

## **Court of Criminal Appeals Evidence Topics**

### ***Darcy v. State***

No. 07-13-00297-CR

Case Summary written by Morgan Shell, Articles Editor.

JUDGE KELLER delivered the opinion of the court in which JUDGE KEASLER, JUDGE HERVEY, JUDGE ALCALA, JUDGE RICHARDSON, and JUDGE YEARY joined.

During the trial of this case, defense counsel initially produced a note that the witness for the State had sent to appellant in jail. An investigator for the state asked the witness to send the note in an attempt to show the presence of a smuggling network that was sending messages to and from the jail. Appellant, however, clarified that it was not producing the note as evidence, which prompted the state to enter the note as evidence with no objection by defense counsel to the note's admission.

On appeal, however, defense counsel argued that appellant's Sixth Amendment right to counsel was violated because the State made contact with the defendant during an adversarial proceeding in which Appellant was represented by counsel and in the absence of Appellant's attorney. Appellant also argued that he was denied his right to a fair trial when the State created evidence in an attempt to "open the door to extraneous offenses."

In its harm analysis, the court of appeals agreed with defendant that the note made Appellant look like a criminal and reversed the trial court's holding.

The State's main contention on appeal is that the court of appeals erred in reversing the lower court's judgment without addressing Appellant's failure to preserve error. This court explained that it is a systematic requirement for a first-tier appellate court to address any issue of error preservation *before* it may reverse a judgment. It explained that normally, an error occurs only when the trial court wrongfully acts. The court of appeals, however, found that Appellant's Sixth Amendment right was violated when the state contacted Appellant in the absence of his lawyer.

The Court of Criminal Appeals, however, explains that any violation of Appellant's right to counsel would have been immaterial to the defendant's conviction and the result would have been the same had the note not been admitted.

Additionally, this court held that while the right to counsel at a critical stage is a waivable-only right, this is not true of "the right to prevent the admission of evidence obtained in violation of the right to counsel." Appellant forfeited his complaint that the note was obtained in violation of his Sixth Amendment right to counsel because he failed to object to its admission at trial once Appellant became aware of the facts concerning the note (forfeit by inaction).

The judgment by the court of appeals is reversed and the court affirms the judgment of the trial court.

JUDGE MEYERS and JUDGE JOHNSON filed a concurring opinion.

The State's admission of the note into evidence was an attempt to admit evidence of the extraneous offense of smuggling contraband into the jail. Instead of arguing that such introduction of evidence was a violation of Appellant's Sixth Amendment right to counsel, Appellant should have objected to the note under Texas Rule of Evidence 404(b). If the judge overruled these objections, Appellant should have then requested the judge to instruct the jury not to consider such extraneous evidence unless it believed beyond a reasonable doubt that Appellant committed the extraneous offense.

But Appellant failed to object to the State's introduction of the note and failed to request such a jury instruction thereby forfeiting his right to raise the claim now.

JUDGE NEWELL concurred.

The note in no way related to the crime charged against Appellant. Witness Morris only sent the note in an attempt to uncover a smuggling network. The note made no mention of the offense in question nor did it ask to uncover any of the facts or circumstances surrounding the offense. Additionally, the note did not have any impeachment value because there was no evidence that Appellant responded to the note. Thus even assuming that the note was invalidly entered into evidence, Appellant cannot show harm.

***Smith v. Texas***

No. PD-1615-14

Case Summary written by Ty Taylor, Staff Member.

PRESIDING JUDGE KELLER delivered the opinion of the court.

William Smith was stopped for driving without wearing a seatbelt. During the stop, the arresting officer smelled an odor of alcohol emitting from Smith. After conducting multiple field sobriety tests on Smith, the officer arrested Smith for driving while intoxicated. Following the arrest, the officer searched Smith's car and found at least three alcoholic beverages. Smith denied taking a breath test. The officer proceeded to transport Smith to the hospital where his blood was drawn, and a subsequent analysis of the blood revealed Smith had a blood-alcohol concentration (BAC) of .21 percent alcohol.

Smith's guilt was decided in a bench trial. In her testimony, forensic scientist Emily Bonvino testified that Smith's blood analysis showed his BAC to be .21 percent alcohol, and that he more than likely had a BAC above .08 percent alcohol at the time of the offense. Smith did not object to this testimony.

However, when the State sought to introduce the blood sample into evidence, Smith objected to the evidence on Fourth Amendment search and seizure grounds. More specifically, Smith challenged the constitutionality of Chapter 724 of the Health and Safety Code; which does not expressly require a warrant for law enforcement to order blood to be drawn from a person who is in violation of § 724.012. The trial court admitted the blood into evidence, and the court did not rule on the issue for the remainder of the bench trial. The trial court denied Smith's motion for an instructed verdict. Once convicted, Smith was sentenced to twenty-five years in prison.

The court of appeals found that Smith preserved his error because it was over Smith's objection on constitutional grounds that the trial court admitted the blood evidence. The court of appeals then decided that based on the provided evidence, the blood sample should have been excluded. Further, the court of appeals concluded that the trial court's error was harmful, and therefore reversed Smith's conviction.

Issue: Whether a defendant's complaint that was not ruled upon by the trial court can be sufficient to preserve error.

The State claims that Smith failed to preserve error because he did not object to testimony about his blood-test results, and he did not receive a final ruling until after evidence was closed. Smith argues that the time when a ruling is obtained is not crucial because the judge is aware of the motion's substance regardless of when it is argued.

The Court of Criminal Appeals noted that a party must obtain a ruling on a complaint or object to a trial judge's refusal to rule in order to preserve error. The trial court did not rule on the Fourth Amendment issue whenever the evidence was admitted. Because the court did not accompany the admission of evidence with a ruling on Smith's complaint, the admission of the evidence was not sufficient to preserve error.

The court reasoned that the ruling made at the close of evidence was on Smith's motion for instructed verdict, which is different than ruling on the admission of evidence. A ruling on a trial court evidentiary error and a ruling on insufficient evidence is not treated the same in regard to preserving error. If evidence is improperly admitted, and not preserved, it is considered in determining a defendant's guilt. Further, the court found there was other evidence to support Smith's conviction aside from the test results. Because Smith failed to receive a ruling on his Fourth Amendment claim, he failed to preserve error regarding the complaint. The court also noted Smith's failure to object to testimony regarding the results of the blood test, and stated that the test results were in evidence regardless of a ruling on the blood itself. Erroneous testimony is not sufficient for reversal if other testimony proves the same fact objected to. The judgment of the court of appeals was reversed and remanded.

JUDGE RICHARDSON filed a dissenting opinion.

Judge Richardson disagreed with the majority's holding that Smith did not preserve his Fourth Amendment challenge of the warrantless blood draw. Judge Richardson points to the U.S. Supreme Court case *Missouri v. McNeely*. Citing *McNeely*, Judge Richardson argued that admitting the blood was inherently a violation of Smith's Fourth Amendment rights, an objection Smith clearly made at the trial level. In fact, Judge Richardson argued that Smith objected throughout the bench trial that the blood was drawn in violation of his Fourth Amendment rights. Further, Judge Richardson argued that the timing

of the objection is not crucial in a bench trial as it is in a jury trial, because a judge is able to consciously disregard inadmissible evidence.

***State v. Sutton***

No. PD-1051-15

Case summary written by Ryan Mitchell, Staff Member.

JUDGE RICHARDSON delivered the unanimous opinion of the Court.

Christopher Lee Sutton was charged under Texas Penal Code § 21.12(a)(1) with five counts of having an improper relationship with a student at Caney Creek High School (CCHS) while being an employee of the school. Sutton was convicted on all counts and “received a ten year probated sentence for each count.” Sutton appealed, claiming that the statute required a showing that he was an employee of a school and that he “worked at” the school. At trial, evidence was presented showing that Sutton worked for Conroe Independent School District Police Department, several witnesses testified that Sutton was not an employee of CCHS, and Sutton’s office was not at CCHS but at the police department command center.

The lower appellate court held that there was insufficient evidence for a jury to reasonably conclude that Sutton was an employee of CCHS, and reversed Sutton’s convictions.

ISSUE – In order to satisfy the requirements of Texas Penal Code § 21.12(a)(1), was there sufficient evidence to establish that Sutton was an employee of Caney Creek High School?

The State argued that the legislature intended the statute to cover all school district employees, which would include Sutton. The court disagreed that the Legislature intended the statute apply to Sutton in this case, although the court noted it would be a “closer call” if Sutton was assigned to CCHS or its feeder system. Additionally, the court reasoned that a broad interpretation of § 21.12(a)(1) to include all district employees would, in turn, ignore § 21.12(a)(2). This subsection gives a specific list of district employees that the statute applies to, and police officers were not included. The court held that if the legislature intended to include police officers, it would have specifically included them.

Only limited evidence was presented at trial to show that Sutton “worked at” or was an employee of CCHS. The court found “overlapping

responsibilities” and mentorship of the officer assigned to CCHS insufficient for a jury to conclude that Sutton “worked at” or was an employee of CCHS. For these reasons, the court affirmed the Ninth Court of Appeals.

***Henley v. State***

No. PD-0257-15

Case Summary written by Danny Barber, Staff Member.

JUDGE RICHARDSON delivered the opinion of the court in which JUDGE MEYERS, JUDGE JOHNSON, JUDGE KEASLER, JUDGE ALCALA, and JUDGE YEARY joined.

Appellant struck the complainants and fled the scene. A jury found the appellant guilty of assault causing bodily injury to a family member. On appeal, the appellant claimed that the trial court improperly excluded evidence with regard to his justification defense. Specifically, the appellant claimed that he was justified in protecting his two boys from future harm by causing injury to the boys’ mother and grandmother. Appellant believed his ex-wife was not a fit parent because of allegations of misconduct by the boys’ stepfather and allegations of sexual abuse by the stepfather’s eleven-year-old former stepson. Appellant sought to introduce the allegations into evidence to his claim of defense of a third person. The trial court held that this evidence was inadmissible.

The Texas Court of Criminal Appeals reviewed the trial court’s decision under the abuse of discretion standard, and ruled that the trial court did not abuse its discretion in excluding evidence. The first step in determining admissible evidence is determining its relevance. It is the trial judge’s “threshold decision” to exclude irrelevant evidence, and the judge’s decision cannot be overturned “unless it is ‘clearly wrong.’” In determining the relevancy of evidence, the Texas Court of Criminal Appeals held that the evidence must be “material and probative.” To be material, evidence must be directed to a material proposition. To be probative, the evidence must have the quality of proving the proposition. Therefore, if no issue could be influenced by the evidence, then the evidence is irrelevant.

In this case, the appellate court ruled that the appellant was not justified in assaulting his ex-wife. The court held that, under a

justification defense, a person “must reasonably believe that his intervention is ‘immediately necessary’” to prevent certain harm in the very near future. Because the stepfather and former stepson were not present during the assault, the evidence would have had to show that the ex-wife or ex-mother-in-law were an immediate threat to the boys. Both courts concluded that they were not.

Additionally, the Texas Court of Criminal Appeals concluded that, under Texas Rules of Evidence § 403, the trial judge possessed authority to exclude the evidence. Based on this rule, the appellate court concluded that the proffered evidence “did not pertain to any valid defense theory in the case” and “would only have served to confuse and distract the jury from the main issues.”

Ultimately, the appellate court affirmed the appellant’s conviction because the proffered evidence was neither material nor probative to his claimed justification defense. The immediacy requirement was not met, and under Rule 403, the trial judge possessed authority to reject the appellant’s supposed evidence. Therefore, the trial court did not abuse its discretion, and the appellate court affirmed the judgment.

JUDGE MEYERS filed a concurring opinion.

The judge countered the dissenters’ arguments, and pointed to the appellant’s conduct. Looking at the appellant’s conduct, there is no indication that the appellant could have even protected his sons. The judge offered the fact that appellant placed his sons in the car, struck his ex-wife, and fled the scene, while leaving his sons behind. If the appellant believed his sons were in danger, he should not have fled the scene after striking the complainants.

PRESIDING JUDGE KELLER filed a dissenting opinion in which JUDGE HERVEY and JUDGE NEWELL joined.

The dissent disagreed with the court’s analysis regarding the need of evidence of imminent danger for a defense of third persons to survive. With regard to defense of third persons, the actor’s conduct must be “immediately necessary” to protect against harm, but it does not need the harm to be “imminent.” The dissent argued that the court misconstrued the two terms.

JUDGE HERVEY filed a dissenting opinion in which PRESIDING JUDGE KELLER and JUDGE NEWELL joined.

The dissent argued that the defendant is entitled to present a complete defense, and therefore the evidence should have been admitted before trial. Whether or not the court believes the conduct of the appellant was reasonable is not the proper inquiry, the dissent argued. The real issue is whether the appellant is afforded the opportunity to present his defense to the jury.

JUDGE NEWELL filed a dissenting opinion in which PRESIDING JUDGE KELLER and JUDGE HERVEY joined.

The dissent argued that the court improperly blocked relevant evidence. Relevant evidence need not by itself prove or disprove a particular fact; relevant evidence need only “provide a small nudge toward” proving or disproving a particular fact. Therefore, the evidence should have been admitted, and appellant should have been allowed to present this evidence to the jury. The dissent also objected to the court’s determination of reasonableness regarding the appellant’s belief. The question to whether a belief is reasonable, the dissent contended, is a jury question, and deciding it prematurely undermines the permissive principles associated with defensive jury instructions.

### ***Tate v. State***

PD-0730-15

Case Summary written by Shane Puckett, Staff Member.

JUDGE HERVEY delivered the opinion of the Court, joined by JUDGES KELLER, KEASLER, ALCALA, RICHARDSON, YEARY, and NEWELL. JUDGE JOHNSON concurred. JUDGE MEYERS dissented.

Tate was convicted of possession of a controlled substance and sentenced to two years’ confinement. The Second Court of Appeals reversed the conviction on the grounds that there was insufficient evidence to prove that Tate intentionally or knowingly possessed the controlled substance.

Issue: Whether the appellate court ignored multiple rules of sufficiency review and substituted its own judgment for the jury’s when it held that there was insufficient evidence connecting appellant to the



contraband found in plain view in the center console of the car that Tate owned and was driving.

The Court of Criminal Appeals concluded that the appellate court failed to adhere to the proper rules of sufficiency review because it failed to consider the evidence submitted cumulatively and in the light most favorable to the verdict.

To prove the requisite intent for possession of a controlled substance, the state had to show that Tate: (1) exercised control, management, or care over the substance in question; and (2) knew that the substance was contraband.

In *Evans v. State*, the court summarized a non-exhaustive list of fourteen factors that may indicate an affirmative link between the defendant and the contraband—thus establishing the defendant's knowing possession:

- (1) The defendant's presence when a search is conducted;
- (2) whether the contraband was in plain view;
- (3) the defendant's proximity to and the accessibility of the narcotic;
- (4) whether the defendant was under the influence of narcotics when arrested;
- (5) whether the defendant possessed other contraband or narcotics when arrested;
- (6) whether the defendant made incriminating statements when arrested;
- (7) whether the defendant attempted to flee;
- (8) whether the defendant made furtive gestures;
- (9) whether there was an odor of contraband;
- (10) whether other contraband or drug paraphernalia were present;
- (11) whether the defendant owned or had the right to possess the place where the drugs were found;
- (12) whether the place where the drugs were found was enclosed;
- (13) whether the defendant was found with a large amount of cash; and
- (14) whether the conduct of the defendant indicated a consciousness of guilt.

The court stated that the proper standard of review for determining the sufficiency of the evidence is to consider all admitted evidence in the light most favorable to the verdict, and then determine whether a jury could have reasonably inferred that the defendant was guilty beyond a reasonable doubt based on this evidence. The court concluded that the appellate court improperly analyzed each

circumstance of guilt in isolation, as opposed to considering the cumulative force of all the evidence when determining whether Tate exercised control over the substance and whether he knew that the substance was contraband.

The court reasoned that the appellate court improperly weighed several of the *Evans* factors that were present in this case: (1) the contraband was located while the accused was present during the search; (2) the contraband was in plain view; (3) the contraband was conveniently accessible by Tate; and (5) the contraband was found with other drug paraphernalia. Furthermore, instead of properly evaluating the evidence that was submitted, the appellate court focused on absent evidence that it would have liked to have seen—direct evidence confirming that the passengers in Tate’s car did not have the syringe, fingerprints on the syringe, and evidence that the officer who pulled Tate over saw the syringe in the vehicle. Due to the fact that the appellate court failed to consider the evidence cumulatively and in the light most favorable to the verdict, it improperly concluded that there was insufficient evidence to uphold Tate’s conviction.

### ***Thomas v. State***

No. PD-1086-15

Case Summary written by Logan Smith, Staff Member.

JUDGE RICHARDSON delivered the opinion of the Court in which JUDGE MEYERS, JUDGE JOHNSON, AND JUDGE ALCALA joined, and in which JUDGE KELLER, JUDGE KEASLER AND JUDGE HERVEY, AND JUDGE YEARY joined as to Section A. JUDGE YEARY concurred. JUDGE NEWELL did not participate.

Appellant was tried, convicted, and sentenced to life in prison for murder. While the jurors deliberated Appellant’s guilt, they requested a portion of a witness’s testimony, which was permitted under Texas Code of Criminal Procedure Article 36.28. There were varying accounts among the witnesses and the jury was in dispute as to the number of people present at the time of the shooting and the colors of their shirts. The trial court read back three brief portions of one witness’s testimony: two from her direct examination and one from her cross-examination by Appellant’s trial counsel. On direct appeal, Appellant claimed the trial court erred in reading too little testimony to the jury. The First Court of

Appeals agreed additional testimony would have been responsive to the jury's request, but it also held the error was harmless because the omission did not affect the Appellant's substantial rights. It affirmed the Appellant's conviction.

ISSUE: Whether the First Court of Appeals erred in holding that erroneously omitting testimony from a jury requesting such reading is harmful only when the excluded portion "contradicted" the selected excerpt.

As an initial matter, complaints about error in the reading of trial testimony must be preserved by objection at time of its reading. To do so, a party must object and state their grounds for such with enough specificity. Here, Appellant's objection at trial adequately complained of the trial court's failure to read back all of the witness's testimony on direct, cross, and redirect, that would have been responsive to the jury's request; the court of appeals correctly determined the Appellant preserved his complaint.

Appellant asserts a nonconstitutional error, in which harm is assessed pursuant to Tex. R. App. P. 44.2(b). Under this standard, reversal is required when the trial court's Article 36.28 error affected the Appellant's substantial rights, such as when the error itself substantially swayed the jury's judgment. Here, the court of appeals incorrectly began its harm analysis in stating an error is harmless "where there is no variance between the direct testimony and cross-examination." In this case, there was variance between the witness's direct testimony read to the jury and the excerpt from her cross-examination excluded from the jury. The harm analysis should not solely hinge on the lack of contradiction between the read and unread testimony; the error could be harmful even when no contradiction exists. A proper harm analysis requires a review of the entire record, including the weight of the evidence of the Appellant's guilt, to determine whether the trial court's erroneous omission of testimony that varied from what was read back to the jury affected the Appellant's substantial rights. After review of the record, if the appellate court can say it "has fair assurance that the error did not influence the jury, or had but a slight effect," then the error is harmless.

Here, the information elicited from the witness on cross-examination in the brief excerpt of testimony, which was not read to the jury, was neither crucially important to prove or disprove the

prosecution's or defense's theories in the case, nor did it prove or disprove an essential element of the crime charged. Furthermore, nothing the witness said on cross-examination undermined her direct testimony or rendered it potentially misleading. The partial reading also did not serve to emphasize a series of events more favorable to the State or diminish a series of events favorable to the defense. The omission did not have a substantial or injurious effect. After reviewing the record as a whole, the trial court's error under Article 36.28 did not influence the jury's verdict because such error did not affect the Appellant's substantial rights. It was harmless. The judgment of the First Court of Appeals was affirmed.

JUDGE YEARY concurring.

There is no occasion for this Court to discuss whether error was preserved in this case. It is true this Court has said issues of error preservation are systemic in the intermediate court of appeals, but it has also explained that what is meant by that is that a court of appeals should never reverse a conviction without first addressing any potential question of procedural default. Here, the State argued the error was not preserved. The court of appeals disagreed and concluded the trial court erred but went on to hold the error harmless, and this Court agrees. The court of appeals did not reverse the conviction without inquiring into potential procedural default. It affirmed the conviction despite having concluded the error was preserved, after concluding the error was harmless. Discretionary review was granted to examine the court of appeal's harm analysis, not its preservation analysis. To speak on the issue of error preservation in this discretionary review opinion, and under these circumstances, is unnecessary.

***Ex Parte Cacy***

No. WR-85,420-01

Case Summary written by Jesus Cano, Staff Member.

PER CURIAM.

Sonia Cacy was convicted of murder and sentenced to ninety-nine years' imprisonment. The Eighth Court of Appeals affirmed her conviction in part and remanded the case for a new punishment hearing.

Cacy alleged that she was actually innocent of committing the offense in this case.

Issue: Did Sonia Cacy produce exculpatory evidence that would constitute grounds for habeas corpus relief?

After holding a live evidentiary hearing, the trial court recommended habeas corpus relief. The court agreed and granted relief based on the actual innocence standard described in *Ex parte Elizondo*. Cacy was remanded to the custody of the Pecos County Sheriff to answer charges as set out in the indictment.

JUDGE YEARY concurring and PRESIDING JUDGE KELLER joining.

A post-conviction habeas corpus applicant qualifies for relief if the applicant can present new evidence, by clear and convincing evidence, that no reasonable jury would have convicted the applicant having heard the evidence presented at trial along with the new, exculpatory evidence. Judge Yeary believed that Cacy satisfied this “Herculean” burden and is entitled to relief for satisfying it. Judge Yeary also concluded that Cacy is entitled to relief on other bases, including the State using false evidence against her, her conviction being based on unreliable science, and ineffective assistance of counsel.

Judge Yeary went on to state the “actual innocence” rendition brought under *Elizondo*. Judge Yeary believed that the term overstated the criteria that the court grants habeas corpus relief. Not every successful *Elizondo* applicant is necessarily “actually innocent.” Rather this is an evidentiary standard that focuses on whether a reasonable jury, having heard the newly presented evidence would have convicted the applicant. In other words, the State would not have been able to prove the applicant guilty beyond a reasonable doubt. This standard, although high, does not rise to the point that the applicant must prove that he or she is innocent. Although an applicant may provide evidence that the applicant is indeed innocent, this level of showing is not required to be successful under the *Elizondo* standard. Some lesser showings of proof can still result in post-conviction relief.

Judge Yeary went on to explain *Ex parte Franklin*’s stiffening of the *Elizondo* standard. Under *Franklin*, the applicant must offer new evidence that is affirmative evidence of the applicant’s innocence. Judge Yeary stated that the court did not intend to raise the initial burden of production to a harder burden than that of persuasion. The court meant

to require that the new evidence the applicant provided should at least constitute some direct evidence that the applicant did not commit the crime, not an indirect impeachment of the State's evidence. Judge Yeary agreed with granting Cacy habeas corpus relief.