLL LACAYO

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CERTIFICATE OF COMPLIANCE

This petition complies with Tex. R. App. P. 9.4 because it was computer-generated and contains 4,459 words. Isl Brittany Carroll Lacayo

BRITTANY CARROLL LACAYO

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APPENDIX

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25 of 42 DOCUMENTS LISA ANN BARFIELD, appellant v. THE STATE OF TEXAS, Appellee
NO. 14-i3-00518-CR

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

April 2, 2015, Opinion Filed PRIOR HISTORY; [* 1] On Appeal from the County Court at Law No. 2, Harris County, Texas. Trial Court Cause No. 1714161. Judgment should be modified to remove the notation of a Barfield v. State, 2012 Tex. App. LEXIS 5408 (Tex. blood-alcohol content level as no such level was proven. App. Houston 14th Dist., July 10, 2012) We modify the trial court's judgment to remove the blood-alcohol content notation and affirm the judgment as so modified. C O U N S E L : F o r A P P E L L A N T : C h a r l e s F. B a i r d , AUSTIN, TX; Eusebio Pastrano, HOUSTON, TX. I. Background Appellant was arrested for suspected DWI on October 18, 2010. Prior to her arrest, three separate individuals, Paul Jolivet, Dennis Clark, and John Stewart, called JUDGES: Panel consists of Justices Boyce, Jamison, 9-1-1 to report concerns regarding her driving. Record and Donovan. Recordings of the 9-1-1 calls were played for the jury. Jolivet also testified at trial, stating that around 5:30 p.m., he O P I N I O N B Y : M a r t h a H i l l J a m i s o n observed appellant driving on a highway when she appeared "pretty intoxicated" and was "bobbing and leaning

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ing over" within her vehicle. He further explained that Appellant Lisa Ann Barfield appeals from her conviction for driving while intoxicated (DWI). A jury [the] "brakes pretty hard" led other drivers to honk their horns and clear a path for her. Jolivet was concerned that confinement and a \$1,000 fine, both of which were pro appellant was about to cause "a tragedy, an accident." bated for one year. In nine issues, appellant contends (1) Clark testified that he observed appellant driving in the trial court erred in denying her motion for continuance of trial; (2) her trial counsel was ineffective in failing to object to evidence of extraneous offenses; (3) counsel when she pressed the accelerator, [*3] her body would was ineffective in offering evidence of appellant's involuntary lean back. According to Clark, appellant's eyes appeared closed and failing to object to the evidence. He called 9-1-1 because it appeared to be use of that invocation as direct evidence of guilt; (4) "inevitable that she was going to hit somebody." He further testified that counsel was ineffective in failing to object to testimony that other vehicles were avoiding appellant regarding appellant's first trial; (5) the trial judge erred in and she was being followed by two tow trucks. Clark displaying a Mothers Against Drunk Driving (MADD) described her as being "under the influence of some plaque in the courtroom; (6) appellant was denied a fair trial because the trial judge was not impartial; (7) the thing, whether it be alcohol or pills." Stewart did not trial court erred by providing a definition of reasonable doubt at trial, but he informed the 9-1-1 operator that Page 2 appellant was "all over the freeway," appeared to be in must have made the wrong selection regarding appellant intoxicated, and was forcing people off the road. He was appellant's eyes. concerned appellant was going to kill someone with her A video taken at the station also was admitted into driving. evidence. In the video, appellant repeatedly refuses to

Officer Kaleal Johns responded to the call from dis perform a breath test or any sobriety tests, and she re patch and located appellant's vehicle stopped at a red peatedly requests her attorney, including by name. Ap light. Johns pulled behind appellant's vehicle, turned on pellant speaks slowly but coherently [*6] in the video. his lights and siren, and used a loudspeaker to repeatedly She states that she does not trust the police in Harris instruct appellant to pull to the side of the road. Appel County and that she believed she would be charged re lant, however, continued to drive until she reached an gardless of how she performed on any of the tests. The other red light. At that point, Johns exited his car, video is time stamped as beginning at 7:51 p.m., approx knocked on appellant's window, and instructed her to roll imately two hours and twenty minutes after she was re the window down. Johns said that appellant just looked ported to be driving erratically, and the person in the at him with glassy, red, bloodshot eyes. He instructed her video attempting to administer the tests also states the again to roll [""4] down the window, and when she failed time as the video begins. to do so, he instructed her to open her door. When she In her testimony, appellant denied having consumed failed to follow that instruction as well, Johns opened the door. He said that a smell of alcohol "saturat[ed]" the any alcoholic beverages on the day she was arrested. She interior of the vehicle and he detected it on her breath as explained that she suffered from chronic back pain as well as certain psychological disorders, and as a result, well. He asked her if she was okay, but she just looked at she had been prescribed several medications, although at him "like she was confused or dazed." He instructed ap the time of her arrest she had been unmedicated for about pellant to place her vehicle in park, but she again failed a month due to a lapse in medical insurance. She further to comply so he put the car in park himself. Johns then described several sources of stress that she was under at placed appellant in the back of his police car to await the the time of her arrest, including that her husband was arrival of additional officers. He stated that appellant working overseas and she had two exchange students became belligerent while they waited. living with her and her son. She denied having been at a Officer Joel Cuffy testified that when he arrived on restaurant before her arrest and stated she was distracted the scene, he observed that appellant's eyes were red and by a telephone call during her drive and had reached to glassy and she had a strong odor of alcohol on her the floorboard at one point to pick up papers that [*7] breath. Further according to Cuffy, appellant initially had fallen. She further recalled a tow truck "herding" her denied having consumed any alcoholic beverages but and keeping her from the exit she wanted to take. She subsequently admitted to consuming four glasses of Mer- denied that she permitted Cuffy to perform any sobriety lot while at a restaurant shortly before driving. Cuffy tests on her. performed two field sobriety tests on appellant: the hori This appeal stems from the second trial in this case. zontal gaze nystagmus test (HON) and the one-leg stand Following the first trial, appellant was convicted by a test. During the HGN test, Cuffy noted the presence of all six positive [""5] indicators for intoxication, while jury, but the trial court granted her motion for a new trial. While the motion stated numerous grounds including three of four positive indicators were observed during the

ineffective assistance of counsel and the fact the jury was one-leg stand. Based on his observations, Cuffy concluded that appellant was intoxicated. permitted to hear evidence of appellant's requests for counsel, the trial court did not specify the grounds on Officer Donald Downer also responded to the scene which a new trial was granted. As will be discussed more and detected a strong odor of alcohol coming from appellant below, at the beginning of the second trial, appellant. After Downer transported appellant to a police station, appellant's counsel requested a continuance based on the fact that, she refused breathalyzer and blood testing. Based on the fact that counsel had received injuries in a recent accident and on the odor and his interaction with appellant, during which she was taking pain medication. The trial court denied the motion which she repeated certain questions and at times failed to do so. Following the second trial, appellant was found to comprehend what was being said to her. Downer convicted appellant guilty and sentenced to ninety days' confinement and a \$1,000 fine, both of which were probated for one year. Downer testified that he and Johns prepared the offense report, which he acknowledged contained some errors. In the Assistance of Counsel such as noting her eyes were clear when he recalled them. In issues two through four, appellant contends that being bloodshot. He explained that the report is incomplete she received ineffective assistance of counsel because he used drop-down computer menus and he or Johns her trial counsel failed to object to the introduction [*8] Pages of a prior DWI conviction and another unadjudicated. These notes included references to prior arrests of appellant extraneous offense, offered evidence that appellant in court for DWI and evading arrest. When defense counsel invoked her right to counsel and failed to object to the use of the notes, he realized that these notes were part of State's Exhibit 1, he objected to that invocation as direct evidence of guilt, and failed to object, explaining that he had not realized at the time to object to testimony regarding appellant's first trial. The exhibit was admitted that it included the notes. The trial court did not rule on the objection. Instead, the Appellate Standard of Review judge called the jury back into the courtroom and asked them if they wanted to listen to the 9-1-1 tapes again. An appellate court reviews the effectiveness of the foreman responded, "Yes, sir," and the tapes were played according to the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under this standard, a Appellant contends that admission of this extraneous evidence must (1) demonstrate that trial counsel's performance was deficient and fell below an objective standard of reasonableness, and (2) "affirmatively prove that the result of the proceedings would have been different." *Thompson v. State*, Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). 177 (2004); *Wood v. State*, 260 S.W.3d 146, 148-49 (Tex. App.—Houston [1st Dist.] (Tex. App.—Houston Review of a trial counsel's performance is highly [1st Dist.] 2008, no pet.). But even assuming appellant is

deferential, as there is a "strong presumption that counsel correct that admission of the notes violated these provisions of the conduct [fell] within the wide range of reasonable actions and counsel therefore was ineffective in not timely professional assistance; that is, [appellant] must overcome objecting to the notes, appellant has not on this record overcome the presumption that, under the circumstances, the demonstrated that counsel's allegedly inadequate representation challenged action might be considered sound trial strategy. Sentencing prejudiced her case. See *Thompson*, 9 S.W.3d 390, 392 (Tex. Crim. App. 2005). Ordinarily, trial counsel at 812 (explaining that second prong of *Strickland* requires appellant to affirmatively prove prejudice by actions, and in the absence of such opportunity, [*9] an showing a reasonable probability that, [*11] but for appellate court should not find deficient performance counsel's unprofessional errors, the result of the proceeding unless the challenged conduct was so outrageous that no ruling would have been different). Appellant does not cite competent attorney who would have engaged in it. *Goodspeed* any place in the record that demonstrates the jury ever viewed V. State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). actually saw the dispatcher notes. The notes were not To establish ineffective assistance of counsel based on a mentioned before the jury either when Exhibit 1 was failure to object, appellant must demonstrate that the trial admitted into evidence and the tapes were originally court would have committed harmful error in overruling played or when the tapes were again played in the court the objection had trial counsel objected. *DeLeon v. State*, room during jury deliberations. The record clearly shows 322 S.W.3d 375, 381 (Tex. App.-Houston [14th Dist.] 2010, pet. refd). The appellant bears the burden of proof much less emphasized to them. See *Motilla v. State*, 78 Tex. App. 78 (1902) (noting that ineffective, and any allegations of ineffectiveness must whether the State emphasized error can be a factor in be firmly founded in the record. *Thompson*, 9 S.W.3d at harm analysis). Appellant has failed to meet her burden 813. of demonstrating prejudice firmly founded in the record. See *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. B. Extraneous Acts Crim. App. 1996); *Young v. State*, 425 S.W.3d 469 (Tex. App. 2012, pet. refd). Consequent to failing to timely object to the admission of evidence, we overrule appellant's second issue. Concerning extraneous offenses allegedly committed by appellant. This complaint stems from the admission of Exhibit 1, which included the tapes of the 9-1-1 calls that were played to the jury. During its deliberations, the jury sent out a note asking for a transcript of request for counsel when she was taken into police custody the 9-1-1 calls. At that time, defense counsel realized that and in failing to object when this evidence was allegedly not only did Exhibit 1 include the tape recordings but it used as direct evidence of guilt. Counsel in fact raised also included notes that were apparently sent from the 9-1-1 dispatcher to the responding police officers. [*10] Page 4 Several times during trial, including during opening state for

counsel demonstrated that she was sober. ments, examination of police officers and appellant her Counsel further expressed confusion as to why self, and closing arguments. The fact of her invocation the police did not [*14] allow appellant access to was also raised in the playing of the video of appellant her attorney. Appellant explained in her testimo made at the police station and during the prosecutor's ny that she requested her attorney "to help ex d i r e c t e x a m i n a t i o n o f O f f i c e r D o w n e r a n d c r o s s - plain my rights to me and [because she] didn't examination of appellant. Appellant particularly points feel safe or trusting in the environment [she] was out that counsel elicited and did not object during the in with the police." She further explained that following exchange between defense counsel and Officer part of her distrust of the officers came from the D o w n e r. fact that they had arrested her when she was not intoxicated. In closing argument, defense counsel Q: And you stated, I think, she is intoxi further highlighted the refusal by police officers cated because she keeps asking for an at to allow her access to an attorney as evidence that torney, right? the police were not conducting their investigation appropriately. A: That's just one of the signs, cause we [would] be talking and then she'd Appellant contends that reversal is warranted based bring it up every five seconds or so. on Winn v. State, 871 S.W.2d 756 (Tex. App.—Corpus Christi 1993, no writ); according to appellant, Winn is indistinguishable from the present case. We disagree. Appellant urges that in this exchange, her request for The defense counsel in Winn testified during a habeas counsel was used as direct evidence of her guilt. corpus hearing that he offered a videotape which includ ed the defendant invoking his right to counsel because he The admission of evidence that a criminal defendant thought it supported the defendant as a witness, although invoked his or her right to counsel after receiving Miran he did not explain specifically how he thought it would da warnings for the purpose of proving guilt may violate do so. Id. at 764. The court of appeals reviewed the tape the defendant's constitutional right to due process. See and could not discern any way in which it could have Griffith v. State, 55 S.W.3d 598, 604-07 (Tex. Crim. helped the defendant or been a part of a sound trial strat App. 2001); Hardie v. State, 807 S.W.2d 319, 320-22 egy. Id. The court actually did [*15] not mention the (Tex. Crim. App. 1991); see also Lajoie v. State, 237 invocation of counsel on the videotape as being prob S.W.3d 345, 352-53 (Tex. App.-Fort Worth 2007, no lematic but instead noted that the defendant's use of pro pet.) (holding that although admission of evidence re fanity, refusal to answer questions, attitude, and other garding invocation of counsel before Miranda warnings statements did not help the defendant's credibility. Id. may not have violated constitutional rights, such ["13] evidence was more prejudicial than probative and should Additionally, the introduction of the videotape in that case was only one of several allegations regarding coun not have been admitted). Here, Downer's testimony indi sel's performance that led the court of appeals to con cated appellant requested counsel both before and after clude the defendant received ineffective assistance of receiving Miranda warnings. counsel. Id. at 764-65. In contrast, defense counsel in the This case, however, does not present a simple failure present case had a clear strategy that supported use of the of defense counsel to object to the State's use of a de

videotape and other references to appellant's request for defendant's invocation of counsel as evidence of guilt. De counsel.[^] See *Cacy v. State*, 901 S.W.2d 691, 700 (Tex. App.—Houston [14th Dist.] 1995, pet. refd) (rejecting appellant's repeated invocation of counsel here used the repeated invocation of counsel to support two of the defense's main theories: (1) appellant's suggestion that failure to object to evidence of defendant's intoxication was not in fact intoxication at the time of her defendant's invocation of her right to counsel could not have been a tactical decision, as evidenced by the fact she was able to calmly and coherently request counsel by name on the videotape; and (2) appellant's request for counsel and refusal to perform sobriety tests at the station demonstrated Ex parte Skelton, 434 S.W.3d 709 (Tex. App.—San Antonio 2014, pet. refd), to be distinguishable. See *Strickland*, 466 U.S. at 689 (explaining that a habeas corpus review of a trial counsel's performance is highly deferential proceeding, defense counsel offered tactical explanations regarding why he failed to object to evidence regarding the defendant's request for counsel. Id. at 721. This, along with the fact that in opening statements, defense counsel suggested that the evidence contradicted the defendant's position that she had been open and cooperative with police officers, [*16] led the court of appeals to state in relevant part: "A finding or verdict of guilt in this case leads to the conclusion that there was no strategic value in the former trial must not be regarded as a presumption of error to not object under the circumstances. Id. at 720-4. that hears the case on retrial of guilt." Tex. R. App. P. 21.9(d). This rule addresses references to a "finding or verdict of guilt" and does not address the admissibility of failure to object here were integral to the defense's strategy. Furthermore, it is unclear how appellant has not demonstrated that the trial court would have overruled an objection to this testimony had one been made across without including the requests for counsel. We therefore overrule appellant's fourth issue. The videotape is replete with appellant's requests, and it was in relation to her requests for counsel III. Motion for Continuance and refusal to perform sobriety tests that she spoke of her distrust of Houston police. In her first issue, appellant contends the trial court erred in denying her motion for continuance. On the day the appellant used her request for counsel, defense counsel appeared, announced "not surprisingly, the State then had a right to suggest an alternative ready for trial," and requested a continuance.' Counsel's interpretation of the repeated requests, such as put explained that he had been in a bicycle accident and sustained head trauma which required staples on his scalp. *Szmales v. State*, 927 S.W.2d 213, 217 (Tex. App.—Houston [14th Dist.] 1996, pet. refd) (holding state could apparently restrict his arm movements. He further stated impeach defendant with his own silence once the issue arose that he was "feeling light-

headed" and was on medica was raised defensively). Moreover, it was the repetitive- tion for pain as well as a cold. He concluded that "I can ness of the requests, and not the nature thereof, that not effectively represent [*19] my client with these inju Downer suggested as indicative of intoxication. Also, ries and my sickness." The trial court denied the motion defense counsel may have been reluctant to object to this for a continuance and trial began. testimony because he didn't want to bring further atten tion to Downer's suggestion the request for counsel was 3 Appellant also filed a written motion for con evidence of guilt. Counsel [*17] reasonably may have tinuance on the same day. This was apparently concluded that Downer's seemingly dismissive attitude appellant's first request for a continuance. toward appellant's rights supported the defensive theory that appellant did not agree to the sobriety tests because We review a trial court's denial of a motion for con she distrusted Houston police. Under these circumstanc tinuance for an abuse of discretion. See *Janecka v. State*, es, appellant has failed to meet her burden of establishing 937 S.W.2d 456, 468 (Tex. Crim. App. 1996); see also that her counsel performed deficiently in presenting and *Rosales v. State*, 841 S.W.2d 368, 372-73 (Tex. Crim. failing to object to evidence of her invocation of the right App. 1992) (granting or denying continuance based on to counsel. See *Thompson*, 9 S.W.3d at 813. Consequent the illness of counsel is within the trial court's discre ly, we overrule her third issue. tion). To establish that the trial court abused its discre tion by denying the motion for continuance, appellant D . R e f e r e n c e s t o F i r s t T r i a l must show actual prejudice to her defense resulted from counsel's representation. See *Janecka*, 937 S.W.2d at In issue four, appellant contends trial counsel was 468; *Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. ineffective in failing to object to testimony concerning Crim. App. 1995). Examples of prejudice include unfair the prior trial. During an exchange between defense surprise, an inability to effectively cross-examine the counsel and Clark, one of the witnesses who called 9-1- State's witnesses, and the inability to elicit crucial testi 1, counsel first objected to Clark's reference to the earlier mony from witnesses. See *Janecka*, 937 S.W.2d at 468. trial, but when the objection was overruled, counsel used Texas courts have concluded that no prejudice is shown Clark's testimony from the prior trial to impeach his re when a defendant is ably represented throughout trial by sponse to a question. Counsel referred to "testimony substitute counsel. See *Miller v. State*, 537 S.W.2d 725, from February 28,2012." 726 (Tex. Crim. App. 1976); *State v. Doyle*, 140 S.W.3d As explained above, to establish ineffective assis 890, 894 (Tex. App.-Corpus Christi 2004, pet. refd). tance of counsel based on a failure to object, an appellant However, appellant has not cited and research has not must demonstrate that the trial court would have commit revealed any Texas cases specifically addressing a situa ted harmful error in overruling an objection. See *DeLeon*, tion such as here, where defense counsel demonstrated 322 S.W.3d at 381. The [*18] only authority appellant recent injuries and expressed concern as to whether he cites is Texas Rule of Appellate Procedure 21.9, which could [*20] provide effective representation, yet a prop- Page 6 er motion for continuance was denied. Nonetheless, it tive assistance of counsel claims, relating to failure to appears clear under *Janecka*, et. al, that appellant still object to the evidence of extraneous offenses

or testimony must show specific prejudice to her defense resulted from mentioning the first trial in this case and the offer of proof from denial of the motion for continuance. 937 S.W.2d at evidence concerning her invocation of the right to counsel. 468. For the same reasons that we found these assertions did not establish ineffective assistance of counsel, we find the most closely analogous case appears to be *Jimenez v. State*, in which the defense counsel learned of the motion for continuance short of the trial. Moreover, they do not rely on the fact that he was required to have cancer surgery to establish that appellant was substantially deprived of a trial as soon as possible. 717 S.W.2d 1 (Tex. Crim. App. 1986). The trial court denied counsel's motion for continuance, but the court of appeals reversed and ordered a new trial because the defendant had been forced to stand before the judge, which occurred during voir dire proceedings. The exchange came immediately after medical problems who must hurry through the trial in a member of the jury panel was questioned by the judge as to whether he would have carcinoma surgery when scheduled." *Id.* at 2 and the judge determined not to strike the venireperson 2 (quoting court of appeals). The Court of Criminal Appeals for cause. The exchange went as follows: appeals then reversed the court of appeals, holding that no actual prejudice was shown in the record because the [Defense Counsel]: I need to make a record that the defendant was ably represented through trial by counsel. request for extra strikes under the law that *Id.* Although not directly on point because, unlike here, [venireperson] was caused [sic] for a per curiam counsel in *Jimenez* did not allege any current disability, empty strike. Now I'll have to use my authority in this case does generally support the rule that simply allowing strikes to strike him. I'd actually like to legislate a physical problem is not enough to support [*21] an extra strike. reversal; prejudice must be shown in the record. See *THE COURT: Denied.* [*23] *Janecka*, 937 S.W.2d at 468.' [Defense Counsel]: I have to perfect 4 In *Stevens v. State*, the Court of Criminal Appeals the record. Now I'm going to have to be considered an appeal from a defendant who strike [another venireperson] because [he was put to trial without his attorney despite an affidavit from the attorney and a certificate from a doctor [the other venireperson] is going to get a doctor, stating, in substance, that the attorney was left off. unable to appear due to illness. 128 Tex. Crim. *THE COURT: I did not* 't hear what 531, 532-33, 82 S.W.2d 148, 148-49 (1935). The defendant had been unable to hire substitute [you're] saying. Let's proceed. counsel, though he consulted all three attorneys in town. *Id.* The Court held that, under those circumstances, the trial court abused its discretion in Appellant suggests that this exchange, and particularly refusing to continue the case and thereby substantially the judge's final reaction, demonstrated defense was substantially deprived of counsel. *Id.*, 128 counsel may have been "slurring his speech, not speaking Tex. Crim. at 533-34, 532-33, 82 S.W.2d at 149. ing clearly or having difficulty judging his volume due to The circumstances of the present case are distinct from his head injury." She then cites a Florida appellate opinion distinguishable from the facts in *Stevens* because the opinion in which the court held that the trial court abused its discretion here does not establish that appellant was abused in denying a motion for continuance

be seen in the excerpt App. 1918). Defense counsel requested the plaque be above, defense counsel did not offer any specific reason removed during a conference on motions in limine, as for requesting removal of the plaque and specifically did follows: not mention any constitutional rights as grounds necessitating the plaque's removal. See Tex. R. App. P. 33.1(a) [Defense Counsel]: Okay. Second motion in limine. Judge, we ask you to take (requiring that to preserve error, a complaint must state the grounds for the ruling that the complaining party down your Mother[s] Against Drunk seeks from the trial court with sufficient specificity to [*25] Drivers' plaque that's sitting behind make the court aware of the complaint, unless the specify your bench. The label MADD is clearly its grounds are apparent from the context); *Resendez v. State*, 306 S.W.3d 308, 312 (Tex. Crim. App. 2009) (displaying the plaque in front of it. And, as an officer of the court, Rule 33.1(a) and stating that "a party must be clear, from standing and sitting in the jury box specific enough so as to 'let the trial judge know what he box, it's clearly visible that you have a [*27] wants, why he thinks himself entitled to it, and do Mother[s] Against Drunk Drivers' plaque so clearly enough for the judge to understand him at a behind your chair. time when the trial court is in a proper position to do T H E C O U R T: D e n i e d . something about it," quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)); *Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002) (discussing the policies behind requiring specific objections As appellant acknowledges, our sister court recently even in regards to constitutional error); *Tollett v. State*, considered an appeal involving the same trial judge and 422 S.W.3d 886, 896 (Tex. App.-Houston [14th Dist.] apparently the same plaque. See *Simpson v. State*, No. 2014, pet. refd) (holding defendant waived contention 01-12-00380-CR, 2014 Tex. App. LEXIS 6527, 2014 that trial court committed constitutional error by not specifying WL 2767126, at *6-10 (Tex. App.-Houston [1st Dist.] specifically raising constitutional issue in the trial court). June 17, 2014) (mem. op., not designated for publication), 7gr. refd, 447 S.W.3d 264 (Tex. Crim. App. 2014). Appellant argues, however, that the judge's display The defendant in *Simpson* argued that displaying the of the plaque violated her constitutional rights to be tried plaque violated statutory law and judicial conduct rules by an impartial tribunal and may have given the jury an and improperly influenced the jury. 2014 Tex. App. impression of his views. Except for complaints involving LEXIS 6527, [WL] at *5. The First Court held that even fundamental constitutional requirements, all other complaints based on a violation of both constitutional and statutory rights are waived by failure to comply with Rule 33.1. *Mendez v. State*, 138 S.W.3d 334, 338 (Tex. Crim. App. 2004). Fundamental errors include violations of rights that are either "absolute" or "not forfeitable." The display of the MADD plaque in the present case *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). Such errors need not be preserved to be raised on appeal, and sometimes do not require a harm analysis in order. See *Blue v. State*, 41 S.W.3d 129, 132 (Tex. Crim. App. 2000) (holding that errors requiring reversal of a conviction. See *id*; *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 2000)

(holding judge's comments did not rise to such a level as to vitiate the presumption of innocence or 1997).[^] the impartiality of the jury as in Blue)', see also Chan- thakoummane v. State, No. AP- 75,794, 2010 Tex. Crim. 6 Appellant makes her constitutional error assertion only in arguing whether a harm analysis App. Unpub. LEXIS 249, 2010 WL 1696789, at ♦11 (Tex. Crim. App. Apr. 28, 2010) (not designated for pub [♦28] is required, but her arguments are equally location) (holding judge's comments "did not go so far as applicable to whether preservation was required. to taint the presumption of innocence"). The only infor We will broadly construe her brief as alleging mation in this record regarding the plaque is defense fundamental constitutional error that is exempt counsel's representation that the plaque was visible from from the requirements of rule 33.1. the jury box and had the acronym "MADD" on it. No In Blue V. State, 41 S.W.3d 129 (Tex. Crim. App. mention of the plaque was made in front of the jury. The 2000), the trial judge commented to the venire panel, record does not contain any images of the plaque or its among other statements, that the defendant had seriously location in the courtroom. The plaque was clearly not considered entering into a plea agreement. 41 S.W.3d specific to this defendant, as were the judge's comments 130, 132. A plurality of justices found this conduct to be in Blue, and there is no suggestion that it expressly refer fundamental error as it "tainted," "damaged," and "vitiat enced guilt or innocence [^30] in any way. We decline ed" the presumption of innocence.7(i. at 132, 135. The to hold that the refusal to remove the MADD plaque was court held this error required no objection and performed fundamental error requiring reversal even though not no harm analysis.® properly preserved for appellate review. We therefore overrule appellant's fifth issue. 7 A fifth justice would have held that the judge's comments in their entirety violated the right to an V. Impartiality of Judge impartial judge. Blue, 41 S.W.3d at 135 (Keasler, In issue six, appellant contends the trial judge com J., concurring in the judgment only). mitted a litany of actions that demonstrated bias against 8 As described in a concurring opinion. her and denied her a fair trial.^ Due process requires a neutral and detached hearing body or officer. Brumit v. The trial judge['s] first statement State, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006) (cit told the jury, essentially, the State and appellant were discussing how ing Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)). However, not every appellant would plead but appel lant was having difficulty in decid complaint about a judge or the conduct of a trial impli cates constitutional due process protections; indeed, ing how to plead. Furthermore, the "most matters relating to judicial disqualification [do] statement told the jury it was, in not rise to a constitutional level," and "matters of kin the opinion of the trial judge, ap ship, personal bias, state policy, remoteness of interest, pellant's fault for the delay in try would seem generally to be matters merely of legislative ing the case and that everyone discretion." Caperton v. A.T. Massey Coal Co., Inc., 556 would save time if appellant U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 would simply plead (presumably (2009) (quoting respectively FTC v. Cement Institute, guilty). [♦29] The second state 333 U.S. 683, 702, 68 S. Ct. 793, 92 L. Ed. 1010, 44 ment told the

jury a defense attorney. *F.T.C.* 1460 (1948), and *Tumey v. Ohio*, 273 U.S. 510, 1927, 5 Ohio Law. Abs. 159, sent false testimony. The third 5 Ohio Law. Abs. 185, 25 Ohio L. Rep. 236 (1927)); 5th statement told the jury that, in the also *Avilez v. State*, 333 S.W.3d 661, 673-74 (Tex. App.- judge's opinion, very few defend - Houston [1st Dist] 2010, pet. refiled) (quoting Caperton). ants, over a forty-year period, had been found not guilty. Page 9 9 The specific actions she complains of include: partiality of the trial court); see also *Luu*, 440 S.W.3d at refusing to remove the MADD plaque, denying 128 (discussing and following *Brumit*). the motion for continuance and threatening counsel Appellant merely asserts in conclusory fashion [*33] self with contempt if he mentioned the ruling to that the trial judge demonstrated general bias against the jury, questioning two venirepersons, "coerced DWI defendants and specific bias against her and lists in" counsel to release a witness from subpoena, multiple alleged demonstrations of bias with little or no "directing" or "curtailing" [*31] counsel's examination of certain witnesses, refusing to grant a analysis thereof, leaving the court to speculate as to why she perceives the cited occurrences to be objectionable. mistrial after a witness mentioned the first trial, See *Luu*, 440 S.W.3d at 129 (rejecting contention trial refusing to allow the defense to publish appeal judge demonstrated bias that amounted to fundamental defendant's mugshot to the jury, permitting the State to error when appellant "offer[ed] no discussion whatsoever use evidence without having given the defense to support his conclusory assertions that the judge was notice, refusing to allow counsel to take two witnesses on voir dire prior to testifying about scientifically biased against him"). Our review of the record, including the pages appellant cites, does not reveal tific evidence, defining reasonable doubt in the obvious bias. Most of appellant's citations are to rulings jury charge, stating "Well, it really doesn't matter of the court that appellant does not contend were erroneous what you thought, does it?" when counsel at issue. There is certainly no clear expression of bias in the attempted to state on the record the circumstances under which State's exhibit 1 was admitted, and rulings or comments. A few of her citations are to rulings that are the subject of other issues on appeal, including maintaining a blanket policy of rejecting all denial of the motion for continuance, refusal to grant a tiated agreements in DWI cases that would refer a mistrial after a witness mentioned the prior trial, defining criminal defendant to the "DIVERT" Program. reasonable doubt in the jury charge, and refusing to re Absent a clear showing of bias, we presume a trial move the MADD plaque from the courtroom.'® As this court's actions were not so tainted. *Brumit*, 206 S.W.3d at cussed elsewhere in this opinion, none of these consti 645. To reverse a judgment based on improper comments tutes error. Continued exhibition of the MADD plaque, or conduct by the judge, we must find (1) that judicial [*34] however, requires further analysis for bias. impropriety occurred and (2) prejudice probably resulted. *Id.*; *Luu v. State*, 440 S.W.3d 123, 128-29 (Tex. App.- 10 The reasonable doubt definition is addressed Houston [14th Dist.] 2013, no pet.). Our review encom in the next section of this opinion. passes the entire record. *Luu*, 440 S.W.3d at 129. Re As our sister court did in *Simpson*, we find the dis marks by the judge during trial that are critical or display of the MADD plaque to be analogous

to a judge's proving of, or even hostile to counsel, the parties, or their extra-judicial statements regarding a category of offense cases, ordinarily do not support [*32] a challenge for or punishment. 2014 Tex. App. LEXIS 6527, 2014 WL bias unless they reveal an opinion derived from an extra 2767126, at *9-10." Courts considering those types of judicial source. Id. When no extrajudicial source is all statements have concluded that the mere fact a judge has leged, such remarks demonstrate bias only if they reveal such a high degree of favoritism or antagonism as to expressed such views does not, taken alone, demonstrate that the judge acted with bias against a particular defend have made fair judgment impossible. Id. ant in a particular trial. See *Rosas v. State*, 16 S.W.3d We begin by noting that appellant does not cite any 771, 774-75 (Tex. App.-Houston [1st Dist.] 2002, no place in the record where she made a request, objection, pet); *Chastain v. State*, 667 S.W.2d 791, 794 (Tex. or motion based on the trial judge's alleged bias. See Tex. App.—Houston [14th Dist.] 1983, writ refd) ("It is pre R. App. P. 33.1(a) (requiring a timely request, objection, sumed that a judge will base his judgment upon the facts or motion to preserve a complaint for appellate review). as they are developed at the trial."). As the Simpson court She specifically did not file a motion to recuse the judge aptly states: "While the display of the plaque could be or seek a new trial on the basis of bias. Accordingly, we viewed as evidence the trial judge dislikes drunk driving, may reverse her conviction on this ground only if we it was not a comment on this particular defendant's guilt fi n d t h a t s u c h b i a s r e s u l t e d i n f u n d a m e n t a l e r r o r. S e e or innocence and, therefore, did not demonstrate bias Mendez, 138 S.W.3d at 341-42; Luu, 440 S.W.3d at 128. against Simpson." 2014 Tex. App. LEXIS 6527, 2014 The Court of Criminal Appeals has expressly reserved WL 2767126, at *10. It therefore does not overcome the the question of whether a judge's comments can exhibit presumption that the trial judge conducted the trial bias to such a decree as to constitute fundamental error. properly, much less demonstrate fundamental error. See See *Brumit*, 206 S.W.3d at 644-45 (declining to decide *Brumit*, 206 S.W.3d at 645; Mendez, 138 S.W.3d at 341- whether an objection is required to preserve error of this 42; Simpson, 2014 Tex. App. LEXIS 6527, 2014 WL nature and instead holding that the record did not reflect 2767126, at *10. Page 10 instruction at issue created a presumption of spe 11 As appellant does here, the defendant in cific intent under the facts of the case. Id. at 280- Simpson made display of the MADD plaque the 82. Here, the trial court merely included a defini basis of both an issue concerning possible impact tion of reasonable doubt that has been described [*35] on the jury as well as an issue complaining as useless; it did not create a presumption on in of Judicial bias. 2014 Tex. App. LEXIS 6527, tent. Paulson V. State, 28 S.W.3d 570, 572 (Tex. 2014 WL 2767126, at *5-10. *Crim. App.* 2000). Lastly, regarding appellant's contention that the trial We begin our analysis by noting that the definition judge has a policy of rejecting all negotiated agreements submitted by the trial court in this case was the first sen in DWI cases that would refer a criminal defendant to the tence in paragraph four of the reasonable doubt defini "DIVERT" Program and that this policy demonstrates tion crafted by the Court of Criminal Appeals in Geesa v. bias, we have previously held directly to the contrary. State, 820

S.W.2d 154, 162 (Tex. Crim. App. 1991), but This position does not in fact establish the judge has a subsequently withdrawn [*37] by the Court in Paulson bias against DWI defendants. See Rhodes v. State, 357 V. State, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000). S.W.3d 796, 800-01 (Tex. App.-Houston [14th Dist] The Paulson court harshly criticized certain portions of 2011, no pet.). Accordingly, we overrule appellant's sixth the Geesa definition; as to the particular language at issue. sue here, however, Paulson simply described it as "use less" and circular. Paulson, 28 S.W.3d at 572 (comparing VI. Reasonable Doubt Instruction the first sentence of paragraph four to the statement "[a] white horse is a horse that is white."). Thus, it appears In issues seven and eight, appellant contends that the that the Paulson court viewed the language at issue here trial court erred in providing the jury with a definition of as less likely to cause harm than some other parts of the reasonable doubt and that this error prejudiced her case. Geesa definition. See Adkins, 418 S.W.3d at 866-67 (in The definition in question stated "A 'reasonable doubt' is terpreting Paulson in this fashion). a doubt based on reason and common sense after a care ful and impartial consideration of all the evidence in the Turning to the record in this case, we first observe case." The trial court overruled appellant's timely objec that the State's case against appellant was strong. The tion to the definition. In Adkins v. State, we found sub State presented five eyewitnesses at trial, including three mission of the same definition in a DWI trial in this same police officers and two individual citizens, who each trial court to be error. 418 S.W.3d 856, 863-66 (Tex. concluded that appellant was intoxicated at the time of App.-Houston [14th Dist.] 2013, pet. refd). The State her detention. The officers observed her close a t h a n d offers no reason, and we discern no reason, for reconsid immediately after her detention, and the citizens ob ering that holding in this case. served her while she was driving. The State further pre sented a tape recording of a third citizen's 9-1-1 call in Having found error in submission of the charge, which he likewise concluded appellant was driving while [*36] we must now analyze that error for harm. Ngo v. intoxicated. Each witness recounted specific observa State, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). tions that led them to their conclusion. It was also estab Because appellant properly objected to the definition, we lished that appellant [*38] refused to submit to a breath will reverse if the defendant suffered "some harm" to his alyzer test as well as other sobriety tests. See Bartlett v. rights. See id^^ In making this determination, we exam State, 270 S.W.3d 147, 153 (Tex. Crim. App. 2008) (ex ine the jury charge as a whole, the state of the evidence, plaining that refusal to submit to a breath test is relevant argument by counsel, and any other relevant information in establishing guilt as it tends to show a consciousness revealed in the record. Hutch v. State, 922 S.W.2d 166, of guilt). Although defense counsel developed a few in 171 (Tex. Crim. App. 1996); Adkins, 418 S.W.3d at 866. consistencies between the statements and the police re The record must show that appellant suffered "actual" ports, and appellant denied the allegations during her not merely "theoretical" harm. Almanza v. State, 686 testimony, the evidence overall was strongly indicative S.W.2d 157, 174 (Tex. Crim. App. 1985); Adkins, 418 of guilt. See, e.g., Langham v. State, 305 S.W.3d 568, S.W.3d at 866. 582 (Tex. Crim. App. 2010) (identifying the

strength of the State's case as a relevant factor in a harm analysis). 12 Appellant asserts that a failure to properly instruct on reasonable doubt constitutes structural error. Next, we note that the court's charge appears to have error that requires reversal and is not subject to a harmless error analysis. The court properly instructed the jury on the burden of proof, the elements of the offense, and the presumption of innocence. However, the only authority she cited for this proposition, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), is readily distinguishable. In *Sullivan*, the finding of reasonable doubt harmless. Lastly, we examine

Page 11 comments made by the judge, prosecutor, and defense counsel in discussing the burden of proof with the Jury. VII. Blood-Alcohol Content Before trial began, the judge offered a somewhat rambling statement regarding the importance of the jury's determination but also stressed that appellant must be judged. Appellant's judgment should be modified to remove the notation of a blood-alcohol content level as there was no evidence presumed innocent and that the State had the burden of establishing any such level. Specifically, the description proved her guilt beyond a reasonable doubt. [*39] In the judgment of the offense for which appellant was prosecuted, the venire panel that he had the burden of conviction reads "DWI 2ND OFFENDER BAG .08," but proof but could not define beyond a reasonable doubt for no evidence was admitted showing appellant had a specific blood-alcohol content as she refused such testing. The State concedes the propriety of this requested correction. Beyond a reasonable doubt does not mean that I prove this case to you beyond all doubt in the world. It does not mean that I prove it to you one hundred percent, may modify a trial court's judgment to correct an error. because if I could prove it to you one hundred percent you would have been a 27-28 (Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); see also *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (holding the witness stand. It's not an impossible that "an appellate court has authority to reform a judgment to meet. ment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source"). Accordingly, we modify the trial court's judgment to strike the term "BAG .08" from or particularly damaging to the jury's understanding of the offense. the burden of proof. Defense counsel offered more clarity in closing argument, telling jurors that "[r]easonable doubt... is the highest burden in the land." He then again We modify the trial court's judgment to remove the erroneously described the preponderance-of-the-evidence and notation regarding appellant's blood-alcohol content. clear-and-convincing burdens of proof and emphasized that beyond a reasonable doubt was an even harder standard to meet. Having overruled all of appellant's other issues, we affirm the judgment as so modified. [*41] Considering the charge as a whole, the strength of the State's evidence, and the comments made by counsel Justice and the judge, we find

that the trial court's error in defining Panel consists of Justices Boyce, Jamison, and Doming reasonable doubt in the jury charge did not cause no v a n . actual harm to appellant's rights. See Ngo, 175 S.W.3d at 472 (Tex. R. App. P. 47.2(b)). 743. Accordingly, [*40] we overrule appellant's seventh and eighth issues.