

NO. 07-08-0496-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL C
OCTOBER 26, 2011

TOMMY CORONADO, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE 222ND DISTRICT COURT OF DEAF SMITH COUNTY;
NO. CR-07L-208; HONORABLE ROLAND SAUL, JUDGE

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

MEMORANDUM OPINION ON REMAND

The Texas Court of Criminal Appeals has decided that the statutory procedure established by article 38.071, section 2(b) of the Texas Code of Criminal Procedure is not an appropriate constitutional accommodation for the right of confrontation. Accordingly, the prior opinion of this Court, *Coronado v. State*, 310 S.W.3d 156 (Tex.App.--Amarillo 2010, pet. granted), was reversed and the case was remanded for further proceedings consistent with the opinion of the Court of Criminal Appeals.

Coronado v. State, ___ S.W.3d ___, No. PD-0644-10, 2011 Tex.Crim.App. LEXIS 1248 (Tex.Crim.App. Sept. 14, 2011). On remand, we reverse and remand the case to the trial court for further proceedings.

Background

On December 19, 2007, Appellant was indicted for aggravated sexual assault¹ and indecency with a child.² On November 14, 2008, a pretrial hearing was held to determine the admissibility of the videotaped recording of the three-year-old child victim's forensic interviews at the Bridge Children's Advocacy Center, in accordance with the provisions of article 38.071 of the Texas Code of Criminal Procedure. At the conclusion of that hearing, the trial court determined that the child was "unavailable to testify" in the presence of Appellant, as that term is used in article 38.071, and then ordered, as a condition precedent to the admissibility of that recording, that Appellant have the opportunity to present written interrogatories to the child through a subsequent recorded interview. Following the conclusion of the pretrial hearing, the interview on written questions was conducted. At trial, in lieu of the child victim's live testimony, the State offered the videotaped recordings of the child's Bridge interviews. A jury then convicted Appellant of aggravated sexual assault, a first degree felony, and indecency with a child, a second degree felony. Following a plea of "true" to the allegations contained in the enhancement portion of the indictment, the jury assessed Appellant's

¹See Tex. Penal Code Ann. § 22.021(a)(1)(B)(1) and (2)(B) (West 2011).

²See Tex. Penal Code Ann. § 21.11 (a)(1) (West 2011).

sentence, as to each offense, at confinement for life and a fine of \$10,000. Judgment was entered and this appeal followed.

Confrontation of Witnesses

Appellant contends that because he was allowed to cross-examine the child victim's videotaped statements only through the use of written interrogatories, presented by a third person, via a videotaped interview, he was denied his right to face-to-face confrontation and cross-examination as guaranteed by the Sixth Amendment. The Court of Criminal Appeals agreed finding that the submission of written interrogatories pursuant to the procedure authorized by section 2(b) of article 38.071 is not a meaningful and effective substitute for in-court, sworn testimony, subject to "rigorous adversarial testing" via face-to-face confrontation and cross-examination in a criminal trial. *Coronado*, 2011 Tex.Crim.App. LEXIS, at *39 - 40. Accordingly, we find that the trial court erred by allowing the State to introduce the child victim's videotaped Bridge interviews.

Harm Analysis

A Confrontation Clause violation is subject to harmless error analysis. *Rubio v. State*, 241 S.W.3d 1, 3 (Tex.Crim.App. 2007). However, before constitutional error can be held harmless, the reviewing court must be able to determine beyond a reasonable doubt that the error did not contribute to the appellant's conviction. *Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705 (1967). Therefore, if there is a reasonable likelihood that a Confrontation Clause violation materially affected

the jury's deliberations, then the error is not harmless beyond a reasonable doubt. *Rubio*, 241 S.W.3d at 3. Ultimately, the question is whether the State has proven beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.*

In the instant case, the child victim's allegations of sexual abuse were hotly contested by Appellant. The only evidence implicating Appellant in the commission of these offenses were the out-of-court statements of the three-year-old child victim. Although the sexual assault nurse examiner testified that the victim suffered injuries consistent with a sexual assault, nothing about that testimony directly implicates Appellant. Based upon these facts, we cannot say beyond a reasonable doubt that the introduction of the child victim's statements did not contribute to the jury's verdict of guilt.

Conclusion

Having found that the violation of Appellant's right of confrontation of witnesses was not harmless, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings.

Patrick A. Pirtle
Justice

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