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

YEARY, J., delivered the opinion of the Court in which KELLER, P.J., and KEEL and SLAUGHTER, JJ., joined, and in which KEASLER, J., joined as to Parts I, III & IV, and in which WALKER, J., joined as to Part II. HERVEY, J., filed a concurring opinion in which RICHARDSON and NEWELL, JJ., joined. NEWELL, J., filed a concurring opinion in which HERVEY and RICHARDSON, JJ., joined. WALKER, J., filed a dissenting opinion.

OPINION

Appellant was convicted of the offense of assault on a family member, and because he had previously been convicted of such an offense, this repeat offense was a third degree felony. TEX. PENAL CODE § 22.01(b)(2)(A). Appellant pled true to two additional prior felony enhancement counts, and the trial court assessed his punishment at confinement for twenty-five years in the penitentiary. TEX. PENAL CODE § 12.42(d). The court of appeals

reversed the conviction, however, holding that the trial court erred in disallowing a certain line of questioning during Appellant's cross-examination of the principal witness against him, that this error was of constitutional dimension, and that it was not harmless beyond a reasonable doubt. *Jones v. State*, 540 S.W.3d 16, 33–35 (Tex. App.—Houston [1st Dist.] 2017). Having reversed the conviction on this basis, the court of appeals declined to address Appellant's second point of error. *Id*. at 35 n.4.

In its petition for discretionary review, the State contends that the court of appeals erred on both counts—in concluding both that constitutional error occurred and that any constitutional error was not harmless. We granted review of both questions, and we now reverse the court of appeals' judgment on the basis of the second, concluding that, while constitutional error did occur, it was harmless beyond a reasonable doubt.

I. BACKGROUND

A. The Incident

The indictment alleged that Appellant caused bodily injury to Amy Jimenez, with whom he had a dating relationship, by striking her with his hand. Jimenez did not testify against Appellant at trial, however. Instead, the State called Jimenez's mother, Adeline Gonzales, to testify to the incident that was the basis for the charge. Gonzales testified that she had recently moved from an apartment into a house, and that Jimenez and Appellant (Jimenez's boyfriend), and their two-year-old daughter, were living there with her. On the evening of December 17, 2014, they all gathered in front of a new "huge" television to watch

a movie. When a sexually explicit image appeared on the screen, Appellant made an "inappropriate" comment. Jimenez rebuked Appellant ("Hey, my mom's in the room."), and tensions flared. Gonzales retreated to her bedroom with the child, and Appellant went to the garage.

At around 10 p.m., Gonzales informed Jimenez that her daughter needed "some stuff for school[.]" Jimenez went into the garage to get the car keys from Appellant, and a "heated conversation" ensued. Gonzales, with the child in her arms, watched the interaction between Jimenez and Appellant from the kitchen doorway leading into the garage. She testified that Jimenez stood "pretty close" to Appellant, trying to get his attention, but Appellant continued focusing on his cell phone, ignoring her. Gonzales described Jimenez's reaction somewhat variably, testifying that she "whacked," "slapped," and "tapped" the cell phone in Appellant's hands. She denied that Jimenez ever "kicked" the cell phone, however. Appellant "took a swing at [Jimenez,] and he hit her in the face . . . pretty hard because her whole face went back." The blow bloodied Jimenez's lip and caused it to swell up.

Seeing that Jimenez looked "scared," Gonzales instructed her to drive to her father's house, and Gonzales then called 9-1-1, asking them to "hurry." According to Gonzales, Appellant began to "ransack" the interior of the house. She elaborated: "You could hear things being thrown over." Appellant then came back into the garage, "screaming obscenities" and calling Gonzales names. He picked up a jack and began "swinging it" in close proximity to Gonzales, who was still holding the child. Gonzales demanded that

Appellant leave, but he refused to do so until he could "kiss my baby." He grabbed the crying child from Gonzales and held her "like a rag doll under his arm" as she screamed and struggled. Appellant eventually put the child down, and when the police arrived, he went back into the house, then exited the back door. According to Gonzales, Jimenez did not return to the house until after the police arrived.

The State also introduced several letters that Appellant wrote to Jimenez from the jail as he awaited trial. In the letters he urged her not to show up to testify against him or, alternatively, urged her to "lie for" him. He acknowledged that Gonzales "was a witness" to the encounter, and he never made any mention of Jimenez having "kicked" him, nor did he ask Jimenez to admit that she had done so.

The first police officer to arrive at the scene, Officer Jairo Portillo, also testified. His account conflicted with Gonzales's in certain respects. For example, he testified that Jimenez was at the scene when he got there. More importantly, he rebutted Gonzales's claim that Appellant "ransacked" the interior of the house. Gonzales had insisted that she had informed the police of Appellant's destructive behavior, but Portillo saw no evidence of it in the house,[1] and there was no mention of it in the police report.

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[1] Portillo testified:

> Q. [BY DEFENSE COUNSEL] When you went through the house, did you see anything that was overly disturbed? Was there lamps on the floor, tables turned over, anything that had -- would give you a direct knowledge that something had happened inside the house?
>
> A. No.

Appellant's testimony was consistent with Gonzales's in many respects. The main difference was his account of Jimenez's conduct. During the hour-and-a-half in which Appellant remained in the garage playing games on his cell phone, he maintained, Jimenez came out several times "trying to pick a fight," but he ignored her. Finally, he claimed, Jimenez "kicked" the phone from his hands—a "karate kick"—causing him to drop it. According to Appellant, however, Jimenez did not just strike the phone: "She kind of hit my hand pretty hard." He readily admitted that, in response, he "slapped" Jimenez "across her face[.]" He doubted that Gonzales could have seen this exchange, however, given their respective positions in the garage. On cross-examination, he agreed with the prosecutor that Jimenez had "slapped" the phone from his hand, but when the discrepancy was pointed out to him, he insisted once again that "[s]he kicked me."

B. The Offer of Proof

Immediately before the parties made their opening statements to the jury, Appellant made it known that he desired to question Gonzales with respect to a Child Protective Services (CPS) proceeding to relinquish the parental rights of both Jimenez and Appellant.

Q. You never saw any of that, right?

A. No, I didn't see anything like that.

Q. When you went through the rooms, you never saw anything that was just thrown askew all over the place that would say, Oh, they were stealing something, taking something, doing something within the house, correct?

A. Correct.

The trial court ruled that this inquiry would not be relevant, to which Appellant objected.[2]

Later, at the conclusion of Gonzales's testimony, Appellant made an offer of proof:

> Q. [DEFENSE COUNSEL] Do you know that there's a CPS -- that there's a child custody battle going on to eliminate parental rights of both [Jimenez] and [Appellant]?
>
> A. [GONZALES] Yes, sir.
>
> Q. Do you have an interest in that being done?
>
> A. I don't understand what that means.

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[2] In its totality, the pretrial exchange was as follows:

> [DEFENSE COUNSEL]: The third and last point, Judge, it is my understanding that CPS is involved and the welfare of the children in whether or not parental rights were taken from the complaining witness, [Jimenez], and the defendant, and that one of the persons who may be -- I don't know how to put this gently -- would get the grandchild would be the mother. Again, it would go to motive as to why -- if she sat up there and saw, based on the police report, if she saw mutual conduct –
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> THE COURT: So you want to ask Adeline Gonzales whether there's a CPS investigation and whether she gets the children if that CPS issue was sustained?
>
> [DEFENSE COUNSEL]: Yes.
>
> [PROSECUTOR]: I mean, presently she doesn't even have the child. The child is with the aunt. So if she had something to benefit from this, I would think that by now, almost a year later, she would have. The child has been placed with an aunt and it's speculative at this point that pending the result of this trial, even if it would be conferred to Ms. Gonzales.
>
> THE COURT: I'm going to find the CPS investigation and any potential outcomes are not relevant to this trial and in fact would be more prejudice to the defendant.
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> [DEFENSE COUNSEL]: All right. Please note our objection.

Q. Do you have a preference?

A. Do I have preference of what?

Q. That their parental rights be terminated or not?

A. I don't have any say in that. That damage has been done between the both of them.

Q. My understanding is the child is with an aunt; is that correct?

A. My sister.

Q. Your sister?

A. Yes. And before that, she was with me. I had her. I've always had her.

Q. The reason that you take care of the child is because of the relationship that [Appellant] and [Jimenez] have, correct?

A. I'm sorry?

Q. It's because of the type of relationship that [Jimenez] and [Appellant] have and the things that they do destructive towards each other, correct?

A. I'm not sure I want to answer that.

Q. The reason –

A. Yes, that's why I take care of her because I want her to be safe. She's a beautiful little girl. She deserves to be safe. (Witness crying.)

C. On Direct Appeal

Appellant argued on direct appeal that the trial court violated his Sixth Amendment right to confront the witnesses against him by prohibiting cross-examination with respect to Gonzales's knowledge, and potential interest in the outcome, of the CPS proceedings

respecting the termination of Appellant's and Jimenez's parental rights. The court of appeals first held that Appellant properly preserved this issue for appeal, *Jones*, 540 S.W.3d at 23–25, and we have no occasion to revisit that determination. On the merits, the court of appeals held that "the trial court abused its discretion by denying [A]ppellant his constitutional right under the Confrontation Clause to question Gonzales about her interest in the outcome of ongoing parental rights termination proceedings against him and Jimenez and therefore her possible bias in testifying against him." *Id*. at 33. Because Gonzales was such a "crucial link" in the State's case, the court of appeals explained, it could not conclude beyond a reasonable doubt that the constitutional error was harmless. *Id*. at 35.

II. ERROR?

The State now argues that the court of appeals erred to hold that Appellant's offer of proof was sufficient to justify the cross-examination that he sought. According to the State, "[w]hat is missing is a logical connection between" the proceedings to terminate Appellant's and Jimenez's parental rights and Gonzales's trial testimony "that would suggest an actual bias, namely that [her] desire to keep [Appellant's daughter] safe had led her to involve herself in the custody case." State's Brief on the Merits at 11. We disagree.

Speaking of the defendant's right to cross-examine an adverse witness in the seminal case of *Alford v. United States*, 282 U.S. 687 (1931), the United States Supreme Court observed:

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and

> the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Id. at 692 (citations omitted). *See Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996) (citing *Alford* for the proposition that "the defendant should be granted a wide latitude even though he is unable to state what facts he expects to prove through his cross-examination").

We have observed:

> The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility. An unbelievable denial of the existence of a fact can be even more probative as to lack of credibility than an affirmative admission of the fact.

Spain v. State, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979); *see also Carroll*, 916 S.W.2d at 500 (quoting *Spain*). The proposition from *Spain* that a defendant need not secure an admission of bias to justify broaching the subject in cross-examination has since been implicitly ratified in Rule 613(b) of the Texas Rules of Evidence. TEX. R. EVID. 613(b). Rule 613(b) reflects the reality that a biased witness may well deny that the circumstances gave

him a motive to testify falsely.[3] But the rule just as plainly contemplates that the witness may nevertheless be questioned about the potential for bias so engendered.

It is true, as the State emphasizes, that more recent case law since *Spain* has required a "logical relationship" or "causal connection": a showing by the proponent of the cross-examination that the circumstances he wishes to call to the witness's attention in fact give rise to an inference of undue influence or bias—even if the witness denies any actual shading of his testimony. *See Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998) ("For the evidence to be admissible, the proponent must establish some causal connection or logical relationship between the pending charges and the witness' . . . potential bias or prejudice for the State[.]"); *Irby v. State*, 327 S.W.3d 138, 147 (Tex. Crim. App. 2010) (same); *Johnson v. State*, 433 S.W.3d 546, 552 (Tex. Crim. App. 2014) (same). Such a principle cannot be applied too rigorously, however, since, "generally speaking, the Texas Rules of Evidence permit the defendant to cross-examine a witness for his purported bias, interest, and motive without undue limitation or arbitrary prohibition." *Hammer v. State*, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009). Too strict an adherence to this "logical relationship"/"causal connection" principle would undermine *Alford*'s constitutional mandate—and Rule 613(b)'s implicit assumption—that a defendant be permitted to explore any plausible basis for witness bias, whether or not the witness is willing to admit to it.

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[3] The rule permits extrinsic proof of the circumstances giving rise to the potential bias only after "the witness is first examined about the bias . . . and fails to unequivocally admit it." TEX. R. EVID. 613(b)(4).

Appellant's offer of proof in this case was perhaps less than ideally thorough. It would have been preferable for Appellant to squarely ask Gonzales whether she actually had any hope or expectation of obtaining custody of Appellant's daughter in the event that parental rights were terminated, and whether she believed that her testimony against Appellant in his criminal trial would facilitate that eventuality. He might also have asked Gonzales whether it was at least her goal to place Appellant's daughter with *anyone* other than Appellant—including Gonzales's sister. But the fact of the matter is that it would not have mattered how she answered these questions in the offer of proof. Both Rule 613(b) and the Sixth Amendment contemplate that Appellant should be able to ask her these questions in the jury's presence so that it could gauge the plausibility of her response. If the jury should disbelieve her denial, that would have provided some justification for taking her testimony with a grain of salt. *Spain*, 585 S.W.2d at 710.

The record demonstrated that Gonzales was aware that CPS was involved in child custody proceedings that could affect Appellant's future custody of his daughter. It demonstrated that Gonzales had an interest in the child's safety and that she did not think the child was safe in Appellant's custody. It demonstrated that Gonzales often took care of the child, and that the child was in the temporary custody of Gonzales's sister at the time of trial. It would take no great leap of logic for a jury to infer that Gonzales was motivated by the hope or expectation that, if Appellant were convicted of this offense, it would diminish his chances of retaining custody of his daughter. Gonzales's awareness of the pending

termination-of-parental-rights proceeding created a sufficient "logical relationship"/"causal connection" to invoke Appellant's Sixth Amendment right to cross-examine her for potential bias.[4] We agree with the court of appeals that he should have been permitted to address Gonzales' attitude about the parental termination proceedings in the jury's presence.

III. HARM?

Applying the harm factors from *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the court of appeals concluded that the constitutional error was not harmless beyond a reasonable doubt.[5] *See Jones*, 540 S.W.3d at 33–35; TEX. R. APP. P. 44.2(a) (in light of constitutional error, reviewing courts must reverse "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment"). Gonzales was the State's only witness to the actual assault. Her testimony was not cumulative of any other State's evidence, nor was it corroborated (other than to the extent it matched up with Appellant's).

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[4] The logic of the inference is not dependent on Gonzales being a party to the termination proceedings. Because of her concern for the child's safety, it could be inferred that she had an interest in the outcome of those proceedings—and thus, a motive to prevaricate at Appellant's trial—regardless of whether it might have impacted her directly. By the same token, it would have done Appellant little good to develop evidence of Gonzales's concern for the child's safety in the abstract. The reason those facts are important to Appellant's offer of proof was precisely to demonstrate Gonzales's interest in the outcome of the termination proceedings.

[5] *See Van Arsdall*, 475 U.S. at 684 ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.")

Because Jimenez, the complaining witness, did not testify, Gonzales's testimony was indispensable if the State was going to be able to convict Appellant. The case essentially devolved into a swearing match between Gonzales and Appellant about the circumstances surrounding the assault. Thus, 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.

And yet, we ultimately cannot agree with the court of appeals that Appellant was harmed. Appellant testified and admitted that he struck Jimenez.[6] The only material difference between Appellant's account and Gonzales's was their respective descriptions of Jimenez's initial assault upon Appellant which gave rise to Appellant's claim of self-defense. Gonzales claimed Jimenez "whacked" or "slapped" the cell phone that was in Appellant's hand. Her testimony varied slightly from direct- to cross-examination with respect to whether this caused Appellant to drop the cell phone, but she never said Jimenez struck Appellant's

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[6] It might be argued that, had Appellant been allowed to fully cross-examine Gonzales, he may well have chosen not to testify, hoping that the jury would simply disbelieve Gonzales's testimony that any assault actually occurred. The record tends to belie this scenario. During his opening statement to the jury at the beginning of trial, Appellant's trial counsel assured the jury that it would hear testimony to contradict the State's account of the assault. Such testimony could only have come from Appellant himself—as, in fact, it later did. It is true that, by the time of this opening argument, the trial court had already made a preliminary ruling that Appellant could not raise the subject of the CPS proceedings during Gonzales's cross-examination. But the trial court had not yet heard Appellant's offer of proof. One of the purposes of an offer of proof is to try to change the trial court's mind, *see* Goode, Wellborn & Sharlot, 1 TEXAS PRACTICE: GUIDE TO THE RULES OF EVIDENCE, § 103.3, at 29 (3d ed. 2002) ("A secondary purpose (of an offer of proof) is to permit the trial judge to reconsider its ruling in light of the actual evidence."), and it is always possible that the trial court would change its ruling upon hearing the offer of proof. Had Appellant not planned to testify from the outset, he would surely have waited to make his promise to the jury in an opening statement made only after the State had concluded its case-in-chief, instead of at the beginning of trial. This circumstance strongly suggests that Appellant's decision to testify was not contingent on the trial court's ruling with respect to the permissible scope of his cross-examination of Gonzales.

hand. On direct examination, she testified that she did not see whether the cell phone dropped. On cross-examination, however, she agreed that Jimenez's blow did suffice to knock the cell phone out of Appellant's hand. By contrast, Appellant testified that Jimenez "karate-kicked" his hand, causing the cell phone to drop. Gonzales denied that Jimenez ever kicked either Appellant or his cell phone. Appellant testified that he doubted Gonzales could even have seen what happened from her particular vantage in the garage.

Nothing about this particular dispute could likely have dictated the outcome of the jury's resolution of Appellant's self-defense claim. The jury was instructed that, in order to find that Appellant struck Jimenez in self-defense, it must find that her initial attack upon him "created" in his mind "a reasonable expectation or fear of some bodily injury." *See* TEX. PENAL CODE § 9.31(a) ("[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use of unlawful force."). The jury's resolution of the reasonableness of Appellant's belief (if any) that Jimenez was about to cause him bodily injury would not likely have turned on the subtle difference between Gonzales's account of Jimenez's conduct and his own. Under either account, the jury would likely have concluded that Jimenez struck at Appellant hard enough to knock the phone out of his hand, whether she also struck his hand in the process or not. Moreover, whether she dealt the blow with her own hand or with a "karate kick" does not seem to be a distinction that would likely sway the jury's assessment

of the reasonableness of Appellant's apprehension that unlawful force was "immediately necessary" to protect himself.

In any event, any cross-examination to expose Gonzales's potential bias would only marginally have increased the damage already inflicted upon her general credibility by other evidence that the jury was permitted to hear. Her testimony that Appellant ransacked the house was contradicted by Officer Portillo's testimony that he saw no evidence of ransacking. And, what is more, the jury would have perceived a potential for bias on Gonzales's part inherent in the simple fact that she was both the victim's mother and the child's grandmother. That Gonzales had an interest in assuring that Appellant did not retain custody of the child would only have added incrementally to the jury's perception of her as an interested witness of questionable reliability. We are confident beyond a reasonable doubt that the jury would have rejected Appellant's self-defense claim even had it been made aware of the more particularized reasons to question Gonzales's motives in testifying.

IV. CONCLUSION

Accordingly, we reverse the judgment of the court of appeals and remand the cause to that court for disposition of Appellant's remaining point of error.

DELIVERED: March 27, 2019
PUBLISH