COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00326-CR
NO. 02-15-00327-CR

ROBERT GENE GEOTCHA, JR. APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1364883D, 1364887D

CONCURRING AND DISSENTING OPINION

Although I agree with the majority that Appellant's conviction in appellate cause number 02-15-00327-CR, in which Wanda Jackson was the named complainant, should be affirmed, I disagree regarding appellate cause number 02-15-00326-CR, the case in which Alquisha Knox is the named complainant. In that case, I must respectfully dissent from the conscientious majority's holding that Appellant did not preserve "other" hearsay and confrontation objections and

from the majority's overly broad holding that statements made for medical diagnosis are not testimonial.

The prosecution represented before trial that Knox, Appellant's accuser, would testify at trial. The prosecution represented to Appellant, to the trial court, and to the jury that Knox would testify to lay the necessary predicate to authenticate a text message purportedly sent by Appellant that the prosecution brought up during voir dire.

As the majority points out, Appellant made timely and specific hearsay and confrontation objections to the prosecution's question to the paramedic asking what Knox, who was not present at trial despite being a named complainant and despite the State's pretrial representations, had told him about what had happened to cause her injuries. As the majority mentions in a footnote, when the trial court overruled Appellant's objections, he requested and was granted a running objection.

The law is well established that a party may preserve his complaint by requesting and receiving a running objection to the trial court's overruling his objection.[1] But the majority's final holding appears to rest on its vague statement that Appellant's "other complaints" were forfeited. I do not understand what other confrontation complaints could have been forfeited. Knox is a complainant. The prosecution did not produce her at trial but offered her accusation. Appellant

[1]Tex. R. App. P. 33.1; Tex. R. Evid. 103; *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008).

objected to being denied the right to confront his accuser, Knox. The trial court granted him a running objection to the denial of confrontation of Knox. What "other objections" had to be lodged to avoid forfeiting his complaint of the denial of confrontation of Knox?

Additionally, the Texas Court of Criminal Appeals does not paint with such a broad brush the admissibility of statements made for medical diagnosis:

> [C]onsistent with the rationale for admitting statements made for purposes of medical diagnosis or treatment over a hearsay objection, it is appropriate to require the proponent of the evidence to show that the out-of-court declarant was aware that the statements were made for that purpose and that "proper diagnosis or treatment depends upon the veracity of such statements." This is the first part of the *Iron Shell/Renville* test. Absent such an awareness on the declarant's part, we cannot be sure that the self-interested motive to tell the truth, making such statements sufficiently trustworthy to overcome a hearsay objection, is present.[2]

A police officer took a statement from Knox when he first arrived and then helped her into an ambulance. The paramedic questioned Knox while police were on the scene. The record does not reflect how much time elapsed between the officer's questioning and the paramedic's; the record suggests that they were in close temporal proximity or overlapping.

Nothing in the record satisfies any test that would show Knox's statements to the paramedic were nontestimonial. I would hold that the trial court erred by overruling Appellant's objection to the denial of confrontation. I must, therefore,

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[2] *Taylor v. State*, 268 S.W.3d 571, 588–89 (Tex. Crim. App. 2008) (citation omitted).

dissent from the majority's holdings that Appellant forfeited his confrontation complaint elsewhere and that Knox's statements to the paramedic were not testimonial.

I find the prosecution's actions in representing in pretrial discovery and as late as during voir dire that Knox would testify at trial—with no real explanation for her absence at trial—terribly disturbing. Appellant argues that Knox did not appear because the prosecution was successfully manipulating his ability to confront his accuser. I am not sure that the record is sufficient to support this allegation. It is clear, however, that Knox did not appear for purposes of confrontation.

In *Long v. State*, a sexual assault of a child case, our colleagues in Dallas established that the child complainant is an indispensible witness whom the State, not the defendant, must call for purposes of confrontation and cross-examination, and the Texas Court of Criminal Appeals agreed.[3] Subsequently, in *Briggs v. State*, the Texas Court of Criminal Appeals overruled the portions of *Long II* which held former article 38.071, section 2 of the code of criminal procedure facially unconstitutional.[4] But the *Briggs* court recognized that the statute as applied could still run afoul of the constitution:

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[3]*Long v. State* (*Long I*), 694 S.W.2d 185, 191–92 (Tex. App.—Dallas 1985), *aff'd*, *Long v. State* (*Long II*), 742 S.W.2d 302, 321–22 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 993 (1988), *overruled in part by Briggs v. State*, 789 S.W.2d 918, 921 (Tex. Crim. App. 1990).

[4]789 S.W.2d at 921.

> In some cases the accused may well be forced to call the child to the stand himself, or else forgo his right to crossexamine the principal witness against him. But not every defendant would be put to this *unconstitutional choice*. In the instant case, for example, the State called M.T. to the stand during its case in chief, permitting appellant the opportunity to crossexamine her without appearing himself to violate the apparent purpose of the statute. In the event the State merely makes the child "available," but forces appellant to call her to the stand, the *statute may indeed function to deprive the accused of due process and due course of law.*[5]

The *Long II* court reminded us of the importance of confrontation and cross-examination,

> In *Mattox v. United States*, the historical and primary purpose of the right of confrontation was given judicial approval. Continuing to adhere to such recognition the Supreme Court in *Alford v. United States* commented that the right of cross-examination is "one of the safeguards essential to a fair trial."[6]

Further, our sister court in Dallas explained in *Long I* why the absence of the accuser in the case before us violates Appellant's constitutional rights:

> The statute [former Article 38.071] unconstitutionally forces the defendant to elect between two constitutional rights. The Fourteenth Amendment Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Additionally, "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."
>
> The corollary of the conjunction of these two rights is that the accused in a criminal case may be found not guilty though he neither presents evidence in his favor nor cross-examines the State's

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[5] *Id.* at 921–22 (emphases added) (citations omitted).

[6] *Long II*, 742 S.W.2d at 310 (citations omitted).

> witnesses. Thus, Article 38.071, by not commanding the presence of the child complainant, a witness indispensable to the State's case, but simply providing appellant a right to call her to testify, compels appellant to forego either his right to confrontation or his right to remain passive. The compulsion of an election between two constitutional rights penalizes the exercise of a constitutional right and is unconstitutional.[7]

The denial of Appellant's right to confront and cross-examine Knox is not rendered harmless because there was sufficient additional evidence to support his conviction if the jury believed it. The issue is not one of the sufficiency of the evidence. The record reflects that Knox's mother, Jackson, and neighbor, Dvorak, also testified that Appellant had assaulted Knox and caused her injuries.

The issue, rather, is whether Appellant was denied his fundamental constitutional right to confront and cross-examine Knox. The fact that he was denied that right is unquestionable. The jury had no opportunity to observe Knox's demeanor or, as Appellant points out, to observe how she reacted to challenges to her testimony. Nor did the jury have a chance to hear testimony about the relationship between Appellant and Knox that might have revealed defensive or mitigating evidence that other witnesses were not necessarily aware of.

The error is constitutional, and we should apply rule 44.2(a) and reverse unless we determine beyond a reasonable doubt that the error did not contribute

[7] *Long I*, 694 S.W.2d at 192 (citations omitted).

to Appellant's conviction or punishment.[8] The question is whether the trial court's error in overruling Appellant's objection to the denial of his right to confront and cross-examine his accuser was harmless beyond a reasonable doubt.[9] In applying the "harmless error" test, our primary question is whether there is a "reasonable possibility" that the error might have contributed to the conviction or punishment.[10]

Our harmless error analysis should not focus on the propriety of the outcome of the trial; instead, we should calculate as much as possible the probable impact on the jury in light of the existence of other evidence.[11] We "should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment,'" and if applicable, we may consider the nature of the error, the extent that it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error.[12] This requires us to evaluate the entire

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[8]Tex. R. App. P. 44.2(a).

[9]*See Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997).

[10]*Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999).

[11]*Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 944 (2001).

[12]*Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011) (quoting Tex. R. App. P. 44.2(a)).

record in a neutral, impartial, and even-handed manner, not "in the light most favorable to the prosecution."[13]

Clearly, the evidence that Knox told the paramedic that Appellant had caused her injuries affected both the conviction and the punishment. Because Appellant was denied his essential right to confront his accuser and to cross-examine her, and because he properly preserved this issue for appellate review, I would reverse the trial court's judgment and remand appellate cause 02-16-00326-CR to the trial court. Because the majority does not, I must respectfully dissent.

/s/ Lee Ann Dauphinot

LEE ANN DAUPHINOT
JUSTICE

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[13]*Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989), *disagreed with in part on other grounds by Snowden*, 353 S.W.3d at 821–22.