PD-0488-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/18/2020 4:22 PM
Accepted 11/19/2020 9:37 AM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
11/19/2020
DEANA WILLIAMSON, CLERK

No. PD-0488-20

Jesse Villafranco, Jr., Appellant v. The State of Texas, Appellee	In the Court of Criminal Appeals of Texas at Austin

On Review from Cause No. 11-18-00102-CR
11th Court of Appeals of Texas

Brief for Appellee

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Brief for Appellee

The Appellee files the State's brief as follows:

ISSUES PRESENTED

ISSUE ONE

Was the court of appeals wrong in refusing to remand this case to the trial court to remedy its error under Rule 44.2 of the Texas Rules of Appellate Procedure?

ISSUE TWO

Was the appellate court's harmless error analysis correct?

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

ARGUMENT & AUTHORITIES

ISSUE ONE

Was the court of appeals wrong in refusing to remand this case to the trial court to remedy its error under Rule 44.2 of the Texas Rules of Appellate Procedure?

Summary of Argument

This court should take the opportunity to harmonize two different lines of case law. One line says that a defendant must object if he is denied the right to closing argument (which is a critical stage), while the other line says he need not object if he is denied counsel at the critical stage of a proceeding. This court should hold that when a defendant is represented by counsel, that counsel should have to object to preserve error when a defendant is denied counsel at a critical stage of a proceeding.

Argument

1. Additional Facts

During his cross-examination of A.U., Appellant's counsel asked her if she remembered a friend or neighbor named Isaiah. (RR 3 p. 91) This prompted the State

of object under Rule 412 of the Rules of Evidence. (RR 3 p. 91) Appellant responded with his theory of admissibility:

> Your Honor, the incident at hand describes her privates being touched. She made an outcry also in regards to this individual making that same type of conduct. The question goes into then that rather than it being Mr. Villafranco, it's very well that this other person she named is the person that did this conduct.

(RR 3 p. 93) The State responded that what A.U. "might say in regards to Isaiah is a different type of act altogether than what we are alleging." (RR 3 p. 94) When the court asked if the act involved penetration, the State replied, "Not of the vagina." (RR 3 p. 94) The State later elaborated on its answer: "The SANE exam is going to show vagina penetration. Once again, just based on what I just spoke with the witness about, the act with

Isaiah does not involve vagina penetration at all, so that would not rebut that." (RR 3 p. 95)

The State then suggested a hearing under Subsection C of Rule 412. (RR 3 p. 95) The court concurred and told defense counsel, "I need to know exactly what you're -- specifically you're trying to go to so I can conduct, if I believe necessary, an in-camera hearing with the court reporter and nobody else." (RR 3 p. 96) Defense counsel explained that in the "CAC video" of the interview of A.U., she said something about being touched by Isaiah, but the interviewer and A.U. did not go into details about any of those incidents: "She said touching. And the extent of what that was or anything else like that, I -- it did not go into that, so there's no way for me to know without asking." (RR 3 pp. 96-97) Appellant reiterated

that he wanted to go into the incident to rebut medical evidence that was to be introduced. (RR 3 p. 97)

It looked as if the trial court was going to let Appellant's counsel ask questions of A.U. (RR 3 p. 98) But then, the trial court pulled back on this: "Well, wait just -- let's be sure I'm looking at this correct. I think this says that I must conduct an in-camera hearing and that doesn't mean that you -- either one of you get to ask any questions of her." (RR 3 p. 98) Appellant agreed with this interpretation[1] but seemed to ask for an opportunity to cross-examine A.U. in order to guide the court in it's *in camera* questioning. (RR 3 pp. 98-99) The trial court agreed to allow Appellant to ask some questions to A.U. regarding this subject matter. (RR 3 p. 99) Defense

[1] The State will address this issue later in the argument.

counsel then elaborated on the areas he would ask about:

> [T]he child at her CAC interview describes Isaiah -- describes Isaiah touching her. To the extent of how and where he touched her or what date or anything else like that is unclear, but the extent of where he touched her and to what degree he touched her would be my inquiry, because it could then have an alternate theory explained in regards to the SANE exam that she was exposed to.

(RR 3 pp. 99-100)

In the *in camera* hearing, the trial court asked A.U. if the touching with Isaiah happened before or after the incidents with Appellant, to which she answered before. (RR 4 p. 4) Then the court addressed the issue of penetration:

> Q. Okay. And did he in any way penetrate your vagina?
>
> A. What does that mean?

> Q. Stick his finger inside of you, stick his private part inside of you? Did he do that in any way?
>
> A. He did put his middle part in my butt.
>
> Q. Say –
>
> A. He did put his middle part in my butt.
>
> Q. In your butt, not in your vagina?
>
> A. No, sir.
>
> Q. Did he penetrate any other part of you?
>
> A. No, sir.

(RR 4 pp. 4-5) A.U. also told the court that this only happened once. (RR 4 p. 5)

The court concluded the examination and then ruled the incident with Isaiah inadmissible. (RR 3 pp. 103-04)

2. The Question Before This Court

The State conceded in its brief on direct appeal that that the procedure the trial court used in its

examination of A.U. was flawed and in contravention of this court's precedents. *See LaPointe v. State*, 225 S.W.3d 513, 520 (Tex. Crim. App. 2007). The State instead argued that Appellant forfeited his right to complain about the procedure the court used by not objecting to it. *See* Tex. R. App. Pro. 33.1. The Court of Appeals sidestepped this argument, noting that Appellant did not object to the procedure, but deciding the case on harmless error grounds. Slip op. at 6-7.

Since this court granted review in part on the question of whether the appellate court should have remanded the case back to the trial court, and the State is not questioning the impropriety of the trial court's actions, the only "live" question under this issue is one of procedural default. The State will argue that Appellant

did in fact procedurally default and has not preserved this issue for appellate review.

3. Mendez v. State

In order to discuss the terminology of procedural error, it is necessary to discuss this court's holdings in *Mendez v. State*, 138 S.W.3d 334 (Tex. Crim. App. 2004). *Mendez* was a murder case in which the defendant pleaded guilty to the jury after the indictment was read. *Id.* at 336. When the defendant took the stand, he testified that he did not intend to shoot the victim. *Id.* at 336-37. The trial court submitted a charge to the jury that instructed them to find the defendant guilty and to decide whether he committed the crime under the immediate influence of sudden passion arising from adequate cause, which would have reduced the punishment to a second-degree punishment range. *Id.* at 337; *See* Tex.

Penal Code § 19.02(d). The jury found the defendant guilty and assessed a punishment of 99 years, foregoing the second-degree punishment range. *Id.*

On appeal, Mendez contended that the trial judge should have *sua sponte* withdrawn his plea of guilty after the testimony raised an issue as to his guilt. *Id.* The Eleventh Court of Appeals disagreed, holding that because the error in this case was subject to harm analysis, the defendant was required to bring his complaint to the trial court, and because he didn't, he waived the error. *Id.* at 337-38.

This court took up the case, not to reverse the holding of the appeals court, but to clarify the terminology surrounding the concept of procedural default. *Id.* at 339. In its analysis, this court identified four terms that frame the concept of procedural default: (1) structural

errors; (2) systemic requirements; (3) waivable rights; and (4) forfeitable rights.[2] *Id.* at 339-41.

• Structural Error

This court, citing Supreme Court precedent, found that structural error are defects that affect the framework in which the trial proceeds and not simply an error in the trial process. *Id.* at 340 (quoting *Johnson v United States*, 520 U.S. 461, 468-69 (1997)). The opinion went on to quote *Johnson*, noting the limited class of cases in which structural error had been found: "a total deprivation of right to counsel, lack of an impartial judge, unlawful exclusion of grand jurors of a defendant's race, the right to self-representation at trial, the right to public trial, [and an] erroneous reasonable doubt instruction

[2] This was a framework first suggested by this court in *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993).

to the jury." *Mendez*, 138 S.W.3d at 340. This court went on to note that most constitutional errors are not structural errors, which is to say that they can be harmless. *Id.*

• Systemic Requirements

Systemic requirements are those mandates that a court must follow even if the parties wish otherwise, and either party may complain on appeal that the mandate was violated. *Id.*

• Waivable Rights

A waivable right is one that must be implemented unless expressly waived. *Id.*

• Forfeitable Right

A forfeitable right is a right that must be implemented upon request. *Id.* It is this category of rights to

which Rule 33.1 of the Texas Rules of Appellate procedure applies.[3] *Id.* at 342.

• Waiver v. Forfeiture of Complaint

This court also took pains to distinguish forfeiture versus waiver. Waiver, this court noted, is defined as the intentional relinquishment of a known right or privilege. *Id.* Forfeiture of complaint, on the other hand, is the consequence of not bringing your complaint to the trial court under Rule 33.1. *Id.*

4. Is this right waivable or forfeitable?

This court has held that the denial of counsel at a critical stage must be affirmatively waived and cannot be forfeited by inaction alone. *Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014). However, there are a

[3] This court banished the term "fundamental error" from the lexicon of our jurisprudence, subsuming it under the *Marin* framework. *Id.* at 341.

number of cases from the courts of appeal involving closing argument that hold the denial of counsel during that critical phase must be objected to or forfeited. *See Foster v. State*, 80 S.W.3d 639, 640-41 (Tex. A—Houston [1st Dist.] 2002, no pet.); *Habib v. State*, 431 S.W.3d 737, 740-42 (Tex. App. – Amarillo 2014, pet. ref'd.). While the latter cases are from the lower courts, these two lines of cases do reveal a conflict in precedent that this court can clarify. The State will argue below that in the limited Rule 412 situation the right to counsel should be a forfeitable right.

• The Reason for Error Preservation Rules

As the Texas Supreme Court has noted, there are a number of prudential considerations that undergird the rules of error preservation. *See In the Interest of B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). First, error

preservation conserves judicial resources by availing a trial court of an opportunity to correct its error before the appeal proceeds. *Id.* Second, the rule promotes fairness among litigants by not allowing a litigant to surprise his opponent on appeal by stating his complaint for the first time. *Id.* And, third, error preservation furthers the goal of accuracy in judicial decision-making by giving parties the opportunity to develop and refine their arguments and by giving this court the benefits of the lower court's judicial review to focus and further analyze the questions at issue. *Id.*

- Not requiring an objection in this situation only builds error in the system.

It is important to remember that the Appellant in this case was represented by counsel throughout the proceedings. This was not a situation in which someone who was unschooled in the law was forced to fend for

himself and make all of the legal decisions against a trained lawyer on the other side. In such a situation, it would be ludicrous to expect a *pro se* defendant to object to a lack of representation if he perhaps didn't know he was even entitled to an appointed lawyer.[4]

In this case, since a defense lawyer was present throughout the proceedings, the prudential considerations that militate in favor of error preservation are all present. The trial judge was not given an opportunity to correct his error.[5] And there is something fundamentally unfair about bringing this complaint for the first

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[4] One of the foundational cases that held a defendant was not required to request counsel during a critical stage, *Oliver v. State*, 872 S.W.2d 713 (Tex. Crim. App. 1994) involved a situation where a defendant did not have counsel at a preliminary hearing, before he was appointed counsel. *Id.* at 714; *See Oliver v. State*, 813 S.W.2d 762, 763-64 (Tex. App. – Houston [1st Dist.] 1991).

[5] Counsel in *LaPointe* specifically requested the opportunity to question the victim for the purpose of making a bill of exception. *LaPointe*, 225 S.W.3d at 515.

time before the appellate court when the defense lawyer could have easily pointed out to the judge that there was case law directly on point that mandated his presence at the *in camera* hearing.

Moreover, there is no logical reason why there should be a different rule in one situation versus the other. Both are a denial of counsel during a critical stage. In both cases a defendant will have counsel present through most of the proceedings who will be able to vindicate her client's rights. It is not unreasonable in such a situation to require counsel to preserve error with an objection to uphold the prudential considerations inherent in error preservation.

This court has the opportunity to clear up an area of confusion in Texas law, and the State submits that the proper course would be to require the defense to object

in a situation in which a trial judge proposes to hold a Rule 412 hearing in an *ex parte* fashion.

5. In any event, Appellant affirmatively waived his right to counsel in this hearing.

Even if this court finds that the right to counsel in this instance must be affirmatively waived, it is apparent from the record that Appellant did affirmatively waive counsel at the hearing. When the trial court looked at the rule and wrongly concluded that his colloquy with the victim must be *ex parte*, Appellant's counsel replied, "That's correct, your honor." (RR 3 p. 98)

This situation is analogous to the scenario in which a defendant announces "no objection" when the State offers something into evidence. In that circumstance, the defendant waives any objection he may have had to the evidence, even evidence that was subject to a pre-trial motion to suppress. *Moody v. State*, 827 S.W.2d 875, 889

(Tex. Crim. App. 1992). Appellant's action in this case was more than mere acquiescence; he assented to the procedure the trial court used by agreeing with the court.

ISSUE TWO

Was the appellate court's harmless error analysis correct?

Summary of Argument

Appellant argues that the victim in this case could have been confused about the terms for different parts of the body and thus needed to be cross-examined. The Court of Appeals was correct in its analysis because the record shows no confusion on the part of the witness as to where on her body she was abused by the other perpetrator, Isaiah. The victim was unequivocal that Isaiah did not penetrate her in her vagina, which was the

accusation at issue in this case. Cross-examination of A.U on this point would have been fruitless.

Argument

Because the trial court's error was of a constitutional dimension, this court must determine beyond a reasonable doubt that it did not contribute to the conviction or punishment.[6] Tex. R. App. Pro. 44.2 (a). To perform this analysis, it is important to remember the theories of admissibility Appellant advanced to support the admission of the evidence that A.U. was abused by Isaiah. As noted above, Appellant argued that the evidence was admissible because Isaiah might be the "real" perpetrator of abuse in this case (RR 3 p. 93) and because the medical

[6] As the Court of Appeals did in its opinion. (slip opinion at p. 7) The standard of review of the appellate court's determination on harmless error would seem to be *de novo*. *See McDonald v. State*, 179 S.W.3d 571, 579-80 (Tex. Crim. App. 2005) ("like the United States Supreme Court, we do have the inherent authority to review the trial record to evaluate whether error is harmless.").

evidence showed an injury to A.U., the injury could be potentially explained by the abuse at the hands of Isaiah. As will be shown below, neither of these two theories is supported by the testimony of A.U., and no amount of questioning by Appellant would have brought forth anything different.

Appellant asserts in his brief that A.U. could potentially be confused about the nomenclature of the bodily orifices at issue in this case. A.U., however, exhibited no such confusion in any questioning propounded to her. When she was asked about the "middle part" in the forensic interview, she circled the vagina in a drawing. (RR 3 p. 133) During the *in camera* hearing, when the trial court asked A.U. if Isaiah had penetrated her in her vagina, she said Isaiah had put his "middle part" in her butt. (RR 4 pp. 4-5) There is no indication that A.U. was

confused either about the difference between the anus and the vagina or what Isaiah did to her. A.U. was very positive in her testimony that Isaiah penetrated her only in her anus.

The SANE examiner noted scarring and redness in A.U.'s vagina that could have come about as a result of penetration. (RR 3 pp. 162-63) The SANE examiner apparently did not make any notations about A.U.'s anus, and, again, anal penetration was not alleged in the indictment. Thus, the lack of cross-examination by Appellant could not have harmed him, because the evidence did not advance his defensive theory.

PRAYER

Appellee prays that this court affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Kalenak, do hereby certify that on the date this document was electronically filed, I sent a copy by efile to Franklyn Mickelsen, attorney of record for the Appellant.

_____

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CERTIFICATE OF COMPLIANCE

I, Eric Kalenak, certify the Brief for Appellee was prepared with Microsoft Word for Office 365 and that according to that program's word-count function, the sections covered by Tex. R. App. P. 9.4(i)(3) contain 3002 words. I further certify that the font for this document is Century Schoolbook, and the body text size is 14 point, while the footnote size is 12 point.

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Assistant District Attorney

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