COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-13-00521-CR

RODNEY DIMITRIUS LAKE A/K/A RODNEY D. LAKE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1173627D

MEMORANDUM OPINION[1] ON REMAND

The decisive issue in this case is whether a trial court's constitutional error in denying a defendant's request to present closing argument before the court revoked his community supervision and sentenced him to a term of confinement was harmless beyond a reasonable doubt. Appellant Rodney Dimitrius Lake a/k/a Rodney D. Lake appeals his conviction and his ten-year sentence for

[1]*See* Tex. R. App. P. 47.4.

sexual assault. Because we are not convinced beyond a reasonable doubt that the error did not contribute to the trial court's revocation or sentencing decisions, we reverse the trial court's judgment and remand this case for a new hearing on revocation.

Background Facts

By his admission during the revocation proceedings, appellant sexually assaulted and impregnated his victim. In an attempt to eliminate evidence of his crime, he took the victim to get an abortion, but she could not get one because her pregnancy had progressed too far.

A grand jury indicted appellant for sexual assault.[2] In a trial to a jury, he pled not guilty. The jury found him guilty, assessed ten years' confinement, and recommended the suspension of the sentence and his placement on community supervision. The trial court signed a judgment reflecting the conviction, the suspension of the ten-year sentence, and appellant's placement on community supervision for ten years. The court also imposed several conditions of community supervision.

Later, the State filed a petition for the trial court to revoke the community supervision and to impose the sentence. The State alleged that appellant had violated conditions by contacting the victim, by having physical contact with a

[2] *See* Tex. Penal Code Ann. § 22.011(a)(2)(A) (West 2011).

child, by viewing pornography, by using a computer without blocking software, and by failing to complete community service obligations.[3]

The trial court held a hearing on the State's petition. Appellant pled that the State's allegations were not true. Five witnesses testified: Elaine Brown, appellant's probation officer; Ezio Leite, a licensed sex offender treatment provider; Robert Brown, appellant's stepfather; Raquel Bonds, appellant's wife; and appellant. After the testimony concluded, the following exchange occurred:

> [DEFENSE COUNSEL]: Defense closes, Your Honor. Can we make a closing statement when the time comes, Your Honor?
>
> THE COURT: Sir?
>
> [DEFENSE COUNSEL]: Can I make a closing statement when the time comes?
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> THE COURT: I don't need one.

After this colloquy, the trial court found that appellant had violated two conditions of his community supervision: he had viewed pornography, and he had used a computer without blocking software. The court found the other allegations in the revocation petition to be not true. Based on the trial court's findings of true to two violations, the court revoked appellant's community supervision and sentenced him to ten years' confinement. Appellant appealed.

[3]This was the second revocation petition. The trial court dismissed a prior petition upon the State's motion.

The History of this Appeal

Upon the original submission of this appeal, appellant presented two points: the trial court violated his constitutional rights by denying his request to present closing argument, and the trial court violated his constitutional rights by refusing to consider the entire range of punishment upon revocation. Based on the trial court's denial of appellant's request to present closing argument, we reversed the revocation of his community supervision, and we remanded for a new revocation hearing. *Lake v. State*, 481 S.W.3d 656, 660–61 (Tex. App.—Fort Worth 2015), *rev'd*, No. PD-0196-16, 2017 WL 514588, at *7 (Tex. Crim. App. Feb. 8, 2017) (plurality op.). We held that appellant's state and federal constitutional rights guaranteed an opportunity to make a closing argument, that the trial court had violated those rights, and that because "the error [was] constitutional and the effect of the denial of closing argument [could not] be assessed, the error [was] reversible without any showing of harm." *Id.* at 660.

The court of criminal appeals reversed our judgment. *Lake*, 2017 WL 514588, at *7. The court did not disagree that the trial court had committed constitutional error by denying appellant's request to present closing argument.[4]

[4]Similarly, on remand to this court, the State explains that it has "never disputed that a constitutional error occurred when the trial court denied [a]ppellant's request to present closing argument at the revocation hearing." *See Ruedas v. State*, 586 S.W.2d 520, 524 (Tex. Crim. App. [Panel Op.] 1979) (holding that "by refusing to allow [a defendant's] counsel to present a closing argument on the question of whether or not probation should be revoked, the trial court denied the [defendant] of his right to the effective assistance of counsel at

Id. at *1. But the court disagreed that the error was "structural" error that was reversible without analyzing harm. *Id.* at *6–7. The court remanded the appeal to this court to conduct a harm analysis. *Id.* at *7. In doing so, the court explained in part,

> Even when an error that is not structural . . . seems to defy proper analysis or the data seems to be insufficient to assess harm, an appellate court is "obligated to conduct a thorough analysis to determine the extent of harm caused by this error before reversing the conviction." For federal constitutional error that is not structural, the applicable harm analysis requires the appellate court to reverse unless it determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. *If, after such analysis, the harm of the error simply cannot be assessed, then "the error will not be proven harmless beyond a reasonable doubt," but "appellate courts should not automatically foreclose application of the harmless error test."*

Id. at *2 (footnotes omitted) (quoting *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)). The court cautioned that under the constitutional harmless error standard, courts must presume harm and must conclude that no harm occurred only when the "record shows the harmlessness of the error to be obvious." *Id.* at *6.

Denial of Closing Argument

By the court of criminal appeals's instruction, we must determine whether the trial court's constitutional error in denying appellant's request to present closing argument was harmless. When a trial court commits constitutional error,

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the probation revocation proceeding"). The State concedes that the "only issue on remand is whether the constitutional error requires reversal."

we apply rule of appellate procedure 44.2(a). Tex. R. App. P. 44.2(a). The question under that rule is whether the trial court's error was harmless beyond a reasonable doubt. *See Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997); *see also Love v. State*, No. AP-77,024, 2016 WL 7131259, at *13 (Tex. Crim. App. Dec. 7, 2016) ("As we cannot determine beyond a reasonable doubt that the text messages did not contribute to the jury's verdict at the guilt phase, we hold that the error was not harmless."); *Davis v. State*, 195 S.W.3d 311, 317 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("[I]t is the State's burden, as beneficiary of the error, to prove the error is harmless beyond a reasonable doubt.").

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 proceeding in light of the existence of other evidence. *See Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 944 (2001). 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.'" *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011) (quoting Tex. R. App. P. 44.2(a)). This requires us to evaluate the entire record in a neutral, impartial, and even-handed manner, not "in the light most favorable to the prosecution." *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.

In *Herring v. New York*, the Supreme Court explained the critical nature of a defendant's ability to present a closing argument. 422 U.S. 853, 858–65, 95 S. Ct. 2550, 2553–57 (1975). The issue in that case was the constitutionality of a statute that allowed judges in bench trials to deny closing arguments. *Id.* at 853, 95 S. Ct. at 2551. The Court held that the statute was unconstitutional and reasoned,

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. . . .
>
> . . . .
>
> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact . . . .
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> . . . .
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> Some cases may appear to the trial judge to be simple—open and shut—at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be 'likely to leave (a) judge just where it found him.' *But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.*

Id. at 858–63, 95 S. Ct. at 2553–56 (emphasis added) (footnotes omitted).

Relying on the principles from *Herring*, various courts (including Texas courts) have reversed criminal convictions or juvenile delinquency judgments for the denial of a defendant's opportunity to present closing argument. *See Ruedas*, 586 S.W.2d at 523–24; *see also S.S. v. State*, 204 S.W.3d 512, 514 (Ark. 2005) ("[W]hen a defendant has been denied the right to make a closing argument, there is no way to know whether an appropriate argument in summation may have affected the ultimate judgment in his case; thus, the trial judge's decision cannot be considered harmless."); *Fain v. State*, 134 So. 3d 1039, 1040 (Fla. Dist. Ct. App. 2013) (holding that denial of closing argument in a probation revocation appeal was not harmless because the court could not "know how [the] closing argument might have affected the judge's perception of the evidence").

The evidence supporting the trial court's findings that appellant violated two conditions of community supervision is strong, and as the State argues, appellant has never challenged the sufficiency of the evidence to support revocation. Elaine Brown, appellant's probation officer, testified that appellant had violated a condition of community supervision by receiving information about the victim from his stepfather and by responding to the information as a way of communicating with the victim.[5] She also testified that appellant had violated a

[5]Brown testified that she had understood that appellant's stepfather was going to "tell [the] victim that [appellant] was no longer mad at her." The trial

condition by having contact with and shaking hands with a minor without a chaperone at a family Thanksgiving get-together in 2011.[6] Next, she explained that he had violated conditions by accessing computing devices that had no blocking software, by viewing and searching for sexually explicit photos (including photos of exposed breasts, women in G-string bikinis, and "vaginal pictures of celebrities"), and by failing to complete community service at a rate of ten hours per month.[7] Finally, Brown explained that appellant had previously been confined for violating a condition of community supervision by going to a toy store, which was a child safety zone.

Leite, appellant's sex offender counselor, testified that appellant had problems with his progress in outpatient treatment and that the treatment was "not getting the job done." Leite opined that appellant could be a candidate for an intensive inpatient sex offender treatment program that is at a "lockup facility" and that is aimed at helping offenders "understand, learn, and manage their cognitive destruction." Leite testified that he favored such a treatment in the event that appellant remained on probation. Leite recognized that while on probation, appellant had viewed pornographic material, which was "against his

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court found that the State's allegation concerning appellant's contact with his victim was not true.

[6]Concerning this allegation, the trial court found that while contact "may have happened, it happened under circumstances which [did] not constitute a violation."

[7]The trial court found that the community service allegation was not true.

probation and against treatment expectations." He also recognized that "at times [appellant thought] that the rules [did not] apply to him or [that they were] not important for him to follow."

On cross-examination, when the State asked Leite about the inpatient program's ability to help appellant follow rules of probation, Leite conceded, "I don't know that [the program] will do the trick, Counselor." Leite recognized that appellant had a pattern of violating probation and testified that appellant initially did not admit to committing the offense despite the presence of DNA proving that he fathered a child with the victim. He testified that appellant's searching for "vaginal pictures of celebrities" was significant because "here we have someone who has committed a sexual offense and . . . that person continues to overemphasize sexuality and in a context that demeans women, which is what he did in his sexual offense. So I see the cycle repeating itself, and that is highly problematic."

Robert Brown, appellant's stepfather, testified as relating to the State's first allegation in its revocation petition that he did not receive information from the victim about appellant or convey information to the victim from appellant. Bonds, appellant's wife, testified concerning appellant's contact with children on Thanksgiving that no children were at the house when appellant arrived and that when children arrived and came inside the house, she and appellant left. Bonds also testified about matters related to appellant's access to computing devices that she owned; she admitted that for part of his probation, he had access to

computers without blocking software and could have viewed pornography during that time.

Appellant denied that he had contact with the victim through his stepfather. Concerning the Thanksgiving incident, appellant testified that he and Bonds had left the house when they saw that children were there and that he had not had contact with children that day other than a "fist bump" with a boy. Appellant denied that he had viewed pictures for "sexual gratification" during his probation but admitted that he had seen certain "sexually suggestive" images—including blurred pictures of nudity, pictures of women in their underwear, and pop ups from pornographic websites—on a computer without blocking software during three months in 2011. Appellant said that he had viewed sexually explicit material or pornography once or twice since beginning sex offender therapy.

On cross-examination, appellant said that community supervision was not an appropriate punishment for his crime and conceded that he "deserve[d] prison." He admitted that he did not deserve probation, but he asked the trial court to allow him to remain on probation, reasoning that he had "worked so hard to follow the rules," at least near the time of the revocation hearing.

Certainly, this evidence *could* support revocation and the imposition of a sentence, the State *could* have argued as much had the trial court allowed the parties to present arguments, and the trial court *could* have made the same revocation and sentencing decisions had the State made such an argument (and had appellant responded with a different argument). But findings of "true" to

alleged violations of community supervision do not necessitate revocation and the imposition of a sentence; instead, those decisions are subject to a trial court's broad discretion. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 22(a) (West Supp. 2016) (providing that after a trial court determines that a defendant has violated a condition of community supervision, the trial court may continue the community supervision and impose additional conditions); *Ex parte Tarver*, 725 S.W.2d 195, 200 (Tex. Crim. App. 1986) ("A trial court in a motion to revoke probation hearing has wide discretion to modify, revoke, or continue the probation. A court may continue or modify the probation even though finding that the allegations in the motion to revoke probation are true." (citations omitted)). Similarly, revocation does not necessitate imposing the sentence assessed by the jury (here, ten years); instead, the trial court has discretion to impose a lesser sentence. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 23(a); *Lombardo v. State*, No. 14-15-00406-CR, 2017 WL 1025853, at *7 (Tex. App.—Houston [14th Dist.] Mar. 16, 2017, no pet.) ("[I]f the trial court determines that the best interests of society and the defendant would be served by a shorter term of confinement, the trial court may exercise its discretion to reduce the term of confinement originally assessed to any term not less than the minimum prescribed for the offense."). Because the trial court has such discretion (1) to either revoke or continue community supervision upon finding that a defendant violated a condition or (2) to either impose the original sentence or reduce the sentence if the court decides revocation is appropriate, the defendant is "entitled . . . to an

opportunity to show not only that he did not violate the conditions [of his probation], but also . . . [to contest] the appropriate disposition." *Euler v. State*, 218 S.W.3d 88, 91 (Tex. Crim. App. 2007) (quoting *Black v. Romano*, 471 U.S. 606, 612, 105 S. Ct. 2254, 2258 (1985)).

Here, although the evidence showed that appellant had repeatedly failed to comply with conditions of community supervision, it also showed the availability of an intensive inpatient program in which he had not yet participated. Moreover, the trial court found that the majority of the State's allegations in its revocation petition were not true. From this record, we simply cannot foreclose beyond a reasonable doubt the *possibility* that if the trial court had given appellant an opportunity to present a closing argument, he could have persuaded the trial court to either continue probation for placement in the inpatient program (or for the imposition of another condition) or to impose a sentence less than ten years upon revocation. *Cf. Lake*, 2017 WL 514588, at *2 (stating that if harm of an error cannot be assessed, then the error cannot be harmless beyond a reasonable doubt).

We recognize that the trial court's comment that it did not "need" closing argument could weigh in favor of a determination that closing argument would not have impacted the court's decision. However, a decision holding no harm based on such a comment would result in a circular circumstance in which the error—the denial of closing argument—insulates itself from reversal. *Cf. Commonwealth v. Miranda*, 490 N.E.2d 1195, 1203 (Mass. Ct. App. 1986) ("[W]e

are precluded from concluding, on the basis of the trial judge's own say-so, that argument would in all likelihood have left him where it found him."). Given *Herring*'s emphasis on the persuasive potential and "basic element[al]" importance of closing arguments and given that the record does not show what appellant would have argued if he had been granted the opportunity, we cannot conclude that the trial court's comment shows beyond a reasonable doubt that no closing argument could have affected the court's revocation or sentencing decisions.

In summary, whether appellant's success in terms of avoiding revocation or lessening sentencing might have been greater if he had been able to present a closing argument is a matter of bald conjecture. That being the case, we cannot hold that the trial court's constitutional error was harmless beyond a reasonable doubt. *See* Tex. R. App. P. 44.2(a); *Williams*, 958 S.W.2d at 194; *see also Lake*, 2017 WL 514588, at *2. We hold that the error was not harmless, and we sustain appellant's first point.[8]

[8]Therefore, like upon original submission, we will not analyze appellant's second point. *See Lake*, 481 S.W.3d at 660; *see also* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

Conclusion

Having sustained appellant's first point, we reverse the trial court's judgment and remand this case for a new trial on revocation.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; KERR and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2017