the Jasuta / Schulman report

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TIBA's Case of the Week

Eastland Court of Appeals

Case Name: ***Richard Del Lee v. The State of Texas***

- **OFFENSE**: Continuous Sexual Abuse
- **COUNTY**: Midland
- **C/A CASE No**. 11-19-00388-CR
- **DATE OF OPINION**: December 30, 2021 **OPINION**: Chief Justice John Bailey
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 238th D/C; Hon. Robert Moore
- **LAWYERS**: Piper Morgan (Defense); Eric Kalenak (State)

(**Background Facts**): Appellant is K.C.'s and S.M.'s step-grandfather. K.C. was sixteen at the time of trial. When she was a young girl, she had visitation with her biological father every other weekend, primarily at Appellant's house. These visitations began when K.C. was four years old and continued until she was eleven years old. She testified that, shortly after she started visiting Appellant's house, Appellant began inappropriately touching her. These acts of inappropriate touching continued nearly every weekend that K.C. visited her biological father. K.C. testified that she stopped going to Appellant's house when she was eleven years old because "[she] was tired of it." In July of 2018, K.C. went to a party for her younger half-brother. During this party, K.C. noticed that "[S.M.] kind of was acting shy, like closed off." K.C. testified: "I used to act like that all the time, you know, really shy all the time. I just had a feeling that I knew something was happening." K.C. then approached Malissa Minica, her former stepmother, and explained what Appellant had done to her. Minica then asked S.M. if anything had ever occurred at Appellant's house that made her uncomfortable. S.M. explained that Appellant had touched her inappropriately in the computer room in his home. Additionally, S.M. told Minica that Appellant had told her to keep his actions a secret. S.M. was twelve at the time of trial. S.M. also visited Appellant's

house every other weekend growing up. S.M. testified that Appellant inappropriately touched her multiple times during her visits to his house. Appellant first started inappropriately touching S.M. when she was seven years old, and the last incident occurred when she was ten years old.

294.01 Hearsay & Confrontation / Exceptions / Outcry Testimony: Appellant objected on the basis of hearsay to the testimony of two outcry witnesses: Katherine Shores, a forensic interviewer, and Kyle McCardle, an assistant district attorney in Midland County. Appellant made these hearsay objections when Shores and McCardle were called by the State as witnesses, but prior to their testimony. The trial court overruled the hearsay objections at the time they were made without conducting a hearing outside the presence of the jury. The trial court also granted Appellant's request for a running objection to both witnesses' testimony. Appellant asserts that, based upon his hearsay objection, the trial court should have conducted a hearing under Article 38.072 to determine whether the outcry statements were reliable. In response, the State contends that Appellant cannot challenge the lack of a hearing because he did not specifically request a hearing. In advancing this argument, the State points out that the Eastland Court of Appeals made the following statement in ***Smith v. State***, 131 S.W.3d 928 (Tex.App. - Eastland 2004)(see , Vol. 12, No. 15; 04/19/2004): "[A] timely hearsay objection at trial gives rise to the requirement that the trial court conduct an Article 38.072, section 2(b)(2) reliability hearing." The State contends that this statement in ***Smith*** was *dictum* and that the Court should adopt a contrary view as reflected in ***Cates v. State***, 72 S.W.3d 681 (Tex.App. - Tyler 2001)(holding that a defendant waives his opportunity for an outcry witness reliability hearing under Article 38.072 by not specifically asking for one).

Holding: In ***Smith***, we relied on ***Long v. State***, 800 S.W.2d 545 (Tex.Cr.App. 1990), for the proposition that a hearsay objection is sufficient to invoke the procedural requirements of Article 38.072, including the requirement for a hearing. In addition to ***Smith***, we have cited ***Long*** for this proposition in other [unpublished] opinions. Accordingly, we have determined that the preservation question was decided in ***Long*** -- a timely hearsay objection gives rise to the requirement that the trial court conduct an Article 38.072 hearing. *** The State further contends that Appellant's hearsay objections were premature because Appellant objected to the testimony of Shores and McCardle before they answered any questions. In this regard, Appellant made his hearsay objections after the State called Shores and McCardle as witnesses and after they were each sworn as witnesses. The Court of Criminal Appeals addressed the timing of a hearsay objection in ***Long***. *** The Court held that a hearsay objection made before the outcry witness begins to testify is timely to invoke the requirements of Article 38.072. *** Furthermore, as required by Article 38.072, section 2(b)(1), the State filed a notice of its intent to rely on the statute for the outcry testimony from Shores and McCardle. Thus, Appellant's hearsay objections to the testimony of Shores and McCardle can reasonably be viewed as timely objections under the statute. Accordingly, Appellant's hearsay objections to the outcry testimony from Shores and McCardle were timely. *** Because the trial court did not first hold a hearing to determine whether the outcry statements made to Shores and McCardle were reliable, as required by the

statute, the trial court erred when it admitted the statements made by K.C. to Shores and by S.M. to McCardle.

Holding (**Harm Analysis**): K.C.'s. testimony was similar to that of Shores. K.C. testified that Appellant inappropriately touched her almost every time she visited his house. Shores testified that K.C. told her about two incidents in which Appellant inappropriately touched her. Additionally, K.C. testified about an incident in which Appellant forced her to touch his genitals. Likewise, Shores testified that K.C. told her about this same incident. Moreover, S.M. testified that Appellant inappropriately touched her more than one time. Similarly, McCardle testified that S.M. told him that Appellant touched her more than three times. The improper admission of evidence is harmless when the same facts are proven by other properly admitted evidence. ***Brooks v. State***, 990 S.W.2d 278 (Tex.Cr.App. 1999)(see ☙, Vol. 7, No. 13; 04/05/1999). Because the same facts related by Shores and McCardle were also addressed in the testimony of K.C. and S.M., the failure of the trial court to conduct a reliability hearing under Article 38.072 was harmless.

(**David A. Schulman**) Counsel on appeal was not counsel at trial and was either trying to avoid an "***Anders***" brief or didn't understand why the error was harmless. Even if trial counsel pushed a little more and gotten the trial court to conduct a hearing, the evidence would still have been admitted and there still would have been no error by its admission.

☙ **205 Trial Court's Actions / Improper Comments by Trial Judge (Denial of the Right to Testify)**: Appellant's trial counsel originally indicated that Appellant was going to testify in his own defense at the guilt/innocence phase. The prosecutor suggested that Appellant should be admonished about his right to testify. The trial court excused the jury and questioned Appellant about his decision to testify. The trial court initially advised Appellant that he could not be compelled to testify. The trial court further advised Appellant that if he chose not to testify, the jury would be instructed that it could not use his silence against him. After these admonishments, Appellant informed the trial court that he wanted to testify. However, in the span of one page of the reporter's record, Appellant informed the trial court that he was not going to testify. Appellant subsequently indicated that he had not discussed his decision to testify with his trial counsel. The trial court offered Appellant the opportunity to visit with his trial counsel about the matter and Appellant accepted this opportunity. After the recess to confer with counsel, Appellant informed the trial court that he would not be testifying. On appeal, Appellant contends that the trial court improperly influenced his ultimate decision and, therefore, denied him the right to testify.

Holding: The record does not support Appellant's contention that the trial court coerced him into not testifying by following the advice of his counsel. Appellant changed his mind several times regarding his decision to testify or not before ultimately deciding that he would not testify. The above-quoted portion of the reporter's record reflects that the trial court informed Appellant that it was his decision to make -- not that of the trial court or Appellant's trial counsel. The tenor of the trial court's questions and remarks, including those indicating that Appellant should listen to the advice of trial counsel, was neither overbearing nor coercive as Appellant suggests.