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

HERVEY, J., filed a concurring opinion in which RICHARDSON and NEWELL, JJ., joined.

CONCURRING OPINON

Appellant, Dedric D'Shawn Jones, was charged with family-violence assault with a previous conviction for attacking his girlfriend, Amy Jimenez. Jimenez's mother, Adeline Gonzales, saw the incident, and she testified against Jones at trial, but Jimenez did not testify.[1] At the time of the offense, Jones and Jimenez had a one-year-old child,

[1]The State told the jury in opening arguments that Jimenez was an uncooperative witness.

Alice,[2] and during Jones's trial, there were on-going Child Protective Services (CPS) proceedings to terminate their parental rights. Defense counsel wanted to cross-examine Gonzales about whether she was aware of the termination proceedings and whether she might be biased against Jones because she wanted custody of Alice or, at least, wanted Jones's parental rights terminated. The trial court denied the request, but it allowed defense counsel to make an offer of proof. Jones was convicted, but he appealed. The court of appeals held that the trial court erred and that the error was harmful. The State filed a petition for discretionary review, arguing that the court of appeals's analysis was flawed.

Today, the majority holds that Gonzales was subject to cross-examination for potential bias because she was aware that there were on-going CPS termination proceedings against the defendant. I not only disagree with the majority's reasoning, I also fear that it opens Pandora's Box, paving the way for any defendant to cross-examine any third-party witness who testifies against a defendant and is aware of on-going termination proceedings against the defendant.

FACTS

Jones was dating Jimenez, and they shared a room in Gonzales's home. The night in question, Gonzales and Jimenez had been working while Jones was at home taking care of Alice and painting the house. When Jimenez and Gonzales returned home, they

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[2]Alice is a pseudonym because she was a minor at the time of the offense. TEX. R. APP. P. 9.10(a)(3).

ordered pizzas for dinner and watched a movie on Netflix. During an explicit scene, Jones made an inappropriate comment, which upset Jimenez and Gonzales. Gonzales went to a bedroom with Alice, and Jimenez and Jones argued for a few minutes before Jones went into the garage and played a video game on his phone. According to Jones, he was in the garage for between an hour to one and a half hours, and during that time, Jimenez came into the garage to talk to him numerous times, but he ignored her. The last time she went to talk to Jones, Jimenez "got in his face," Jones said, and was yelling at him when she suddenly "karate kicked" the phone out of his hands. While Jimenez and Jones were arguing, Gonzales opened the kitchen door to walk into the garage and saw Jimenez "whack" the phone out of Jones's hand with one of her hands and Jones slap Jimenez. According to Gonzales, Jimenez was bleeding from her mouth and lip, but Jones said that he doubted that the slap drew blood.

After the altercation, Jimenez left, and Gonzales told Jones to leave, but she said that he went back into the house and that it sounded like he was "ransacking everything." When Jones went back into the garage, Gonzales said that he was "[s]creaming obscenities, calling me everything in the book and ransacking what he could." According to her, as Jones was screaming, he kicked in the doors to her car and then picked up a car jack and started swinging it near her and Alice. After Jones put the car jack down, he said that he would not leave until he got to "kiss his baby," and he cornered Gonzales and grabbed one of Alice's legs. Gonzales said that "it scared me, because I said, My God, he

could have ripped her spinal cord. I let her go." Gonzales claimed that when Jones walked away, he was holding Alice "like a rag doll under his arm. And she was crying and crying. He's screaming." She also said that Alice was pushing away from Jones and screaming "this loud cry like I never heard it before." Jones put Alice down as he was leaving, and Gonzales ran to her and picked her up.

After Jones left, Gonzales testified that she went back into the house, and she saw that Jones had rifled through Jimenez's things and that he had turned everything "upside down." Jones denied ransacking anything. Officer Jairo Portillo was dispatched, and when she arrived on-scene, she looked inside the house and garage, but contrary to Gonzales's testimony, she did not notice that any property had been disturbed.

TRIAL

Jones was arrested and charged with family-violence assault, a Class A misdemeanor, but the charge was elevated to a third-degree felony because he had been previously convicted of family-violence assault. TEX. PENAL CODE § 22.01(b)(2)(A). The State also alleged that Jones was a habitual offender.[3] *Id.* § 12.42(d). As a habitual offender, he faced a minimum of 25 years' confinement. *Id.*

At a pretrial hearing, defense counsel sought to ask Gonzales about Jimenez's history of violence, about whether Gonzales knew that there were on-going CPS

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[3]The State alleged that Jones had previously been convicted of felon in possession of a firearm in October 2009 and for second-degree felony possession of a controlled substance in 2013. After he was convicted, Jones pled true to the enhancement paragraphs.

termination proceedings, and about whether she had an interest in the outcome of those proceedings. The State argued that Jones should not be allowed to pursue that line of questioning because Alice was living with her aunt, and if Gonzales "had something to benefit from this, I would think that by now, almost a year later, she would have." The trial judge sustained the State's objection, stating that "the CPS investigation and any potential outcomes are not relevant to this trial and in fact would be more prejudic[ial] to [Jones]." The last comment about the matter was from defense counsel, who said, "All right. Please note our objection."

During cross-examination of Gonzales, defense counsel again asked to question Gonzales about Jimenez's violent past, but the judge denied the request and said that defense counsel could make an offer of proof after the jury was excused for lunch. After the jury was excused, defense counsel asked Gonzales about Jimenez's history of violence and about the on-going CPS proceedings. The following excerpt is the entirety of the offer of proof with respect to the CPS proceedings issue,

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

[DEFENSE]: That their parental rights be terminated or not?

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

[DEFENSE]: My understanding is the child is with an aunt; is that correct?

[GONZALES]: My sister.

[DEFENSE]: Your sister?

[GONZALES]: Yes. And before that, she was with me. I had her. I've always had her.

[DEFENSE]: The reason that you take care of the child is because of the relationship that Dedric and Amy have, correct?

[GONZALES]: I'm sorry?

[DEFENSE]: It's because of the type of relationship that Amy and Dedric have and the things that they do destructive towards each other, correct?

[GONZALES]: I'm not sure I want to answer that.

[DEFENSE]: The reason --

[GONZALES]: 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.)

[DEFENSE]: In this particular case, it is your testimony that Amy hit Dedric first, correct?

[GONZALES]: She slapped the phone in his hands.

[DEFENSE]: Nothing further.

[COURT]: Anything, [from the State]?

[STATE]: No, Your Honor.

> [COURT]: All right. You're excused. You may step down. Please wait out in the witness room.

The State called two more witnesses before resting its case, and the defense called Jones as its only witness. He admitted that he slapped Jimenez after she "karate kicked" the phone out of his hand, but he never expressly claimed that he slapped Jimenez in self-defense. At the jury charge conference, defense counsel asked for a "mutual combat" instruction.[4] Ultimately, a self-defense, apparent-danger instruction was included in the jury charge.

The jury convicted Jones, and he pled true to the enhancement paragraphs. The jury sentenced him to 25 years' confinement as a habitual offender, but it did not fine him.

DISCRETIONARY REVIEW

The State filed a petition for discretionary review, which the Court granted. It asks us to decide whether the court of appeals erred in finding a Confrontation Clause violation and whether the lower court's harm analysis was flawed because it did not consider the weakness of the self-defense evidence. After carefully reviewing the record,

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[4]During voir dire, defense counsel stated that, "[i]f it's mutual combat and the other person starts it, doesn't have to be an assault . . . . That's not just technically self[-]defense, which it is, but it means something. As a male or female, you don't have to stand to be hit." During his opening remarks, counsel said that "[Jimenez] kicked [the phone] out of [Jones's] hands. And when she did that, there may have been a reaction to it as to a hit on the face." At the charge conference, defense counsel explained the instruction thusly,"if two people are involved in mutual combat, then it's not an assault;"; "It's basically saying that if two people intentionally and knowingly engage in mutual combat, then neither side can say assault . . . ."

I conclude that the trial court did not err when it limited Jones's cross-examination of Gonzales because Jones did not establish a logical connection between the excluded evidence and Gonzales's alleged bias. Consequently, I do not address the lower court's harm analysis.

STANDARD OF REVIEW

The trial court has broad discretion to limit the extent of cross-examination, but it abuses its discretion when it prevents appropriate cross-examination. *Carroll v. State*, 916 S.W.2d 494, 498 (Tex. Crim. App. 1996).

THE RIGHT TO CONFRONTATION

a. Law

The Sixth Amendment states that,"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. One interest protected by the Confrontation Clause is the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). An important aspect of the right is the ability to expose a witness's motivation to testify, and a witness's potential bias is always subject to investigation and is "'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* at 316–17 (quoting 3A John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 940, at 775 (Chadbourne rev. 1978)). "The cross-examiner should be allowed to expose the limits of the witness'[s] knowledge of relevant facts, place the witness in his proper setting, and test the credibility of the

witness. The failure to affirmatively establish the alleged bias or motive does not prevent the cross-examination from having probative value in regard to the witness'[s] credibility." *Spain v. State*, 585 S.W.2d 705, 710 (Tex. Crim. App. [Panel Op.] 1979). We have said that a defendant can establish a basis for cross-examination about potential witness bias by showing a logical or causal connection between the source of the claimed bias and the witness's testimony at trial. *See Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998).

b. Analysis[5]

I disagree with Jones, and the majority, that the evidence in this case shows a logical connection. Nothing in the record suggests that Gonzales testified against Jones because she was aware that her testimony could increase the chances that Jones's parental rights would be terminated or increase the chances that she might obtain custody of Alice. But the majority explains that "Gonzales's awareness of the pending termination-of-parental-rights proceeding created a sufficient 'logical relationship'/'casual connection' to invoke Appellant's Sixth Amendment right to cross-examine her for potential bias." Maj. Op. at 12.

The majority seems to think that a defendant is guaranteed the right to cross-examine a witness in "whatever way, and to whatever extent, the defense might wish."

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[5]A threshold argument made by the State is that the lower court erred when it considered record evidence other than the offer of proof. I do not address that issue, however, because even if the appellate court improperly relied on the entire record, Jones nonetheless has failed to show a logical connection between the excluded evidence and Gonzales's alleged bias against Jones.

Van Arsdall, 475 U.S. at 679 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)). But that is not the law. As the Supreme Court stated in *Van Arsdall*, the Confrontation Clause guarantees only an *opportunity* for effective cross-examination. Appellant was given the opportunity to cross-examine Gonzales about her potential bias by adducing testimonial and/or documentary evidence during the offer of proof to establish a basis for such cross-examination, but Appellant did not adequately avail himself of that opportunity. The offer of proof in this case is not just inartful, as the majority asserts; it is fatally defective.

Justice Brown, who dissented from the majority of the court of appeals, hypothesized numerous ways in which Jones could have further developed his offer of proof and established a basis to cross-examine Gonzales about her alleged bias,

> Jones's offer of proof failed to address a variety of other highly relevant, related circumstances from which a factfinder might infer that Gonzales believed the CPS proceedings could result in her obtaining custody of Alice and was therefore potentially biased. There is no evidence that Gonzales had been interviewed by CPS, was scheduled to be a witness in the CPS proceeding, knew the claims made by CPS, or was otherwise involved in the termination proceedings. There is no evidence that Gonzales knew the status of the CPS proceedings or why the proceedings were instigated; knew any of the law regarding parental-termination proceedings; or knew how a conviction against Jones might affect the termination proceedings. Nor is there any evidence that Gonzales believed she had the financial, physical, and legal ability to be granted custody of Alice when Alice was at the time in the custody of her great-aunt.

Jones, 540 S.W.3d at 40–41 (footnote omitted) (Brown, J., dissenting). I wholeheartedly agree with Justice Brown's comments.

The State argues that the court of appeals's opinion "could be used as the basis for requiring baseless, prejudicial cross-examination of third-party witnesses in any family-violence case whe[n] the defendant and complainant are co-parents." State's Brief on the Merits at 9. The court of appeals's opinion might be so limited, but it does not appear that *this* Court's decision is that limited. In its own words, this Court's decision—precedent binding on all lower courts in Texas—appears to allow for baseless, prejudicial cross-examination in *any* case so long as any of the State's witness knows about on-going CPS proceedings to terminate the defendant's parental rights.[6] Maj. Op. at 12 ("Gonzales's awareness of the pending termination-of-parental-rights proceeding created a sufficient 'logical relationship'/'casual connection' to invoke Appellant's Sixth Amendment right to cross-examine her for potential bias."). Unfortunately, today's decision will undoubtedly invite defendants to file meritless appeals.

CONCLUSION

I conclude that the court of appeals erred when it held that Appellant's right to confrontation was violated, and I dissent from the majority's affirmation of that holding, but because the majority ultimately concludes that Appellant is not entitled to relief, I concur in the result.

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[6]The majority's language is incredibly broad. The only limitation is that the State's witness knows that CPS is trying to terminate the defendant's parental rights. Although I do not agree with the outcome, it ought to at least limit its far-reaching holding only to family violence cases in which the State's witness is a family member of the victim, and there is evidence that the State's witness thinks that the defendant's parental rights should be terminated.

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