

**Court of Criminal Appeals**  
**June 3, 2015**

***Ex Parte Thomas Edward Castillo***

No. PD-0545-14

Case Summary written by Sarah Ellison, Articles Editor.

JUDGE HERVEY delivered the opinion of the Court.

In 2000, the appellant married Carol Sanchez. Following their separation ten years later, the appellant snuck into Sanchez's bedroom and murdered her new boyfriend, Rogelio "Ray" Nava, and inflicted stab injuries to Sanchez, which she survived. The appellant was charged in two separate indictments for capital murder and aggravated assault and burglary.

Prior to the capital-murder trial, the appellant moved to consolidate the two indictments and requested that the State specify how the burglary prior to the capital murder was committed. The trial court denied both motions. The appellant then asked for instructions to be given on murder and manslaughter instead of the full capital murder offense, a request that was also denied by the trial court. The appellant was acquitted of capital murder and subsequently filed a pretrial writ application claiming double jeopardy barred the second prosecution for the aggravated assault and burglary indictments. The trial court denied the application and the appellant appealed to the San Antonio Court of Appeals. The San Antonio Court of Appeals reversed the trial court's decision and ordered the trial court to dismiss the second indictment for aggravated assault and burglary. In response, the State filed a petition for discretionary review arguing the court of appeals erred in barring the second prosecution.

ISSUE: Whether appellant's successive prosecutions for burglary and aggravated assault was jeopardy barred as a result of his prior acquittal for capital murder.

Here, the Court of Criminal Appeals turned to the Double Jeopardy Clause, which "protects an accused from impermissible multiple punishments or successive prosecutions for the same offense after an acquittal or conviction." To understand the meaning of the word "same," the court used a test established in *United States v. Dixon*, 509 U.S. 688, 697 (1993) which explained that a lesser-included offense

is legally the same as a greater offense unless the lesser-included offense requires proof of a fact that is not required to establish the greater offense. After determining the offenses are legally the same, the court must analyze if they are also factually the same.

The State argued that burglary and capital murder were not the same because each offense requires proof of a fact the other does not. Under similar facts, the court in *Littrell v. State*, 271 S.W.3d 273 (Tex. Crim. App. 2008) previously held that the offenses of aggravated robbery and felony murder were legally the same as pled in the case. Applying *Littrell* here, the court determined that to establish capital murder, the State needed to “prove no more than the [burglary] (or attempted [burglary]) . . . plus additional facts.” As a result, the court of appeal’s decision as to the burglary charge was affirmed and the appellant’s prosecution for burglary was barred by double jeopardy.

Similarly, the State next argued that the aggravated assault claim should not be barred because the offense offered proof of a fact that capital murder does not. The court determined that “aggravated assault [was] within the proof necessary for the State to establish capital murder as charged in this case and both offenses [were] legally the same.” However, when determining if they were factually equal, the court found that the victims alleged in the capital murder and aggravated assault charges were two different units of prosecution. As a result, the court of appeal’s decision as to the aggravated assault prosecution was reversed, not barring prosecution on the aggravated assault indictment.

### ***Paredes v. State***

No. PD-1043-14

Case Summary written by Sarah Ellison, Articles Editor.

JUDGE NEWELL delivered the opinion of the unanimous Court. The appellant, a member of a Houston-area gang, killed two men in the commission of a robbery. He then gave the t-shirt he wore during the commission of the crime to a fellow gang member and requested that she wash it. Instead of washing it, the gang member turned the t-shirt over to police and the t-shirt was sent to a private forensic laboratory, Identigene, for DNA testing. The blood on the clothing matched that of the victims.

At trial, Robin Freeman, the forensic-laboratory director for Identigene, testified that although she had not personally conducted the physical aspects of the test, she had supervised the process. While testifying, Freeman ensured that safety protocols were in place and that she had conducted the final interpretation of the data results. Moreover, the three analysts who physically completed the analysis did not testify, documents containing the raw data were not introduced, and Freeman did not testify as to someone else's opinions. Appellant objected on the grounds he was entitled to cross-examine the three analysts who conducted the examination and the trial judge overruled the objection. The trial court's decision was affirmed by the Fourteenth Court of Appeals. Subsequent to this decision, this court held in *Burch v. State*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013) that the admission of a lab report containing drug test results was a Confrontation Clause violation. As a result, this court granted appellant's petition for discretionary review and the case was remanded to determine if the rationale of the *Burch* decision should apply in this case. Issue: Does a violation of the Confrontation Clause result from the admission of a supervising DNA analyst's opinion, when it is based on computer-generated data gathered through batch DNA testing?

On remand, this court distinguished the facts of appellant's case from that of *Burch* and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In *Burch* and *Bullcoming*, the testifying analysts lacked personal knowledge and had neither conducted nor observed the testing processes at their laboratories. The facts of this case proved different given Freeman's hands-on analysis as well as the fact that raw DNA data was not admitted into evidence.

In making its decision, this court further distinguished a set of cases including *Pointer v. Texas*, 380 U.S. 400 (1965), *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Williams v. Illinois*, 132 S. Ct. 2221 (2012). Freeman's performance of the crucial data analysis swayed the court. Because Freeman testified to her own conclusions, and not just to a non-testifying experts analysis, the court determined this was not an attempt by the State to introduce a testimonial lab report through a surrogate. The court of appeals decision was affirmed.

***Phillips v. State***

No. PD-0789-14

Case Summary written by Frederick C. Hutterer, Staff Member.

JUDGE RICHARDSON delivered the opinion of the court, in which PRESIDING JUDGE KELLER and JUDGE NEWELL filed concurring opinions.

On January 17, 2007, Christopher Allen Phillips robbed a hair salon at gunpoint. Police arrested Andre Dulin, who was seen with Phillips at a grocery store after the robbery. Police discovered that Dulin was in possession of property stolen from the hair salon. Dulin testified against Phillips at Phillips' trial.

After the defense called its witnesses, the State called two rebuttal witnesses. The witnesses were inmates who had spent time with Phillips in the county jail. Kavin Diggs stated that Phillips attempted to persuade him to testify that Diggs heard Dulin say that he had committed the crime alone. Elroy Slaughter testified that Phillips attempted to persuade him to sign an affidavit, which would clear Phillips' name. During direct examination, Slaughter testified to never having met Dulin. On cross-examination, however, Slaughter claimed that he had informed a case investigator that he had met with Dulin. While the defense tried to impeach Slaughter, Slaughter maintained that Phillips attempted to convince him to sign an affidavit stating that "Andre was trying to put the case off on him." During redirect, Slaughter claimed that he felt as though Phillips was trying to persuade him to lie.

The trial court read the jury charge without objection, which contained an accomplice-witness charge. The charge, pursuant to Article 38.14 of the Texas Code of Criminal Procedure, informed the jury that it was prohibited from convicting Phillips solely on the basis of Dulin's testimony without additional evidence.

During its closing, the State asked whether "an innocent person go[es] around the jail asking people he's just met to sign affidavits and lie for him?" The prosecution continued to emphasize this point without objection from the defense.

On appeal, the court of appeals held that the testimony did not sufficiently connect Phillips with the robbery, and that the witnesses' testimony was not against Phillips' interest. The court of appeals stated

that the trial court did not err when it did not include an instruction pursuant to Article 38.075(a).

Issue: Whether statements by defendants to jailhouse witnesses are capable of being against defendants' interests even if the statements do not pose a risk of criminal liability.

The Court of Criminal Appeals held that a statement against one's interest is a statement that adversely affects his position. As a result, the court concluded that the trial court erred when it failed to include a jury instruction pursuant to Article 38.075(a).

The court reasoned that the court of appeals' definition of "a statement against the defendant's interest" was unduly narrow. The court stated that a defendant's statement may be against his interest regardless of whether the statement is sufficient to support accomplice-witness testimony. Article 38.075(a) does not contain language limiting its applicability to statements against interest, so the court did not interpret the Article to contain such a limitation. The Court added that a defendant's statement to a jailhouse witness, regardless of whether it has the effect of exposing him to liability, could still be against his interest.

The court concluded that the legislature did not indicate what a "statement against the defendant's interest" is, but that the purpose of Article 38.075(a) would be most effectively achieved by giving the phrase a broad meaning—"a statement that is against a defendant's interest is one that is adverse to his position."

As a result, the court held that Phillips' alleged requests for the witnesses to lie were adverse to his position and against his interest. The court asserted that the trial court erred by failing to include a jury instruction pursuant to Article 38.075(a). Furthermore, the court vacated and remanded the case to the court of appeals because the court did not perform a harm analysis or address two issues on appeal.

PRESIDING JUDGE KELLER, concurring.

Judge Keller stated that the testimony in the case should have been analyzed as though it were accomplice-witness testimony. Because an accomplice-witness instruction is normally required for accomplice-witness testimony, Judge Keller held that an instruction would have been appropriate in this case as well.

JUDGE NEWELL, concurring.

Judge Newell agreed with the majority's holding that a jury instruction is necessary when a jailhouse witness testifies to a statement made by a defendant which could then be used against the defendant in trial. Judge Newell also disagreed with Presiding Judge Keller's assertion that a lack of jury instruction is normally harmless when the statement isn't confessional. Judge Newell reasoned that a denial of such an instruction could have an effect on a jury's verdict, even in a close trial.