Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-15-00207-CR &
04-15-00208-CR

Jessica G. **CASTILLO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the County Court at Law No. 4, Bexar County, Texas
Trial Court Nos. 458109 & 458110
Honorable Jason Garrahan, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: February 3, 2016

AFFIRMED

A jury found appellant Jessica G. Castillo guilty of resisting arrest and driving while intoxicated. On appeal, Castillo raises three points of error, contending: (1) the trial court erred in limiting her cross-examination of the arresting officer, thereby denying her due process; (2) the trial court erred in denying her motion for continuance; and (3) the errors in limiting cross-

examination and denying a continuance had a cumulative effect, rendering the trial fundamentally unfair.[1] We affirm the trial court's judgment.

BACKGROUND

Officer Steven Rivas, a DWI Task Force officer with the San Antonio Police Department, testified that while he was patrolling the area of Highway 281 and Bitters Road in San Antonio, he saw a minivan cross the solid white line as it merged onto the highway. The officer testified that crossing the solid white line is a traffic violation so he began following the minivan. As he followed, Officer Rivas stated he saw the minivan "drift[] out of its lane." In addition, as the driver of the minivan took the interchange to Loop 410, the minivan "drifted to the right into the shoulder and then into the left shoulder into the wall, the concrete wall to the left." Based on these observations and the fact it was 2:30 a.m., Officer Rivas testified his DWI training led him to believe the driver of the minivan might be impaired. He therefore initiated a traffic stop.

After the driver pulled into a parking lot, the officer approached the vehicle and spoke to the driver, later identified as Castillo. Officer Rivas testified that while he was obtaining Castillo's driver's license and proof of insurance, he smelled a strong odor of intoxicants on her breath. The officer asked Castillo how much she had to drink. According to the officer, Castillo replied that she had "two whiskey drinks." After speaking with Castillo, Officer Rivas noticed Castillo's speech was slurred. She was attempting to enter the access code into her phone, but was unable to. When the officer asked her why she was attempting to access her phone, her response was nonsensical. At that point, Officer Rivas asked Castillo to step out of the minivan.

[1] Originally, Castillo included a fourth point of error in her brief in which she claimed the trial court violated her Fifth Amendment right against self-incrimination by requiring her, as a condition of community supervision, to write a letter of apology to the arresting officer. However, Castillo filed a motion in this court, which was agreed to by the State, asking to lift the sentencing stays in these cases so that she could begin serving her sentences concurrently with a sentence in a third case. We granted the motion. In conjunction with the motion, Castillo also specifically "waived and abandoned" this fourth point of error. Accordingly, we will not consider it.

As she exited the minivan, Castillo advised the officer that she had a "trick knee and a trick hip," stating they would "pop out." The officer asked if she had any other medical condition or was under the care of a doctor, to which she responded "no." Officer Rivas also asked Castillo if she wore contact lenses, had a glass eye, if she worse false teeth, or if she had any injections or taken any drugs recently. Castillo responded "no" to those questions as well. Officer Rivas then proceeded to administer the standardized field sobriety tests to Castillo — the horizontal gaze nystagmus ("HGN"), the walk and turn, and the one-leg stand.

According to Officer Rivas, Castillo's performance on each test indicated she was intoxicated. On the HGN test, she exhibited six of the six possible intoxication clues. As for the walk and turn test, she exhibited five of eight possible intoxication clues, and on the last test, the one-leg stand, Castillo showed three of four possible clues. Based on the results of the field tests, Officer Rivas concluded Castillo was intoxicated. He then walked her to the front of his patrol car and asked her to place her hands on the hood so he could frisk her for weapons and then handcuff her — placing her under arrest. Castillo, however, failed to comply, asking the officer why she had to put her hands on the hood. Officer Rivas continued to ask her to place her hands on the hood of the patrol car, but Castillo ignored his request. The officer testified he was forced to "grab her arms." According to Officer Rivas, Castillo resisted his attempts to handcuff her so he placed her on the ground, where she continued to pull her arms away. Eventually, he was able to handcuff a "screaming" Castillo, placing her under arrest for DWI.

On cross-examination, Castillo sought to elicit testimony from Officer Rivas regarding Castillo's refusal to submit to a breath test or blood draw and his actions subsequent thereto — requesting and obtaining a warrant and presenting Castillo to a nurse who drew Castillo's blood. The trial court refused to allow Castillo to delve into this "blood evidence" based on the State's motion to exclude the evidence due to relevance and potential jury confusion. The State's position

was based on the fact that it did not intend to introduce the results of the blood draw taken from Castillo in an effort to prove the offense of DWI, i.e., that Castillo's blood alcohol concentration was more than .08; rather, the State intended to prove Castillo committed the offense by proving Castillo lost normal use of her physical and mental faculties due to ingestion of alcohol. *Compare* TEX. PENAL CODE ANN. § 49.01(2)(B) (West 2011) *with id.* § 49.01(2)(A). Thus, no evidence regarding the blood draw was permitted, and for purposes of preservation, Castillo created a bill of exception.

After Officer Rivas testified, the State called a security officer who was patrolling the shopping center where the stop occurred. The security officer testified that while on patrol in the shopping center where Officer Rivas stopped Castillo, he saw police lights and heard a woman screaming for help. When he got out to see what was going on, he saw "a female individual tussling with a police officer, screaming at the top of her lungs for help, screaming, screaming, just being belligerent, not cooperating with the officer." The security officer testified the "tussling" went on for thirty to forty-five seconds, "maybe a little bit longer." According to the security officer, when the police officer tried to place the woman in the back of his patrol car, she "placed her foot on the door, pushed back from it clearly trying to keep the officer from putting her in the vehicle." Thereafter, the police officer sat the woman on the ground, awaiting back up. As she sat, the woman was "screaming, looking up at me, cussing, calling the officer all sorts of names, saying he was a horrible person, telling him f— you, all kinds of belligerent words that I can't repeat to you." At trial, the security officer identified Castillo as the woman "tussling" with the police officer. He also stated that in his opinion, Castillo was intoxicated.

After the State and Castillo rested and closed, the matter went to the jury for deliberation. After deliberating, the jury found Castillo guilty of resisting arrest and DWI. For each offense, the trial court sentenced Castillo to confinement in jail for 180 days — probated — plus a fine,

costs, community service, and certain other conditions. The trial court ordered the sentences to run concurrently.

ANALYSIS

As set out in the introduction, Castillo has raised three points of error on appeal. In her first two points, Castillo complains the trial court erred in limiting her cross-examination of the arresting officer and in denying her motion for continuance. In her third point, she complains that these two errors had a cumulative effect, denying her the right to a fair trial.

Limitation on Cross-Examination

Castillo first contends the trial court erred in limiting her cross-examination of Officer Rivas. The State counters, arguing the trial court did not err because the State did not intend to prove intoxication by virtue of blood alcohol concentration. Rather, the State intended to prove Castillo was driving while intoxicated by proving she had lost the normal use of her physical and mental faculties by ingestion of alcohol. Thus, according to the State, evidence relating to the blood draw would be irrelevant and only serve to confuse the jury.

Before trial began, the State advised the trial court — as noted above — that it would not be calling a blood expert to testify about the results of the blood draw taken from Castillo, nor would it present any other "forensic toxicology" evidence about the results of the blood draw. The State explained it did not intend to prove the offense of DWI based on Castillo's blood alcohol concentration; rather, the State intended to prove the offense by showing that as a result of ingestion of alcohol, Castillo had lost the normal use of her physical and mental faculties. *Compare* TEX. PENAL CODE ANN. § 49.01(2)(B) (West 2011) *with id.* § 49.01(2)(A). Accordingly, the State asked the trial court to exclude "any mention of blood being taken or anything like that[.]" Castillo countered, arguing that because Officer Rivas obtained a warrant for a blood draw and witnessed the blood draw, she should be permitted to question the officer about those events. The

trial court granted the State's motion, excluding "the actual blood test, the actual taking of the blood and the blood warrant." The trial court advised it would permit Castillo "to bring up the fact it is a no refusal policy" and allow the defense "to go into that." The court explained that unless Castillo "is going to bring in the evidence with the proper witnesses," the evidence would be excluded. When the issue came up during cross-examination of Officer Rivas, the trial court explained it had advised Castillo's attorney that he could not go into the existence of a blood draw "unless you are going to have the person who tested the blood — bring them in." In a bill of exception, Castillo's attorney stated if he had been permitted to cross-examine Officer Rivas, he would have elicited testimony that the officer sought and obtained a search warrant for a blood draw and that a blood draw was taken. According to Castillo, without this, the State was permitted to create a false impression there was no blood draw and no blood sample. According to Castillo, the State should have been required to explain why it chose not to introduce the results of the blood draw.

The Sixth Amendment right of confrontation includes the right to cross-examine the State's witnesses. U.S. CONST. amend. VI; *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996). However, a trial court has discretion to admit or exclude evidence during a trial. *Andrews v. State*, 429 S.W.3d 849, 855 (Tex. App.—Texarkana 2014, pet. ref'd). With regard to cross-examination specifically, the Texas Court of Criminal Appeals has held a trial court "has wide discretion in limiting the scope and extent of cross-examination." *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009); *see Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986) (holding that trial courts retain wide latitude under Sixth Amendment to impose restrictions on cross-examination based on such criteria as confusion of issues and relevance, among other things). Thus, we review a trial court's decision to limit cross-examination under an abuse of discretion standard. *Hammer*, 296 S.W.3d at 561; *Baldez v. State*, 386 S.W.3d 324, 327 (Tex. App.—San Antonio 2012, no pet.).

Here, Castillo sought to cross-examine Officer Rivas regarding the blood draw even though the State asserted it did not intend to introduce the results of the blood test or establish intoxication by proving Castillo's blood alcohol concentration was over the legal limit. And, in fact, the State never introduced any evidence regarding the results of the blood test, nor did it attempt to prove intoxication based on blood alcohol concentration. The trial court explained on the record that to allow Castillo to bring in blood evidence under the circumstances would be "prejudicial and . . . confusing to the jury to hear about a blood test that unless — unless defense is going to bring in the evidence with the proper witnesses, I don't believe that it would be more probative than prejudicial." The trial court also stated the evidence Castillo sought to illicit was "not relevant . . . not probative . . . not good for the jury . . . it is going to be confusing." The trial court again advised Castillo's counsel that blood evidence would not be permitted "unless you want to bring in somebody that, you know, can testify to the actual blood test."

We hold the trial court did not abuse its discretion in refusing to permit Castillo to cross-examine the officer regarding the blood draw or its results. *See Hammer*, 296 S.W.3d at 561; *Baldez*, 386 S.W.3d at 327. Because the State asserted it intended to prove, and did in fact prove, the offense of DWI by establishing Castillo lost the normal use of her physical and mental faculties due to ingestion of alcohol as opposed to having a blood alcohol concentration above the legal limit, *compare* TEX. PENAL CODE ANN. § 49.01(2)(B) (West 2011) *with id.* § 49.01(2)(A), the trial court could have determined in its discretion that the evidence Castillo sought to introduce — evidence relating to the blood draw — was irrelevant and would confuse the jury. *See Van Arsdall*, 475 U.S. at 682 (holding that trial courts retain wide latitude under Sixth Amendment to impose restrictions on cross-examination based on such criteria as confusion of issues and relevance, among other things); *Ho v. State*, 171 S.W.3d 295, 304 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (same).

Moreover, we note the trial court did not make a blanket ruling that the evidence Castillo sought to introduce could not be admitted. Rather, the trial court made it clear on at least two occasions during the trial that Castillo was free to offer the evidence regarding the blood draw if she brought in "the person who tested the blood." And stated later, blood evidence would not be permitted "unless you want to bring in somebody that, you know, can testify to the actual blood test." Castillo did not avail herself of the opportunity offered by the trial court, other than to orally request a motion for continuance, which as we note below, was not preserved for our review.

In support of her position that the trial court erred in not permitting the requested cross-examination, Castillo relies on *Holmes v. State*, 323 S.W.3d 163 (Tex. Crim. App. 2009) and *Woodall v. State*, 216 S.W.3d 530 (Tex. App.—Texarkana 2007), *aff'd sub nom.*, *Holmes v. State*, 323 S.W.3d 163 (Tex. Crim. App. 2009). Those cases are, however, inapposite. In those cases, the State intended to introduce evidence relating to the Intoxilyzer 5000 or asked the trial court to take judicial notice of the underlying science of the Intoxilyzer 5000. *Holmes*, 323 S.W.3d at 166–67; *Woodall*, 216 S.W.3d at 531. The defendants in each case sought the right to cross-examine the State's expert about the reliability of the Intoxilyzer 5000 and the "techniques and application of the techniques and principles of breath testing applied by the Intoxilyzer 5000[,]" but the trial court denied the defendants' requests. *Holmes*, 323 S.W.3d at 166–67; *Woodall*, 216 S.W.3d at 531. The court of criminal appeals held the trial court erred in denying the defendants' requests for cross-examination because the defendants were denied "the right to present a defense," violating their right to a fair trial.

Here, the State specifically stated from the outset that it did not intend to introduce any evidence relating to the blood draw. Castillo was permitted to cross-examine the arresting officer regarding the State's contention that she had lost the normal use of her physical and mental faculties due to ingestion of alcohol — the manner in which the State was attempting to prove the

offense. Moreover, the trial court did not prohibit Castillo from bringing in the evidence relating to the blood draw; rather, the trial court advised Castillo that such evidence could be brought in through a proper sponsoring witness, something Castillo did not attempt to do.

Accordingly, because the trial court did not abuse the wide discretion afforded it with regard to limitations on cross-examination, we overrule this point of error.

Motion for Continuance

In her second point of error, Castillo contends the trial court erred in denying her motion for continuance. We hold Castillo has failed to preserve this issue for our review.

After the trial court granted the State's request to exclude "the actual blood test, the actual taking of the blood and the blood warrant," the trial court — as noted above — advised Castillo that she would only be permitted to "bring up" and "go into" the no refusal policy unless she was "going to bring in the [blood] evidence with the proper witnesses." At that point, Castillo made an oral motion for continuance, stating a continuance was necessary to secure testimony from witnesses with regard to evidence relating to the blood draw. Counsel explained a continuance was necessary because the trial court advised such evidence would not be admitted in the absence of a sponsoring witness. Counsel further argued he had "not been provided the addresses of the potential witnesses that could do this. I have not been provided their phone numbers pursuant to proper procedure. I have not been provided any of that."

In support of her position, Castillo first cites to Article 29.13 of the Texas Code of Criminal Procedure, which states a trial court may grant a continuance even after trial has begun. *See* TEX. CODE CRIM. PROC. ANN. art. 29.13 (West 2006). However, there is nothing in Article 29.13 that abrogates the requirements for a motion for continuance as stated in Articles 29.03, 29.08, or 29.06.

Article 29.03 states a continuance is available on "written motion." *Id.* art. 29.03. And, Article 29.08 provides that the motion must be "sworn to by a person having personal knowledge

of the facts relied on for the continuance." *Id.* art. 29.08. Here, Castillo's motion was made orally, and therefore failed to comply with the mandates of Articles 29.03 and 29.08. *See* TEX. CODE CRIM. PROC. ANN. arts. 29.03, 29.08. Moreover, the motion did not comply with the requirements of Article 29.06. *See id.* art. 29.06. Castillo's counsel did not state: (1) the name of the witnesses he intended to call; (2) the motion was not made for delay; (3) the facts expected to be proved by the witnesses; (4) the witnesses were not absent "by the procurement or consent of the defendant"; or (5) there was no reasonable expectation that attendance of the witness or witnesses intended to be called could be secured during the present term of court by postponement of the trial to some future date in the term. *See id.* In addition, it clearly did not appear to the court that the testimony sought by Castillo — the blood draw — was material given the State did not intend to prove the offense based on blood alcohol concentration. *See id.* Thus, we hold Castillo has failed to preserve his complaint regarding the denial of his motion for continuance for our review. Castillo failed to comply with the articles in the Code of Criminal Procedure governing motions for continuance.

Castillo points out this court, in an unpublished opinion, held that an oral request for continuance "may be addressed to the equitable powers of the court." *See Gonzalez v. State*, 04-07-00804-CR, 2008 WL 5083125, at *3 (Tex. App.—San Antonio Dec. 3, 2008, pet. ref'd) (mem. op.) (not designated for publication). In support of our decision, we relied on *Deaton v. State*, 948 S.W.2d 371, 374 (Tex. App.—Beaumont 1977, no pet.). *Id.* In *Deaton*, the Beaumont Court of Appeals held there is a "due process" exception to the requirements for a motion for continuance set out in the Code of Criminal Procedure. 948 S.W.2d at 374; *see also Anderson v. State*, 268 S.W.3d 130 (Tex. App.—Corpus Christi 2008), *rev'd*, 301 S.W.3d 276 (Tex. Crim. App. 2010); *Petrick v. State*, 832 S.W.2d 767, 770–71 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd); *O'Rarden v. State*, 777 S.W.2d 455, 459–60 (Tex. App.—Dallas 1989, pet. ref'd).

We begin by pointing out that the Texas Rules of Appellate Procedure state that in criminal cases, neither opinions nor memorandum opinions have precedential value if they are not designated for publication. TEX. R. APP. P. 47.7(a). Thus, our opinion in *Gonzalez* has no precedential value. *See id.* More importantly, however, the Texas Court of Criminal Appeals has specifically held, since our decision in *Gonzalez* as well as the other opinions recognizing a "due process" exception, that there is no such exception to a rule of procedural default. *Anderson v. State*, 301 S.W.3d 276, 279–80 (Tex. Crim. App. 2009). Rather, the court, when asked to determine whether an appellant was entitled to appellate review of a trial court's denial of his oral motion for continuance, held the issue must be analyzed under the framework established in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), and under the framework, the right at issue with regard to the continuance was the meaningful opportunity to present a complete defense.[2] *Id.* at 280. The court held that this right is within the third *Marin* category — rights that are to be implemented upon request — and, as such, is subject to forfeiture in the absence of a proper request. *Id.* Accordingly, because the appellant in *Anderson* failed to comply with the statutory requirements that a motion for continuance be in writing and sworn, he failed to preserve his complaint that the trial court erred in denying the motion. *Id.* at 281.

The oral motion for continuance before us is no different. Castillo sought a continuance to obtain the appearance of witnesses who might testify regarding the blood draw and its results. In other words, Castillo sought a meaningful opportunity to present a complete defense and attempted to obtain that right by way of a motion for continuance. However, by failing to comply with the

[2] In *Marin*, the court of criminal appeals identified three types of rules involved in our adversarial justice system: (1) absolute requirements and prohibitions; (2) rights that must be implemented by the system unless expressly waived; and (3) rights that are to be implemented upon request. *Anderson*, 301 S.W.3d at 279 (citing *Marin*, 851 S.W.2d at 278–80). With regard to the first type, known as "systemic requirements," must be followed even if the parties wish otherwise. *Id.* The second set of rules, known as waivable rights, must be expressly waived or must followed. *Id.* The third set of rules, whether constitutional, statutory, or otherwise, are subject to forfeiture if not properly preserved. *Id.*

statutory requirements governing such motions, Castillo forfeited this right. *See id.* Accordingly, we hold Castillo has presented nothing for our review with regard to the trial court's denial of her oral motion for continuance.

Cumulative Error

Castillo contends in her third point of error that the trial court's errors in limiting cross-examination and denying her motion for continuance had a cumulative effect, rendering the trial fundamentally unfair and mandating a reversal.

The Texas Court of Criminal Appeals has recognized that "a number of errors may be found harmful in their cumulative effect," even if each individual error would be harmless. *Linney v. State*, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (quoting *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999)). This has been referred to as the cumulative error doctrine. *See, e.g.*, *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010) (citing *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004)); *Absalon v. State*, No. 13-12-00666-CR, 2014 WL 576083, at *15 (Tex. App.—Corpus Christi Feb. 13, 2014), *aff'd*, 460 S.W.3d 158 (Tex. Crim. App. 2015); *Robinson v. State*, 387 S.W.3d 815, 822 (Tex. App.—Eastland 2012, no pet.); However, "non-errors cannot in their cumulative effect cause error." *Robinson*, 387 S.W.3d at 822 (citing *Chamberlain*, 998 S.W.2d 238); *see Melancon v. State*, 66 S.W.3d 375, 381 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). In other words, for the doctrine to apply, the alleged errors complained of must actually constitute error. *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009). Accordingly, because we have determined the trial court did not err in limiting cross-examination and Castillo failed to preserve the continuance issue for our review, there can be no cumulative error. We therefore overrule Castillo's third point of error.

CONCLUSION

Based on the foregoing, we affirm the trial court's judgment.

Marialyn Barnard, Justice

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