IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1289-17

DEDRIC D'SHAWN JONES, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY

WALKER, J., filed a dissenting opinion.

DISSENTING OPINION

I agree with the Court that the trial court's exclusion of Appellant's sought-after line of cross-examination was erroneous, and I join Part II of the Court's opinion. However, I disagree with the Court's conclusion that the error was harmless. There was harm in the exclusion, and I would affirm the decision of the court of appeals. I disagree with the Court's decision to reverse and remand, and I respectfully dissent.

I — Harmless Error of Limitations on Cross-Examination

The improper limitation of cross-examination violates the Confrontation Clause of the United States Constitution and is subject to review for harmless error. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); Tex. R. App. P. 44.2(a) (constitutional error is subject to harmless error review). Under the harmless error standard, errors must be reversed unless the reviewing court determines, beyond a reasonable doubt, that the error did not contribute to the conviction or punishment. *Chapman v. California*, 386 U.S. 18, 24 (1967); Tex. R. App. P. 44.2(a). If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error was not harmless beyond a reasonable doubt. *Rubio v. State*, 241 S.W.3d 1, 3 (Tex. Crim. App. 2007).

The focus of the harmless error test should not be on the propriety of the outcome of the trial. *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016). Instead, the probable impact of the error on the jury, in light of all other evidence available, should be calculated. *Id.* Evidence of the defendant's guilt should be considered, but that is only one factor in the analysis. *Rubio*, 241 S.W.3d at 3. The question is not whether the legally admitted evidence was sufficient to support the verdict, but rather whether the State has proved, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. *Satterwhite v. Texas*, 486 U.S. 249, 258–59 (1988).

When the question is harmless error due to the improper limitation of cross-examination, reviewing courts apply a three prong analysis. *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991). First, reviewing courts should assume that the damaging potential of the desired cross-examination was fully realized. *Van Arsdall*, 475 U.S. at 684; *Shelby*, 819 S.W.2d at 547.

Second, with that assumption in mind, reviewing courts then ask whether the admission of that impeachment evidence, in the context of the trial as a whole, would have likely made any

significant impact upon the minds of an average jury. *Davis v. State*, 203 S.W.3d 845, 850 (Tex. Crim. App. 2006). To decide that question, courts review the error in connection with the following factors: (1) the importance of the witness's testimony to the State's case; (2) whether the witness's testimony was cumulative; (3) the absence or presence of corroborating or contradicting testimony of the witness on material points; (4) the extent of cross-examination of the witness otherwise permitted; and (5) the overall strength of the State's case. *Van Arsdall*, 475 U.S. at 684; *Shelby*, 819 S.W.2d at 547.

Finally, in light of the first two prongs, reviewing courts must consider whether the error was harmless beyond a reasonable doubt. *Shelby*, 819 S.W.2d at 547. The reviewing court must determine whether it is convinced, beyond a reasonable doubt, that the fact-finding process was reliable even if the improperly restricted or excluded evidence is factored into the analysis. *Davis*, 203 S.W.3d at 850. To perform this analysis, reviewing courts must review the facts of the case and the excluded evidence. *Love*, 861 S.W.2d at 904.

II — The Damaging Potential

Beginning with the first step of the analysis, the damaging potential of Appellant's sought-after cross-examination of Gonzales for bias should be assumed. *Van Arsdall*, 475 U.S. at 684; *Shelby*, 819 S.W.2d at 547.

Appellant's line of cross-examination would have shown that Gonzales knew of the ongoing child custody proceedings to terminate Appellant's and Jimenez's parental rights to the child. Cross-examination would have also shown that Gonzales believed that damage had been done by both Appellant and Jimenez to their parental rights to the child. The jury would have also learned that, despite the child's current placement, Gonzales previously always had possession of the child. The

jury would have heard that Gonzales believed the child deserved to be safe, that Gonzales wanted the child to be safe, and that Gonzales takes care of the child because she wanted the child to be safe.

It is true that the offer of proof made by defense counsel did not clearly establish that Gonzales had an interest in the outcome of the ongoing child custody proceedings. However, it was not necessary that Gonzales fully admit her interests and her biases. Indeed, rarely will a witness readily admit that he or she is coloring testimony because of an interest in a particular outcome in the case. What did make it into the record during the offer of proof was, in my opinion, sufficient to establish actual bias, not just potential bias. Even so, it is reasonable to infer, from Gonzales's desire for the child to be safe, and the fact that Gonzales cared for the child because she wanted the child to be safe, that Gonzales wanted to have possession or custody of the child. How else can she ensure the child's safety? Additionally, her evasiveness and non-answers to the questions, though they do not directly indicate an interest and a bias, show that Gonzales was being evasive and would not answer questions regarding her potential biases. This was despite her testimony to the jury which was rich in detail about the confrontation between herself and Appellant, the tug-of-war over the child, and Appellant's ransacking of the house.[1] The jury would have taken Gonzales's sudden evasiveness and inability to answer these particular questions as showing she was hiding something about the topic.

At the very least, cross-examination would have exposed that Gonzales's desire for the child to be safe meant that, because she believed Appellant and Jimenez were damaging to the child, Gonzales had an interest in the termination of Appellant's and Jimenez's parental rights. Of course,

---

[1] All of which occurred after the charged offense and are irrelevant to the actual matter of whether Appellant assaulted Jimenez.

the offer of proof did not establish that a conviction in Appellant's case would have led to the termination of his parental rights. However, the offer of proof did show that she was aware of the possibility. In response to counsel's question whether Gonzales had a preference that Appellant and Jimenez have their parental rights terminated, Gonzales responded that she did not have a say in that decision. She acknowledged the possibility of termination, even though the decision as to whether to terminate was out of her hands.

I will note that questioning in cross-examination is normally much more thorough than questioning in an offer of proof, and I am certain that this would have been the case with Appellant's trial counsel. Good trial attorneys, in an offer of proof, ask a prosecution witness only enough questions to convince the trial judge that the cross-examination should be allowed. The trial attorney would not become confrontational with the witness until the jury was present so as to take the witness by surprise in front of the jury. In a cross-examination before the jury, the attorney would start out, much like Appellant's trial counsel did in the offer of proof, by asking questions in a cordial and non-confrontational manner. Then, after the witness has told her story, the attorney would have the witness go over the subject again, but this time in a confrontational manner in order to impart the attorney's skepticism of the witness onto the jury. As the cross-examination progresses, questions become leading statements to which the witness can only answer "yes" or "no." The attorney's questions to key issues are asked in such a way that the attorney does not care if the answer is yes or no, and he actually hopes the witness is more and more untruthful as the questioning continues. I strongly feel that if the trial court allowed Appellant's desired cross-examination, by the end of cross-examination the jury would have had serious doubts about Gonzales's credibility as to the potential bias which would also spill over to her assertion that Appellant intentionally hit

Jimenez.

A full realization of the damaging potential would mean that the jury would have been aware of Gonzales's bias. The jury would have recognized that Gonzales was hiding the ball in regards to herself, and the jury would have recognized that Gonzales was saying everything she needed to in order to paint Appellant as an unfit father and ensure his conviction. The jury would have found her non-credible, and the jury would have discounted her testimony.

III — The *Van Arsdall* Factors

The second step of the analysis takes the assumption of damage, and considers the impact of that damage on the rest of the case in light of the factors identified in *Van Arsdall*. *Van Arsdall*, 475 U.S. at 684; *Shelby*, 819 S.W.2d at 547. Considering the *Van Arsdall* factors, the court of appeals noted first that Gonzales's testimony was of great importance to the State's case. *Jones v. State*, 540 S.W.3d 16, 34 (Tex. App.—Houston [1st Dist.] 2017, pet. granted). Jimenez did not testify, and the only eyewitness, other than Appellant himself, was Gonzales. *Id.* For the same reason, the court of appeals also found that Gonzales's testimony was not cumulative, because no other eyewitness present at the time of the offense testified about the confrontation between Appellant and Jimenez, other than Appellant himself, as Jimenez did not testify. *Id.*

On the third *Van Arsdall* factor, the presence or absence of corroborating or contradicting testimony, the court of appeals identified discrepancies between Gonzales's testimony and Appellant's testimony. *Id.* Appellant testified that he slapped Jimenez in self-defense after Jimenez karate kicked the phone he was holding, striking his hand and causing the phone to hit the car. *Id.* In contrast, Gonzales said Appellant struck Jimenez after Jimenez either whacked the phone or merely slapped the phone. *Id.* With regard to Officer Portillo's testimony, the court of appeals noted

that Gonzales testified that Jimenez's mouth had swollen into a big ball on her lip. *Id.* Officer Portillo testified that Jimenez had redness to the face, a cut on her upper lip, and watery eyes. *Id.* Furthermore, Gonzales said Appellant ransacked the house, but Officer Portillo saw no evidence of ransacking. *Id.*

While the discrepancies raised by Appellant's version of events could have been waved away by the jury as self-serving, Gonzales's version of events could not have been waved away absent the cross-examination, which would have revealed her testimony was also self-serving in its own way. Both versions of events being self-serving and suspect, Officer Portillo, who had no apparent bias or interest in the case, would have pushed Gonzales's testimony even further down, and the jury potentially could have found Appellant more credible than Gonzales.

Most importantly to the court of appeals, Appellant's inability to cross-examine Gonzales for bias or interest greatly affected the last *Van Arsdall* factor, the strength of the State's case. *Id.* at 34–35. The State's case depended heavily upon Gonzales's testimony, and therefore her credibility was paramount to the strength of the State's case.

The court of appeals's analysis under *Van Arsdall* was correct, and we should endorse it rather than reverse it. As the Court finds in its opinion: "most of the *Van Arsdall* factors appear to militate in favor of the court of appeals' conclusion that the error was not harmless beyond a reasonable doubt." Majority op. at 13. Nevertheless, the Court sets aside those militating factors and concludes that Appellant was not harmed in this case because Appellant eventually testified during the defense case, and in his testimony Appellant admitted to striking Jimenez, albeit under a claim of self-defense. Perhaps the argument is that the last *Van Arsdall* factor, the strength of the prosecution's case, was enough to overcome any impeachment of Gonzales because Appellant

testified.

The problem with this is that Appellant's testimony was not a part of the State's case at all. He testified in his own defense and that was after Gonzales testified that Appellant struck Jimenez. Because the trial court did not allow the sought-after cross-examination of Gonzales, which would have decimated Gonzales's credibility, the court basically assured a guilty verdict unless Appellant took the stand to explain and negate what Gonzales said.

IV — Fullest Realization of the Damaging Potential

Returning to the initial assumption we must make under *Van Arsdall*, fully realizing the damage that Appellant's sought-after cross-examination of Gonzales could have done would have drastically altered the course of the case. Had Gonzales's bias been exposed to the jury, her credibility would have been undermined such that the jury may not have believed her testimony that Appellant struck Jimenez.

It would be reasonable to conclude, then, that had Appellant been able to perform the desired impeachment of Gonzales during the State's case, Appellant almost certainly would not have testified at all during the defense case. Gonzales was the State's only eyewitness to the event. Assuming counsel provided effective assistance, he would have strongly advised Appellant not to testify given the damaged state of the prosecution's case which, at that phase of the trial, hinged entirely upon Gonzales and her believability. With Gonzales's testimony being non-credible, the State would not have been able to show, beyond a reasonable doubt, that Appellant struck Jimenez, and there would have been no need for Appellant to testify to explain *why* he struck Jimenez.

Furthermore, only because Appellant testified, his prior felony convictions were revealed to the jury. The jurors would not have learned this prejudicial information had Appellant not taken the

stand to testify, and experience teaches us that jurors, upon learning of those prior bad acts, regardless of how irrelevant they may be to the offense at trial, internalize those prior bad acts and may improperly make decisions based upon them. There is a "risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)). As explained by Professors Goode and Wellborn:

> The paradox is that a person's conduct on one occasion would be thought by most persons to be presumptively probative on the issue of her disputed behavior on another. There are few people who do not act on the basis of that belief in their private lives. Most would hesitate to leave their children with a babysitter believed to have been cruel and physically aggressive toward a child. Few would, without special assurances, entrust their church's funds to a person reputed to have been previously dishonest with respect to monies entrusted to her care. These are, of course, examples of using character to predict future conduct rather than, as in court, to recreate past events. However, the probative quality of the character evidence is no less in the latter situation. Nevertheless, the principle of Rule 404(a) points towards exclusion because such evidence "usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise."

1 STEVEN GOODE & OLIN GUY WELLBORN III, TEXAS PRACTICE SERIES, GUIDE TO THE TEXAS RULES OF EVIDENCE § 404.2 (4th ed. 2016).

This is the very reason Rule 404 of the Rules of Evidence exists, "to counter the possibility that evidence may be admitted to show a defendant's corrupt nature from which the jury may then render a verdict not on the facts of the case before them, but, rather, on their perception of the defendant's character." *Rankin v. State*, 974 S.W.2d 707, 709 (Tex. Crim. App. 1996), *withdrawn in part on reconsideration*, 974 S.W.2d 707, 717 (Tex. Crim. App. 1998) (op. on reh'g). Rule 404(b) allows such evidence only "if it has relevance *apart from* its tendency 'to prove the character of a person in order to show that he acted in conformity therewith.'" *Montgomery v. State*, 810 S.W.2d

372, 387 (Tex. Crim. App. 1990) (op. on reh'g) (quoting Tex. R. Crim. Evid. 404(b)).

Counsel and Appellant were acutely aware that the prejudicial prior felony convictions were going to be admitted into evidence were he to testify—the trial court and counsel thoroughly discussed the State's intention to introduce those acts as impeachment evidence prior to the start of the defense case and Appellant's testimony. Yet counsel and Appellant necessarily had to "take the hit on the chin," because Appellant was unable to thoroughly cross-examine Gonzales and her testimony that Appellant struck Jimenez was left to the jury, untarnished and not subject to question.

If the damage was fully realized, I strongly believe that Appellant would not have testified at all. The jury would have been left with the testimony of the discredited Gonzales, and the jury would never have heard about Appellant's prior felony convictions.

V — Reasonable Doubt

In conclusion, the error—excluding cross-examination of Gonzales over whether she was aware of ongoing child custody proceedings and her interest therein—was not harmless. I am not convinced that the error did not contribute to Appellant's guilty verdict, and I therefore cannot say that the error was harmless beyond a reasonable doubt. It is reasonably doubtful that the jury would have believed Gonzales's testimony if her bias was exposed, and it is reasonably doubtful that Appellant would have testified, admitted to striking Jimenez, and had his prior felony convictions revealed to the jury. Harm resulted as a consequence of limiting Appellant's cross-examination. The court of appeals reached the correct conclusion, and we should affirm it. Because the Court does otherwise, I must dissent.

Filed: March 27, 2019
Publish