the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***William Travis Kitchens v. The State of Texas***

- **OFFENSE**: Murder
- **COUNTY**: Harris
- **COURT OF APPEALS**: Houston [1st] 2024
- **C/A CITATION**: Not Designated for Publication
- **C/A RESULT**: Conviction Affirmed
- **CCA. CASE No**. PD-0541-24 **DATE OF OPINION**: September 3, 2025
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Gina Parker **VOTE**: 8-1
- **TRIAL COURT**: 178th D/C
- **LAWYERS**: Stan Schneider & David Schulman (Defense); Chris Conrad (State)

Ed Note: As Mr. Schulman was counsel for Appellant in this case, this summary was written by Austin attorney, **Rob Daniel**.

(**Background Facts**): On March 7, 2016, Hipolito Desoto rode his motorcycle to Appellant's auto-repair shop, IDB Racing, which did repair,maintenance, and restoration services on high-end, exotic, and European cars. IDB Racing was located on FM 1960 West in Houston, an area Harris County Sheriff's Office (HCSO) Detective Chris Cooke described as a high-crime area that gets "hit for burglary a lot." There were bullet holes in the shop's bay doors when Appellant rented the shop. IDB Racing's premises consisted of a three-bay garage area with a small office. Retired HCSO Chief Deputy Michael Smith, who testified as a self-defense expert for Appellant, described the office as cramped; it measured seventeen feet and ten inches from the glass entry door to the wall behind Appellant's desk, with the front of Appellant's desk being twelve feet from the entry door, a distance that Smith stated a person could cover in eight-tenths of a second. Directly across the parking lot from IDB Racing was a machine shop with a sign indicating that it was a machine shop. IDB Racing did not have any sign age suggesting it could be confused with a machine shop; its signage indicated that it was an automotive repair facility. When he saw Desoto ride up on his motorcycle shortly before 10:00 a.m., Appellant, who was age twenty-nine, five feet and seven inches tall, and 160 pounds at the time, opened his desk drawer to make sure his

pistol was available. Appellant had never met Desoto, who was five feet and seven inches tall and 280 pounds. Desoto entered IDB Racing's office and began talking with Appellant. The entire incident was recorded on IDB Racing's surveillance video, which did not record audio. Appellant described Desoto's demeanor as "irritated," with a tone of voice that "wasn't such that I would expect somebody who was coming into a business unannounced looking for somebody to be like." Desoto asked for the whereabouts of the "long-haired hippy machinist." Appellant testified that Desoto's tone and demeanor caused him to become "very uneasy." According to Appellant, when he advised Desoto that no one fitting that description worked at IDB Racing, Desoto became angrier, began violently moving his hands around, and told Appellant that he "didn't fucking get it." Appellant said that he asked Desoto if the person he was describing used to work at IDB Racing or perhaps at another shop in the area, but Desoto "seemed to be getting more and more angry that I couldn't tell him where this guy he was looking for was." Appellant testified that he was terrified and that he "didn't know what to tell him to help him." Chad Finch, an IDB Racing employee and a good friend of Appellant, testified that he saw Desoto pull up on his motorcycle and come into the office, after which Finch heard Desoto, but not Appellant, yelling.

Ed Note (**The Shooting**): Appellant testified that he "expressed to [Desoto] that if he wasn't able to give any more information about the person that he was looking for, then he needed to leave" the premises. According to Appellant, Desoto again told him that he "didn't fucking get it," threw his hands at Appellant as if to push away, and began moving towards the front door. Appellant said that, as Desoto was opening the door, apparently to leave, he said to Appellant, "shit like this is why we will be back to beat your ass." Appellant testified that he responded to Desoto's threat to "come back and beat [Appellant's] ass" by responding back "the same thing he said, out of disbelief." Appellant said that Desoto then pulled the door closed, took the ear buds out of his ears, turned as if to enter back into the office, and "yelled that he was actually going to fuck me up right now." Desoto was unarmed during the entire incident and had his hands by his side when he made this final comment to Appellant. Appellant thought he was about to be beaten to death by Desoto because "it would be nothing" for the 100-plus pounds bigger Desoto to "beat [Appellant] to a pulp and not even blink." Appellant drew his pistol from his desk drawer, stepped towards Desoto, and shot Desoto, who fell to the floor. Asked by his attorney why he shot Desoto, Appellant responded, "I thought he was going to kill me." When asked why he thought that, Appellant said, "Because there was this large stranger in my office that thought I was hiding somebody from him[, and] that was looking for somebody that he seemed angry about." Appellant added that he felt he had no other choice but to shoot Desoto. As Appellant walked forward to leave the office toward the hall entry to the bays, Desoto started to push himself up and looked at Appellant. Appellant testified that he thought Desoto "was about to get up off the ground and beat me to death" and that he fired additional shots at Desoto. One of the shots struck Desoto just above the right eye. Appellant shot Desoto a total of five times. Desoto died as the result of gunshot wounds to the head, chest, and back.

Ed Note (**Procedural History**): In 2018, a jury convicted Appellant of murder and sentenced him to confinement for 15 years. In a 2019 unpublished opinion, the First Court of Appeals held that the trial court erred by refusing to give a "sudden passion" instruction to the jury. The case was remanded for a new punishment hearing. A punishment trial was conducted in 2021. The second jury assessed punishment at confinement for 25 years. The First Court of Appeals rejected Appellant's appeal in a 2024 unpublished opinion. The Court of Criminal Appeals subsequently granted discretionary review (see ℊ&ℊ, Vol. 32, No. 41; 11/04/2024)

[ℊ& **334 Prosecutorial Misconduct / Improper Argument**]: During voir dire at the new punishment trial, defense counsel referred to "banditos" and "motorcyles." During opening statement and cross-examination of the state's witnesses, defense counsel described Desoto as "a big man, riding a motorcycle, wearing sunglasses and no helmet," described Desoto as "substantially larger" than Appellant," and mentioned that Desoto was 5'7" and weighed 280 pounds while Appellant was 5'5" to 5'7" and weighed 160 pounds, "a big difference in size." Desoto's mother-in-law referred to Desoto as "Tommy" throughout her testimony. Desoto's uncle (by marriage) also referred to him as "Tommy." Two defense attorneys delivered closing arguments, during which they described Desoto as "A 280-pound, menacing biker standing in a doorway." The second defense attorney referred to Desoto's first name of "Hipolito" six times in closing argument. The prosecutor's initial closing argument referred to Desoto solely by the name "Tommy." The only reference to "Hipolito" in the prosecutor's final closing argument came during the portion of the argument at issue in this case. In final closing argument, the prosecutor accused the defense team (and possibly Appellant) of using code words to suggest that people of Hispanic origin were scary, specifically: "*I do want to talk to you about something that, for whatever reason, we haven't talked about. And in the five-and-a-half years since this happened, we've used code words to signify it. But no one has actually explicitly said it. Let's talk about the code words they used: 'He's overweight.' He's 280 pounds. He was a 'biker.' And he suddenly turned into an 'outlaw biker,' during closing arguments. That he rode a 'Harley Davidson motorcycle with his handle bars that were up here.' That he had 'facial hair.' That he was 'scary.' They're all just saying he was scary because of what? He was scary because he was a Hispanic guy. That's what they're not saying*." Defense counsel objected. At the bench, Defense counsel argued that the State had injected race into the trial in violation of the Fifth and Eighth Amendments. The State responded that "it's deliberately overwhelming that the complainant was, in fact, Hispanic." The prosecutor also said, "I'm not commenting on the defendant's race; I'm commenting on the race of the complainant." The following then occurred at the bench:

> [DEFENSE COUNSEL]: The suggestion is being made that he was shot because he was a large Hispanic man; that's why this argument was starting. And that's not permissible -- because this isn't a racial shooting, and that's not permissible. And there's no evidence at all."
>
> THE COURT: I mean, there has been a lot of evidence that the Court has heard regarding the defendant's appears -- excuse me -- the complainant's appearance throughout this entire trial. I -- State,

> are you commenting on the defendant's -- excuse me -- complainant's appearance?
>
> [PROSECUTOR]: Yes. He was Hispanic, Judge.
>
> THE COURT: Defense, your objection is overruled.

The bench conference ended, and the prosecutor continued arguing to the jury as follows: "The complainant was Hispanic. It's not a shock to anyone, right? You can see it in his picture. Why do you think they keep calling him "Hipolito Desoto?" It's "Tommy Desoto." The defendant's own prejudices . . .. Defense counsel interrupted, objecting: "Your Honor, I object. There's been no evidence of any prejudice by [Appellant]." The trial court overruled the objection, and the prosecutor continued, saying, "Don't let the defendant's own prejudices become your own." On appeal, Appellant argued that the prosecutor "accused Appellant, without any evidence to support the accusation, of shooting the deceased because Appellant was afraid of Hispanics." Appellant contended that the State "is not allowed to draw an inference from Appellant's description of the complainant being big and burly to that he was afraid of the complainant because he was Hispanic." In its brief, the State responded that the prosecutor's argument was proper "as a reasonable inference from the record and as a response to counsel's argument." Although the State conceded that there was no direct evidence in the record showing that Desoto's race played a role in Kitchen's perceived terror, the State contended that there was a "large amount of circumstantial evidence supporting this inference."

Holding (**Improper Argument**): Generally, proper jury argument falls within one of four areas: (1) a summation of the evidence, (2) a reasonable deduction from the evidence, (3) an answer to an argument of opposing counsel, and (4) a plea for law enforcement. ***Milton v. State***, 572 S.W.3d 234 (Tex.Cr.App. 2019)(see GBS, Vol. 27, No. 12; 04/08/2019). We review a trial court's ruling on the propriety of a prosecutor's jury argument for abuse of discretion. A trial court abuses its discretion if its decision "lies outside of the zone of reasonable disagreement." For various reasons, the State and the Court of Appeals have claimed that the prosecutor's comments fell within areas (2) and (3) -- as a reasonable deduction from the evidence and as a response to defense counsel. We disagree. *** "[E]rror exists when facts not supported by the record are interjected in the argument." The State concedes that there was no direct evidence that [Appellant] harbored any racial motivation, and we agree. We have seen cases in which the evidence showed that the defendant held racist beliefs about the victim's race. [Appellant]'s case is not one of them. No evidence at trial suggested that [Appellant] held any biases or prejudices about Hispanics. The State did not introduce any evidence of past statements by [Appellant] that might show a bias or prejudice against Hispanics or any other minority group. Nor did any witnesses suggest any such bias or prejudice by [Appellant]. *** Nor did [Appellant] provide any such evidence in his own testimony. If one were to review [Appellant]'s testimony by itself, without considering anything else in the record, one would have no idea that Desoto was Hispanic. Not once in his testimony did [Appellant] mention Desoto's Hispanic status, nor did he even mention Desoto by name. [Appellant] did point to Desoto's size, to several facts associated with

being a motorcyclist, and eventually, to threats. None of these facts are about Desoto being Hispanic. *** Mere speculation is not a reasonable deduction from the evidence. Similarly, our sufficiency-of-the-evidence cases have said that juries may not come to conclusions based on mere speculation. These two types of cases involve the same considerations—a prosecutor cannot argue as a reasonable deduction from the evidence what a jury itself is not allowed to deduce. In the sufficiency context, we have said that "speculation" is "mere theorizing or guessing about the possible meaning of facts and evidence presented." That definition of "speculation" applies equally to the improper-argument context. *** The trial court's articulated reason for permitting the prosecutor's argument was that the prosecutor was commenting on Desoto's appearance. That amounts to saying, "The victim was Hispanic. Therefore, the prosecutor can accuse the defendant of being racially motivated in shooting him." If a claim that the defendant's conduct is racially motivated can be justified merely as a comment on the victim's race, then such comments can be made in any cross-racial prosecution -- i.e., any prosecution in which the defendant's race differs from that of the alleged victim. *** The problem with the lower courts' "appearance" rationales is that they do not involve deductions at all, much less reasonable deductions. Instead, these rationales involve mere category matching -- the court sees a category of evidence in the case and concludes that any argument that relates to the category is fair game. The trial court set out the category of "Hispanic" and concluded that the State's argument that [Appellant] was prejudiced related to that category. The Court of Appeals set out the more general category of "appearance" and came to the same conclusion. Neither rationale seeks to determine whether there is an actual link between the evidence and the conclusion the prosecutor asked the jury to draw. But there must be a link --- that is the whole point of requiring a reasonable deduction from the evidence. And if we look for a link, one is obviously lacking. The Court of Appeals was wrong to suggest that comments on appearance alone, no matter how irrelevant to race or ethnicity, somehow necessarily implicate racial or ethnic prejudice.

Holding (**Argument Was Not Permissible as a Response to Defense Counsel's Arguments**): In its briefing before us, the State suggested that the prosecutor's closing-argument comments were a reasonable response to the "banditos" question in voir dire and to the "outlaw biker" remark by defense counsel in closing arguments. *** We repeat our earlier observation that the second defense attorney's closing argument mentioned Desoto's Hispanic first name six times—five times in conjunction with the last name, but once by itself. Although banning counsel from referring to a victim's first name would not be feasible (after all, it's his first name), perhaps the trial court could reasonably have concluded, in light of the entire trial, that counsel's use of the victim's unusual Hispanic first name was -- as the prosecutor suggested -- obsessive, thus allowing for the prosecutor to respond. We will assume arguendo that, under the totality of defense counsel's conduct in this record, the trial court would have been within its discretion to permit the State to tell the jury not to fall for any possible attempt by the defense attorneys to "otherize" the victim on the basis of his Hispanic status. *** And perhaps the prosecutor's argument started off that way, though that is less than clear. The prosecutor said that "we" and "they" used code words, that "they" said the victim was scary because he was a Hispanic guy, that "they're" not saying it, and that "they" keep calling him Hipolito Desoto. With that language it was possible that the

prosecutor was talking only about the defense attorneys, since there were two of them. However, the prosecutor could have been referring to the attorneys and the defendant. It would have been a safer to refer explicitly to the "defense attorneys." But the prosecutor resolved any ambiguity and clearly crossed the line when he next referred to "the defendant's own prejudices" and said "Don't let the defendant's prejudices become your own." With those comments, the jury would have understood all the earlier references to "they" to have included [Appellant] himself. *** Assuming *arguendo* that defense counsel insinuated that Desoto's Hispanic status made him dangerous, the proper response to such an insinuation would have been to highlight the impropriety of a defense attorney's appeal to racial prejudice. *** The trial court erred in overruling the defense objection to the prosecutor's closing-argument comment that the defendant harbored prejudice against Hispanics. The Court of Appeals was wrong to conclude that the comment was a reasonable deduction from the evidence, and the court was wrong to conclude that the comment was a reasonable response to defense counsel. We need not address whether the error is constitutional or non constitutional, and we need not address the issue of harm. The Court of Appeals can address those questions in the first instance. We reverse the judgment of the Court of Appeals and remand the case for a harm analysis.

Concurring / Dissenting Opinions: Presiding Judge David Schenck dissented, taking issue with the majority's "*assertion that the trial judge in this case acted beyond the bounds of discretion necessarily afforded to her to make the determination whether the race of the victim is at issue or has been put in issue by the defense, deliberately or otherwise*." He does not agree that the trial judge abused her discretion.

Sidebars

(**Rob Daniel**) Prosecutors are far too fond of reasonable inferences, which can be used to patch over holes in the state's case or inflame the jury's passion. Some prosecutors, however, don't understand the difference between reasonable inferences and speculation. The Court of Criminal Appeals has consistently highlighted the danger of confusing speculative guesses for reasonable inferences in its opinions addressing legal sufficiency claims. See ***Curlee v. State***, 620 S.W.3d 767 (Tex.Cr.App. 2021)(see GBS, Vol. 29, No. 14; 04/19/2021), ***Edwards v. State***, 666 S.W.3d 571 (Tex.Cr.App. 2023)(see GBS, Vol. 31, No. 5; 02/19/2023), and ***Baltimore v. State***, 689 S.W.3d 331, 340 (Tex.Cr.App. 2024)(see GBS, Vol. 32, No. 20; 05/27/2024). The Court has correctly extended the same logic to closing argument. Some prosecutors think almost any argument is reasonable under the "reasonable inference" exception, but this opinion thoroughly explains why such thoughts are misguided. This opinion should be praised -- the majority has once again affirmed that convictions must be based exclusively on facts and evidence presented from the witness stand, not on guesswork.