NUMBER 13-16-00537-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

RODNICO RONDAE ERVIN, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 54th District Court of McLennan County, Texas.

CONCURRING MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Concurring Memorandum Opinion by Justice Benavides

I concur in the judgment because we are bound by precedent from the Texas Court of Criminal Appeals—which the majority correctly follows—in finding that appellant Rodnico Rondae Ervin did not preserve the arguments he now raises on appeal. *See Page v. State*, 286 S.W.3d 377, 379 (Tex. App.—Corpus Christi 2008, pet. ref'd) ("Courts of appeals are intermediate appellate courts and, as such, are duty bound to apply the law as interpreted by the court of criminal appeals."); *see also* TEX. CONST. art. V, § 5(a) ("The

Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all criminal cases of whatever grade, with such exceptions and under such regulations as may be provided in this Constitution or as prescribed by law.").

REYNA V. STATE DESERVES RE-EXAMINATION

I write separately to respectfully question whether the principles supporting a finding of waiver in this case are still viable, and if they are, I call upon our State's highest criminal court to re-examine the "party responsibility" doctrine of preservation of error as discussed in *Reyna v. State. See* 168 S.W.3d 173, 174–80 (Tex. Crim. App. 2005).

In *Reyna*, a six-member majority held that because Reyna did not clearly articulate that the Confrontation Clause demanded admission of his proffered evidence, the trial court never had an opportunity to rule upon this basis, which then precluded Reyna from raising the ground on appeal. *See id.* at 179–80. Nevertheless, I agree instead with *Reyna*'s three-member dissent that Texas Rule of Appellate Procedure 33.1 and Texas Rule of Evidence 103 govern our preservation of error rules, and that grafting "yet another new requirement [of] 'party responsibility' onto our preservation of error rules . . . denies a criminal defendant an enumerated constitutional right" to confrontation. *Id.* at 180 (Holcomb, J., dissenting).

The dissent noted that Reyna's defense counsel's argument to the trial court that the evidence should be admitted "centered on his right to test the credibility of the witness before the jury, which is clearly a reference to the Confrontation Clause." *Id.* at 181. A similar argument can be made in this case.

Here, the evidence sought by Ervin's defense counsel centered on the collection of evidence during the course of the Waco Police Department Drug Enforcement Unit's (WDEU) investigation. During cross-examination, Ervin's defense counsel sought to question WDEU investigator Anita Johnson, who processed all of the incriminating drug evidence found in this case, about the employment status of her fellow WDEU investigator, David Starr, who initially discovered the relevant drug evidence in this case. As the majority points out, all of the investigative officers in this case agreed that Starr was the first to discover the drug and paraphernalia found at the scene.

Ervin's offer of proof from Investigator Johnson testified about Investigator Starr's employment status with the Waco Police Department at the time of trial. Specifically, Investigator Johnson testified that after an incident with the "District Attorney's office as it related to disclosing information about a drug investigation," Investigator Starr (1) was no longer on duty with the police department, (2) was no longer involved in drug or narcotics investigations, and (3) was removed from active duty. Another WDEU investigator, Darryl Moore, also testified as part of Ervin's offer of proof admitting that among other officers, Investigator Starr had been suspended from his duties at the Waco Police Department and was no longer conducting drug investigations. Investigator Moore further admitted that Starr's employment status had "been widely reported in the general area of McLennan County." To summarize, Ervin's offer of proof elicited evidence that: Investigator Starr was suspended, was relieved of duty from the Waco Police Department, and was no longer conducting drug investigations due to an incident with the McLennan County District Attorney's office where information of drug investigations was being disclosed.

Facially, the trial court's ruling at issue in this case was premised on the evidentiary rule of relevancy. Under the surface, however, the arguments show much more. The State objected to Ervin's cross-examination of Investigator Johnson regarding Investigator Starr's employment status with the Waco Police Department on relevance grounds, after Investigator Johnson testified that each piece of evidence in this case was collected by Investigator Starr. *See* TEX. R. EVID. 401. Generally, evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action. *Id.* In response to the State's objection, the following colloquy occurred:

> [Ervin's Counsel]: Your Honor, I think the status of the officer who located and collected the evidence in this case is relevant to this jury.
>
> [State's Prosecutor]: I don't believe it has any relevance to this particular witness. It's asking about some other person who is not on the witness stand currently. It's a completely side issue.
>
> [Ervin's Counsel]: It is the individual who brought the evidence to Investigator Johnson to be marked, Your Honor.

I construe Ervin's response to the State's relevancy objection as two-fold. First, the response argues that the line of cross-examination has relevance for the jury to understand who collected the evidence in this case. And second, the cross-examination appears to attack the credibility of the officers who investigated this case for the State.

An argument that evidence should have been admitted because it was offered to attack the credibility of the complainant may involve both the Confrontation Clause and the rules of evidence. *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016). Embedded in the Confrontation Clause is an opposing party's opportunity of cross-

examination because it is "the principal means by which the believability of a witness and the truth of her testimony are tested." *Id.* The right to confrontation also includes a defendant's right to cross-examine a prosecution witness to establish bias or motive because jurors are entitled to have the benefit of the defense theory before them so that they can make an informed judgment as to the weight to place on a witness's testimony. *See id.*

Furthermore, in an unrelated 2014 case styled *Johnson v. State*, the court of criminal appeals explained that for purposes of the Confrontation Clause, a "causal connection" or logical relationship must exist between the evidence that the defendant seeks to admit and bias. *See Johnson v. State*, 433 S.W.3d 546, 552 (Tex. Crim. App. 2014). The 2014 *Johnson* Court went on to state that to be considered relevant, the proffered evidence need not definitively prove the bias alleged—it need only make the existence of bias "more probable or less probable than it would be without the evidence." *Id.*

In this case, the only logical construction and interpretation of Ervin's argument in favor of admissibility of his proffered testimony is to invoke the protections of the Confrontation Clause to establish bias, motive, or interest on the part of the State's witness due to her fellow officer's employment troubles regarding drug investigations. To force Ervin's counsel to meet this "party responsibility" theory in order to preserve error seems to favor procedural-default-line-drawing "that even the most careful, alert, knowledgeable, and brilliant lawyer" can trip on, over sacred constitutional rights in place to protect the criminally accused. *See Reyna*, 168 S.W.3d at 184 (Holcomb, J., dissenting).

For these reasons, I concur only in the judgment, and I respectfully ask the Texas Court of Criminal Appeals to re-evaluate this severe and harsh procedural rule that denies criminal defendants like Ervin an invaluable and enumerated constitutional right.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
5th day of October, 2017.