IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0196-16

RODNEY DIMITRIUS LAKE, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
TARRANT COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

In this case, there appears to be unanimous agreement that the trial court violated the constitutional rights of Rodney Dimitrius Lake, appellant, by refusing to permit his attorney to make a closing argument at the trial court's hearing on the motion to revoke appellant's community supervision. Through a cursory analysis, the court of appeals decided that appellant was harmed by that error and it ordered the trial court to conduct a new revocation hearing. I agree with the ultimate decision of the court of appeals to grant appellant a new

revocation hearing. Because the court of appeals reached the correct ultimate disposition in this case, and because this Court's discussion of structural error is unnecessary under the facts of this case, I respectfully dissent.

A fair reading of the appellate court's opinion reflects that the court of appeals considered the error at issue in this case to be constitutional error for which harm could not be ascertained in light of the type of error that had occurred. Although it could not ascertain the harm that would result from the error, the court of appeals never characterized the error as structural. I, therefore, disagree with this Court's characterization of the court of appeals's analysis as treating the error as structural. In its entirety, the court of appeals's harm analysis in its opinion states,

> **Reversible Error Presumed from Denial of Closing Argument**
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> As the *Hyer* [*v. State*][1] court explained in a footnote, relying on United States Supreme Court and Texas Court of Criminal Appeals cases, the Sixth Amendment right to effective assistance of counsel and a defendant's right to be heard under Article 1, Section 10 of the Texas Constitution both guarantee a defendant the right to make a closing argument. Those rights, therefore, are violated when a trial court denies a defendant the opportunity to make a closing argument. *Because the error is constitutional and the effect of the denial of closing argument cannot be assessed, the error is reversible without any showing of harm.* We therefore sustain Appellant's first point, which is dispositive. Consequently, we do not reach his second point.

Lake v. State, 481 S.W.3d 656, 660 (Tex. App.—Fort Worth 2016) (emphasis added). This discussion reflects that the court of appeals considered the error in this case to be of a constitutional dimension, and one for which the harmful effect "cannot be assessed." *Id.* But

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[1] *Hyer v. State*, 335 S.W.3d 859 (Tex. App.—Amarillo 2011).

the court of appeals did not cite any cases discussing structural error, nor did it reference that term in reaching its conclusion as to harm in this case. Given this fact, I disagree that it is necessary for this Court to now conduct such an extensive analysis of whether the error in this case was properly treated as structural error by the court of appeals.

Further, because the court of appeals has already essentially conducted a harm analysis for constitutional error, I disagree that it is necessary for this Court to remand this case to that court for it to conduct a new harm analysis. The constitutional-error harm standard under Texas Rule of Appellate Procedure 44.2(a) states, "[T]he court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). Under that harm standard, an appellate court must reverse for constitutional error unless it is convinced beyond a reasonable doubt that the conviction was unaffected by the error. *See id.* Here, rather than discuss whether the record demonstrated that the conviction was unaffected by the error, the court of appeals indicated that "the effect of the denial of closing argument cannot be assessed." *Lake*, 481 S.W.3d at 660. As a practical matter, I agree with that explanation. An attempt to assess the actual effect of the error in this case would require pure speculation from the appellate court as to what trial counsel may have argued to the trial court had he been permitted to make an argument and as to how that argument may have influenced the trial court, even considering the trial judge's statement that he did not need to hear argument. Given this presumption in favor of reversal of a conviction for

constitutional errors when the record fails to affirmatively convince an appellate court that the conviction was unaffected by the error, it was proper for the court of appeals to conclude that this error was not harmless beyond a reasonable doubt under a constitutional-harm standard. *See id*.

In my view, the instant case is not a complicated one requiring consideration of the law on structural error or any speculation about what appellant's attorney may have argued in his closing statement or how the trial court may have received that information. Rather, the resolution of this case comes down to the strict application of the plain language in Texas Rule of Appellate Procedure 44.2(a). *See* TEX. R. APP. P. 44.2(a). Under that rule, the court of appeals was required to reverse the underlying conviction unless it was convinced beyond a reasonable doubt that the denial of trial counsel's closing argument did not contribute to appellant's conviction or punishment. Under the circumstances of this case, the court of appeals was clearly not convinced beyond a reasonable doubt that the denial of trial counsel's closing argument did not contribute to appellant's conviction or punishment. Maybe the silent record would have been enough to show by a preponderance of the evidence that appellant's conviction or punishment was unaffected by the absence of a closing argument. But the burden here, beyond a reasonable doubt, is extremely high, and the record plainly fails to show by that standard that the denial of trial counsel's argument did not contribute to appellant's punishment.

The issue before us in this case is analogous to the one that was before us in

VanNortrick v. State, 227 S.W.3d 706 (Tex. Crim. App. 2007). In *VanNortrick*, the trial court had erred by failing to admonish the defendant regarding the deportation consequences of his guilty plea. *Id.* at 708. On discretionary review, we held that the non-constitutional error affected VanNortrick's substantial rights and thus required reversal under Rule of Appellate Procedure 44.2(b). *Id.* at 714. In explaining our reasoning, we observed that the record was insufficient to determine whether VanNortrick was a U.S. citizen. *Id.* This was an important consideration in our assessment of harm because, if the record had established that VanNortrick was a U.S. citizen, then the trial court's error would have been harmless, given that the admonition could not have had any bearing on his decision to plead guilty. *Id.* at 709. On the other hand, if the record had established that VanNortrick was a non-citizen, then the error would not have been harmless because, under those circumstances, a defendant is "clearly at a greater disadvantage if subject to deportation as a criminal deportee," and a reviewing court "could not be assured that, aware of the greater disadvantage, the alien defendant would have pleaded guilty." *Id.* Given the record's lack of clarity with respect to whether VanNortrick was a citizen and a lack of any indication that VanNortrick was otherwise aware of the possible immigration consequences of a guilty plea, we reasoned that, regardless of the strength of the evidence of VanNortrick's guilt, we could have "no fair assurance that [VanNortrick] would not have changed his guilty plea had he been properly admonished." *Id.* at 713. We observed that, under these circumstances, we had "no way of knowing what role the knowledge would play in an individual defendant's decision about

whether to plead guilty." *Id*. We concluded,

> Because we cannot know whether [VanNortrick] is a United States citizen, we agree with the Court of Appeals that it is impossible to determine with any certainty whether [his] decision to plead guilty would have changed had he been properly admonished. . . . All we can do is speculate about whether [VanNortrick] would have changed his mind about his guilty plea had he been admonished. In the face of such doubt, we have no fair assurance that [VanNortrick] would not have changed his decision to plead guilty had the trial court admonished him, and so, the error is not harmless.

Id. at 713-14. We accordingly held that VanNortrick's substantial rights had been affected. *Id.* at 714. We noted that our reasoning and holding were consistent with the language in *Cain v. State* that had acknowledged that certain types of errors defy analysis by harmless error standards or are errors for which the data is insufficient to conduct a meaningful harm analysis. *Id.* at 714 (citing *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (recognizing that, "where the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harmless error analysis, then the error will not be proven harmless beyond a reasonable doubt")).

This Court's reasoning in *VanNortrick* signals that the court of appeals correctly held that the error in the instant case was not harmless beyond a reasonable doubt. Here, as in *VanNortrick*, the record is wholly inadequate to provide any indication as to what trial counsel might have said during closing argument. Given the absence of this information from the record, a reviewing court has "no way of knowing what role" counsel's closing arguments might have played in influencing the trial court's decision to revoke appellant's community supervision. *Id.* at 713. Thus, "[a]ll we can do is speculate" about the possible

effects of counsel's arguments, had they been permitted. *Id.* at 714. Under these circumstances, it is "impossible to determine with any certainty" whether the trial court's decision would have changed had counsel properly been permitted to make a closing argument. *Id.* at 713. As in *VanNortrick*, therefore, the error in the present case appears to be one for which any assessment of harm would be based upon pure guesswork by the appellate court. This is precisely the type of error that we identified in *Cain* as requiring reversal because the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harm analysis. *Cain*, 947 S.W.2d at 264.

Further, I observe that the harm standard that we applied in *VanNortrick* was the less stringent standard that applies to non-constitutional errors, as compared to the more rigorous standard that applies to the constitutional error in the instant case. *Compare* TEX. R. APP. P. 44.2(b) (providing that "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"), *with* TEX. R. APP. P. 44.2(a) (as to constitutional errors, appellate court "must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment"). Given that this Court was unable to conclude in *VanNortrick* that the error did not affect VanNortrick's substantial rights under the less stringent standard of Rule 44.2(b), it is highly implausible that an appellate court in the instant case could properly conclude beyond a reasonable doubt that the error did not contribute to appellant's conviction or punishment under the heightened requirements of Rule 44.2(a), which imposes a

presumption of harm. *See Bell v. State*, 415 S.W.3d 278, 284 (Tex. Crim. App. 2013) (requirements of Rule 44.2(a) are "more rigorous" than those of Rule 44.2(b)); *Long v. State*, 203 S.W.3d 352, 353 (Tex. Crim. App. 2006) (observing that Rule 44.2(a) "is a stricter standard" than Rule 44.2(b); any error that is harmful under less rigid standard of Rule 44.2(b) "would also be harmful under 44.2(a)").

I would uphold the judgment of the court of appeals because the presumption is that constitutional error is harmful unless it is shown that the error did not contribute to the conviction, and here, the record fails to show that the error did not contribute to the conviction. A judge's exclamation that he does not need closing argument is unpersuasive because the judge is unaware of what that argument may be or how it may influence a decision. That exclamation, which is the only thing in the record that would support a finding of harmless error, is inadequate to overcome the presumption that the error was harmful in this case. Because the nature of the error in this case is one for which harm cannot fairly be assessed under these circumstances, I would uphold the appellate court's decision to find the error harmful and order a new revocation hearing. I, therefore, respectfully dissent from this Court's judgment that reverses the judgment of the court of appeals and remands this case to that court so that it may conduct a new harm analysis.

Filed: February 8, 2017

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