In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00380-CR

ERIC WADE SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 1-A District Court
Jasper County, Texas
Trial Cause No. 10477JD

MEMORANDUM OPINION

A jury convicted appellant Eric Wade Smith of capital murder. Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2010).[1] The State did not seek the death penalty, and the trial court assessed punishment at life imprisonment. Tex. Penal Code Ann. § 12.31(a) (West Supp. 2010). In three issues appellant contends the trial court erred. We find

[1] Because amended sections 19.03 and 12.31 contain no material changes applicable to this case, we cite to the current versions of the statutes.

appellant's three issues are without merit. Consequently, we affirm the trial court's judgment.

BACKGROUND

Dana Byerly testified that she was married to Martin Byerly ("Byerly"). At the time of his death, they were separated because of issues relating to his abuse of alcohol. While they were separated, Byerly rented a room from Clarence Matthews. Dana Byerly first realized that Byerly was missing when he failed to keep their prearranged meeting on Sunday. She later discovered he had uncharacteristically missed a couple of days of work. Dana Byerly's investigation led her to believe that her husband had gone out to a club on Friday night.

Byerly's employer paid him in cash each Friday, which he carried in his wallet, together with his driver's license. Dana Byerly testified that her husband owned a gold chain necklace that he wore at all times, and a gold nugget ring that he wore when he went out for the evening.

Dana Byerly testified that she discovered Byerly's truck in the Payless parking lot in Jasper the following Tuesday. The truck had a tire with a slow leak that had flattened, which made her believe the truck had been there for a couple of days. She found the truck unlocked with the key in the ignition. She entered the truck and found that the dashboard around the radio had been knocked off. She also found Byerly's cell phone in the vehicle. She then reported Byerly missing to the police.

Jerry Southwell, a former resident of the Try-a-Night motel, testified on behalf of the State. Southwell testified that he knew appellant as a former resident of the Try-a-Night motel. He testified that he and appellant used drugs together. Southwell recalled seeing Byerly at the motel three times. On the first occasion, he recalled that Byerly approached him and revealed that he "was a homosexual . . . looking for a date." Southwell recalled that Byerly returned the next night, once again, looking for a date. Southwell testified that Byerly had engaged in some sort of sexual exposure with another man on both nights. Additionally, on the second night, Southwell testified Byerly told him that "he want[ed] to buy a trick." Southwell directed Byerly to appellant because he understood appellant to be homosexual. Southwell testified he told appellant about Byerly's proposition and Byerly went to appellant's room. Thereafter, appellant returned to Southwell with twenty dollars and a request for Southwell to purchase drugs for him. Southwell purchased the drugs as requested and delivered them to appellant's motel room. Appellant returned to Southwell's room about thirty minutes later with more money to purchase more drugs. Southwell understood from appellant that Byerly had passed out in appellant's room. While in Southwell's room, appellant and Southwell ingested drugs. Southwell did not see appellant again that night, but testified that as he was leaving for work the next morning, around 6:30 or 7 a.m., he saw Byerly. Specifically Southwell recalled that Byerly came to his room looking for his wallet. Byerly went to appellant's room and asked appellant if he knew where he could find his wallet. Southwell and

Byerly found the wallet under Byerly's truck, but all of Byerly's cash and credit cards were missing.

Appellant's father, Homa Horace Smith, testified that in June 2008 appellant told him that "he killed Martin Byerly because they were laying up in a motel room smoking crack cocaine and Martin Byerly didn't want to buy no more and [appellant] wanted some more. So, [appellant] took [Byerly's] money and his jewelry." He testified that appellant later told him "I didn't want you to really know the reason." Appellant then told his father that he killed Byerly "[b]ecause [appellant] woke up and [Byerly] was on [appellant's] back with a pocketknife against [his] throat and [Byerly] was naked and trying to sodomize him." Smith could not discern which version of the events was true. Smith testified that appellant took him to where appellant had disposed of Byerly's body. Appellant told Smith that he left Byerly's truck at the Payless store. Smith testified that appellant asked him to tell the police that he found the body while he was rabbit hunting, and suggested they find someone to frame for the murder. Thereafter, Smith contacted the police and lead them to Byerly's body.

James Weeks, appellant's coworker, testified that appellant did not normally wear visible jewelry to work; however, he recalled one day while cleaning up, he noticed a gold necklace laying on a table. He thought the necklace belonged to appellant. Weeks testified that the necklace he saw at work was the same necklace Byerly was wearing in a picture presented by the State at trial for his comparison. Weeks also testified that

appellant wore a nugget ring on his hand at work one day. He recalled that same day appellant requested time off from work to go to the pawn shop. Thereafter, Weeks did not see appellant with the ring or necklace again.

At trial, appellant admitted that he killed Byerly, but contends that he killed him in self-defense. Appellant testified that he met Byerly at the Try-a-Night motel. He explained that around midnight, Southwell brought Byerly to his room and told him that Byerly was drunk and "wanted a place to sober up . . . and would pay [appellant] for . . . a few hours." Appellant testified that Byerly stayed with him for a few hours and then left. Appellant testified that Byerly returned a week later and made the same request, but this time the two used drugs in his room. When they ran out of drugs, appellant testified that both he and Byerly wanted more, so Byerly gave him money to make the purchase. After they finished using the drugs, Byerly had twenty dollars left. Appellant testified that Byerly was tired, so they lay down on the bed in their shorts. Thereafter, appellant testified that Byerly "grabbed a knife and put it to [his] throat" and proceeded to sexually assault appellant. Appellant testified that eventually he could no longer endure the pain of the assault, and ignoring the knife, he tried to get away. However, Byerly came after him so appellant "picked up [a] cinderblock and hit [Byerly] on top of the head . . . and [the cinder block] shattered and fell to the floor." He testified that this did not stop Byerly. Byerly "went down to one knee[,]" but "stood back up" with "a knife in his hand[.]" Appellant then grabbed a screwdriver and stabbed Byerly in the eye and then in his side. When

Byerly tried to stand, appellant stabbed him in his ear. Appellant testified that Byerly then fell to the floor, but still had a little movement so he tied Byerly's hands together. Appellant explained in detail how he cleaned up his motel room and disposed of Byerly's body. He testified that he did not call the police because he was scared and did not want anyone to know Byerly had sexually assaulted him. Appellant denied killing Byerly to steal his jewelry. He testified that he did not know anything about Byerly's jewelry, but did personally like to wear jewelry. He identified a few photos of himself wearing chain necklaces that he owned prior to moving to Jasper. Appellant recalled Byerly saying he had a ring that he could trade for drugs, but testified that he never actually saw the ring. Appellant recalled that he introduced Byerly to a man that appellant believed Byerly received drugs from in exchange for the ring. Appellant admitted to pawning jewelry after Byerly's death, but testified he pawned some broken jewelry of his mother's and a tiger's eye ring he owned. He also testified that some time after Byerly's death he pawned three or four rings, owned by his fiancé, to buy a wedding ring.

Appellant testified that he tried to speak to his father about killing Byerly a couple of times, but his father was not interested until he mentioned the possibility of receiving a reward. Eventually appellant admitted to his father that he killed Byerly and then showed him where he disposed of Byerly's body. Appellant testified that when his father asked why he had killed Byerly, he responded, "[b]ecause he's queer." He further testified that when his father asked him if he took any money, he nodded his head to indicate that he had

taken money, but claimed he gave this response because he did not want to talk about the killing any further. He testified that he told his father not to say anything to the police about appellant, but that his father should tell the police that he was picking blackberries when he found Byerly's body.

Appellant gave a written statement and a videotaped confession to police. The State had appellant read his written statement to the jury. The State played appellant's confession for the jury as well. Appellant's various recollections of the facts surrounding the sexual assault and the killing, as provided through his written statement, recorded confession and testimony at trial, are inconsistent. Appellant attributed the inconsistencies to his drug abuse, the passage of time and nervousness during the investigation.

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Appellant first complains that the trial court erred by admitting Dr. H. Gill-King's written report into evidence when Dr. Gill-King was unavailable to testify at trial. Appellant's first issue is premised on the assertion that Dr. Gill-King's report is inadmissible as testimonial hearsay. The Confrontation Clause of the Sixth Amendment guarantees 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. The Confrontation Clause bars a witness's out-of-court testimonial statements, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177

(2004). While the United States Supreme Court has not provided a comprehensive definition of testimonial statements, the Court has identified three kinds of out-of-court statements that could be regarded as testimonial, including "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010) (quoting *Wall v. State,* 184 S.W.3d 730, 735-36 (Tex. Crim. App. 2006) (internal quotations omitted)).

In a situation similar to the facts in this case, the United States Supreme Court held that the admission of laboratory results violated the defendant's right to confront the laboratory technician. *See Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009). In *Melendez-Diaz*, the State charged defendant with distributing and trafficking in cocaine. *Id*. at 2530. To prove the nature of the substance at issue, the prosecution presented certificates of analysis, which were affidavits from analysts at the state laboratory. *Id*. at 2531. At trial, the defendant objected under the Confrontation Clause arguing that the analysts must testify in person. *Id*. The Supreme Court stated that the "core class of testimonial statements" included, among other things, extrajudicial statements in formalized testimonial materials like affidavits, which by their nature would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Id*. at 2531-32. The Court held that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth

Amendment[,]" and that the defendant had a right to confront the analysts at trial. *Id*. at 2532. However, the Supreme Court's analysis did not end with its finding that the certificates were affidavits. The Court also considered the certificates' substance to determine if they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," as well as the certificates' use to determine if they were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id*. (internal quotation marks and citations omitted).

In Texas, a medical examiner is required to conduct an investigation when a person dies under circumstances warranting the suspicion that unlawful means caused the death. Tex. Code Crim. Proc. Ann. art. 49.25, § 6(a)(4) (West 2006). If the medical examiner's investigation leads the examiner to determine the cause of death beyond a reasonable doubt, then the medical examiner must file a report stating the cause of death with the district, criminal district or county attorney. *Id*. § 9(a). If the investigation concerns an unidentified body, then the medical examiner may request the aid of a forensic anthropologist to examine the body. *Id*. § 13.

Whether a particular out-of-court statement is testimonial is a question of law. *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008). Once appellant objected, the State, as the proponent of the evidence, had the burden to establish its admissibility. *Id*. We review the trial court's admission of evidence for an abuse of discretion. *See State v.*

Dixon, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any applicable legal theory. *Id*.

After Byerly had been missing for several months, appellant's father led police to Byerly's remains and informed the police of appellant's confession to the killing. Dr. Tommy Brown, the State's forensic pathologist, performed the autopsy. Dr. Brown testified that Byerly died from a stab wound to the left chest and from cranial cerebral trauma. During his testimony, the trial court admitted into evidence, without objection, Dr. Brown's autopsy report. Dr. Brown testified that "cranial cerebral trauma" describes a "blunt force trauma to the head from some type of object that fractured his skull in different places." During the trial, Dr. Brown explained that the fractures in the back of Byerly's skull had three possible causes: (1) Byerly struck his head against a hard surface on falling, (2) Byerly was lying on a hard surface when he was hit with a hard object, or (3) Byerly received direct trauma to the back of his head. Dr. Brown testified that either Byerly's head injuries or his chest stab wound could have been independently fatal. He further testified that a person sustaining these types of head injuries would have been unable to stand up or fight back, and would have been rendered unconscious very quickly.

Dr. Brown sent Byerly's skeletal remains to Dr. Gill-King for identification. Dr. Brown received an anthropological report from Dr. Gill-King and Dr. Brown testified he incorporated Dr. Gill-King's report and findings into his report. Dr. Gill-King was

unavailable to testify at trial. However, the trial court admitted Dr. Gill-King's anthropological report, over defense's objections, as a separate exhibit.

Dr. Gill-King's report indicates that he analyzed Byerly's skeletal remains and prepared an anthropological report. In his report, Dr. Gill-King identifies "several cranial and postcranial perimortem traumatic defects[,]" including "a fracture of the right and left parietals with a radiation across the right arm of the lambdoid suture to the occipital." Dr. Gill-King then opines "this set of defects may represent *contrecoups* [sic] damage."[2]

As noted above, Dr. Brown consulted Dr. Gill-King in connection with his investigation to identify the remains of the body. Both Drs. Brown and Gill-King concluded that Byerly's death was a homicide, which would lead both to anticipate a prosecutorial use of the autopsy report, as well as the anthropological report. Therefore, it is reasonable to assume that Dr. Gill-King believed his report would be available for use at a later trial.

Additionally, the State's use of Dr. Gill-King's exhibit was functionally equivalent to live, in-court testimony to substitute for his absence at trial. In response to defendant's objection at trial, the State argued that the report was admissible since Dr. Gill-King was an expert upon whose report Dr. Brown relied on for his findings. While the State did not

[2] A *contrecoup* is defined as "[a]n injury to parts of the brain located on the side opposite that of the primary injury, as when a blow to the back of the head forces the frontal and temporal lobes against the irregular bones of the anterior portion of the cranial vault." TABER'S CYCLOPEDIC MEDICAL DICTIONARY (F.A. Davis, 2002).

refer to Rules 703 and 705 of the Rules of Evidence, it is apparent from what was said that these rules form the basis on which the report was offered and admitted.

Rule 703 provides that an expert witness may base his opinion on facts or data that are not admissible, if the inadmissible facts or data are of a type reasonably relied on by experts in the particular field. Tex. R. Evid. 703. Rule 705 provides that an expert witness may disclose the facts and data underlying his opinion even if they are inadmissible as evidence under certain limited circumstances. Tex. R. Evid. 705(d). However, Dr. Brown never testified that he relied upon Dr. Gill-King's report in forming his opinions, but only that Dr. Gill-King's report was incorporated and attached to Dr. Brown's report. Clearly, the rules of evidence do not trump a defendant's constitutional right to confrontation. *See Crawford*, 541 U.S. at 61. When the facts and data in a report explain and support a testifying expert's opinions only when the underlying data and facts are true, then the jury must consider the facts and data in the inadmissible report as substantive, rather than merely constituting the underlying basis for the expert's opinion. *See Martinez v. State*, 311 S.W.3d 104, 112 (Tex. App.—Amarillo 2010, pet. ref'd); *Wood v. State*, 299 S.W.3d 200, 213 (Tex. App.—Austin 2009, pet. ref'd). Under the circumstances presented here, the trial court's admission of this report over a timely and specific objection was constitutional error. However, the Confrontation Clause was not offended when Dr. Brown testified to his own opinions regarding the nature and causes of Byerly's injuries and death.

Error was Harmless

When constitutional error is adequately preserved, we must reverse appellant's conviction unless we are satisfied beyond a reasonable doubt that the error did not contribute to his conviction or punishment. *Langham*, 305 S.W.3d at 582. We consider a number of factors to determine whether to declare error harmless beyond a reasonable doubt under *Crawford* including "1) how important was the out-of-court statement to the State's case; 2) whether the out-of-court statement was cumulative of other evidence; 3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and 4) the overall strength of the prosecution's case." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007); *Langham*, 305 S.W.3d at 582. In determining whether the error was actually a contributing factor in the jury's deliberations we may also consider "the source and nature of the error, to what extent, if any, it was emphasized by the State, and how weighty the jury may have found the erroneously admitted evidence to be compared to the balance of the evidence with respect to the element or defensive issue to which it is relevant." *Langham*, 365 S.W.3d at 582. In consideration of these factors, we must determine whether "there is a reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Id.*

Appellant contends that the State's use of inadmissible testimonial hearsay harmed him by possibly strengthening the prosecution's case for murder because "[t]he jury may

have concluded that as the *contrecoups* injury theory was the only theory supported by Dr. Gill-King, an expert, and as the theory seemed to be adverse to [a]ppellant's self defense claim to some degree, a murder conviction was warranted." Appellant's argument is unpersuasive. Dr. Gill-King's report states that Byerly's injury "may" represent *contrecoup* damage. Dr. Gill-King's use of the term "may" clearly presupposes alternative potential causes. Further, the complained of sentence in Dr. Gill-King's report is cumulative of other evidence. Without specifically referring to Dr. Gill-King's report or otherwise using the term *contrecoup*, Dr. Brown also testified that the damage to the skull could have resulted from a *contrecoup*-type of injury, but he also opined that Byerly's striking his head against a hard surface or receiving a direct trauma could have caused the injury to the skull.[3] Contrary to appellant's arguments to this court, during the State's cross-examination of appellant and the State's closing argument, the State referenced Dr. Brown's testimony, but made no mention of Dr. Gill-King's report. Dr. Gill-King's report did not provide the jury with information they otherwise did not receive directly from Dr. Brown. We are satisfied beyond a reasonable doubt that the trial court's admission of Dr. Gill-King's report did not contribute to appellant's conviction or punishment. Tex. R. App. P. 44.2(a). We overrule issue one.

[3] Notably, appellant's trial counsel had an opportunity to cross-examine Dr. Brown on the nature of Byerly's head injury and its cause, specifically the possibility that it was caused by a *contrecoup*-type injury, and he did not.

SUFFICIENCY OF THE EVIDENCE

Appellant further contends by two issues that the evidence was factually and legally insufficient to support his conviction. In *Brooks*, the Court of Criminal Appeals concluded that there is no meaningful distinction between legal sufficiency review and factual sufficiency review. *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The Court held that "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id*. at 912. To determine the sufficiency of the evidence, the appellate court must review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Under the *Jackson* standard, the reviewing court gives full deference to the jury's responsibility "'to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 318-19).

Capital Murder

Appellant complains that the evidence is insufficient to support his conviction for capital murder because the State did not prove appellant killed Byerly while in the course of committing or attempting to commit robbery.

The indictment charged appellant with capital murder under section 19.03(a)(2) of the Texas Penal Code, which provides in pertinent part that a person commits capital murder when "the person intentionally commits the murder in the course of committing or attempting to commit . . . robbery[.]" Tex. Penal Code Ann. § 19.03(a)(2). While section 19.03 does not define "in the course of committing or attempting to commit[,]" the Texas Court of Criminal Appeals has defined it as "conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the offense[.]" *Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980); *Hernandez v. State*, 10 S.W.3d 812, 823 (Tex. App.—Beaumont 2000, pet. ref'd). A person commits robbery if during the course of committing theft a person "intentionally, knowingly, or recklessly causes bodily injury to another" with the "intent to obtain or maintain control of the property[.]" Tex. Penal Code Ann. § 29.02(a)(1) (West 2003).

Appellant contends that the State failed to prove the element of "in the course of committing or attempting to commit the offense of robbery" beyond a reasonable doubt. The State essentially had to prove that appellant intentionally or knowingly caused Byerly's death with the intent to obtain or maintain control of Byerly's property. We find sufficient evidence that a rational trier of fact could have found beyond a reasonable doubt that appellant murdered Byerly during the course of robbing him.

Byerly's wife testified that he always wore a gold chain and that he wore a gold nugget ring when he went out for the evening. Southwell testified that Byerly came to him

looking for a date, so Southwell brought Byerly to appellant. Southwell testified that Byerly entered appellant's room and that later appellant exited his room and requested to buy drugs from Southwell. Southwell testified that after appellant received the drugs, he went back to his room only to return again later with more money to purchase drugs. Southwell testified that he saw Byerly early the next morning looking for his wallet, and when they found it, all of Byerly's cash and credit cards were missing.

Appellant admits to intentionally hitting Byerly over the head with a cinder block and stabbing Byerly three times. Appellant's father testified that appellant confessed to him that he robbed and killed Byerly because Byerly did not want to buy more crack for appellant. Appellant does not deny that he told his father that he stole from Byerly, but claims he was lying to his father to cover up his shame from being sexually assaulted.

Byerly's necklace and ring were not recovered. However, appellant's coworker testified that after Byerly went missing he saw appellant with Byerly's necklace and ring. The coworker testified that appellant indicated he needed to go to the pawnshop and thereafter appellant's coworker did not see appellant with the necklace or ring again. Appellant admitted to pawning various items of jewelry, but he denied that those items belonged to Byerly.

After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of capital murder beyond a reasonable doubt. We overrule this issue.

Self-Defense

Appellant complains that the evidence is insufficient to support his conviction for capital murder because the State failed to disprove the issue of self-defense beyond a reasonable doubt. "[A] person is justified in using force against another when and to the degree [he] reasonably believes the force is immediately necessary to protect [himself] against the other's use or attempted use of unlawful force." Tex. Penal Code Ann. § 9.31(a) (West Supp. 2010). Further, "[a] person is justified in using deadly force against another . . . when and to the degree [he] reasonably believes the deadly force is immediately necessary . . . to protect [himself] against the other's use or attempted use of unlawful deadly force." *Id.* § 9.32(a)(2)(A). The State's burden "requires only that the State prove its case beyond a reasonable doubt." *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

As the sole judge of a witness's credibility and the weight of the testimony, the jury may choose to believe or disbelieve all or any part of a witness's testimony. *See Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). The only testimony at trial in support of appellant's claim of self-defense was his own. Appellant admitted that he killed Byerly, but claims it was in self-defense because Byerly held a knife to his throat and sexually assaulted him. Although appellant testified that he acted out of fear for his life when he killed Byerly, the jury could rationally conclude that appellant's conduct was inconsistent with a claim of self-defense. While appellant told the police that he had the knife Byerly

allegedly used in the deadly assault, no knife was ever recovered. Other witnesses testified that Byerly was not known to be violent. The jury was free to reject some or all of appellant's version of the events, and having done so, as indicated above, the jury could rationally have found all the essential elements of capital murder beyond a reasonable doubt. The evidence, viewed in the light most favorable to the verdict, is sufficient to support the jury's implicit rejection of appellant's claim of self-defense. We overrule this issue.

Having overruled each of appellant's issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on November 18, 2010
Opinion Delivered April 6, 2011
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Before McKeithen, C.J., Gaultney and Kreger, JJ.