the Jasuta / Schulman report

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TIBA's Case of the Week

Austin Court of Appeals

Case Name: ***Lee Christopher Vaughn v. The State of Texas***

- **OFFENSE**: Displaying Harmful Material to a Minor
- **COUNTY**: Hays
- **C/A CASE No**. 03-24-00794-CR
- **DATE OF OPINION**: December 4, 2025 **OPINION**: Justice Karen Crump
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: CCL 3; Hon. Elaine Brown
- **LAWYERS**: Case Darwin (Defense); Daniel Ludmir (State)

(**Background Facts**): Appellant and Mother began dating in 2016, and he later moved in with Mother, L.M., and L.M.'s younger brother. When Appellant moved in, L.M. was ten, and her brother was eight. In 2020, L.M. made an outcry concerning Appellant and gave a statement to a forensic interviewer concerning the outcry. Around that time, L.M. and Brother went to live with their biological father, and Mother and Appellant were ordered not to be alone with the children. As part of the investigation, the police contacted Appellant to see if he would like to talk about the allegations, and he agreed to go to the police station and answer some questions. That interview was recorded and Appellant was indicted. As originally charged, the information alleged that Appellant "did then and there intentionally and knowingly display harmful material, namely pornography, by video, and the defendant knew that the material was harmful, and the defendant was reckless about whether a minor was present who would be offended or alarmed by the display in that he presented the pornographic images for the minor child's view."

[GS **25 Charging Instruments / Amendments & Modifications**]: At the start of voir dire, the State moved to modify the information and asked that the phrase "intentionally and knowingly" be deleted. Appellant objected and argued that the State should "be required to try the case as they pled it when they filed it." The trial court allowed the State to make the requested deletion. On appeal, Appellant contends that the trial court improperly allowed the State to amend the information on the first day of trial. More specifically, Appellant argues that the trial court reversibly erred by allowing the information to be altered because "amending an information on the day of trial is automatically reversible" error and because "the trial court prejudiced [his] substantial rights." Appellant contends that the amendment was impermissible because it affected

the substance of the information or was descriptive of what was legally essential to the validity of the information. Appellant believes that the change shifted "the burden to [him] to prove the affirmative defense of displaying harmful material for educational purposes" and away from the State, which he asserts under the original information had "to prove beyond a reasonable doubt that [he] did not intentionally or knowingly display harmful material for educational purposes." Although Appellant acknowledges that the Penal Code does not require that the display be intentional or knowing, he asserts that by alleging this "additional" mens rea, the State was obligated to prove it at trial. When presenting his arguments, he points to evidence that he urges supports his claim that he showed the videos for educational purposes and then asserts that he would have argued at trial if the deletion had not occurred that this evidence showed that the State had not proved beyond a reasonable doubt that he was intentionally or knowingly displaying harmful material.

Holding: [Appellant]'s issue is predicated on the law pertaining to alterations to charging instruments. That area of law has undergone significant changes over the last few decades, and some more recent Appellate decisions have left uncertainty regarding whether some decades-old law still applies in this area. *** Decades ago, the Court of Criminal Appeals addressed an issue concerning an amendment being made to an indictment after trial had started. See ***Burrell v. State***, 526 S.W.2d 799 (Tex.Cr.App. 1975). *** In that case, after a jury had been selected, the State moved to alter the indictment to remove, among other words, the phrase "and with his malice aforethought." The Court noted that "malice aforethought" was not an element of the charged offense of "assault to murder a peace officer." Further, the Court explained that typically "unnecessary words or allegations may be rejected as surplusage" and disregarded. However, the Court stated that "[t]here is . . . a well recognized exception to the general rule discussed above, and that is where the unnecessary matter is descriptive of that which is legally essential to charge a crime," in which case that matter "must be proven as alleged, even though needlessly stated." Next, the Court reasoned that although "malice aforethought" was not an essential allegation, it was "descriptive and explanatory of the assault and intent." Accordingly, the Court concluded that the deletion "from the indictment was an amendment of substance, for which reason the conviction . . . must be reversed." *** Later, in ***Sodipo v. State***, 815 S.W.2d 551 (Tex.Cr.App. 1990), the Court of Criminal Appeals addressed the propriety of another alteration made to an indictment. In that case, the State moved to modify the indictment before jury selection by changing the cause number alleged in an enhancement paragraph. *** [The] Court determined that the trial court erred by granting the State's request to amend the indictment before the jury had been selected and before trial on the merits had commenced. *** The Court of Criminal Appeals later clarified this area of law and distinguished an amendment from an abandonment. See ***Eastep v. State***, 941 S.W.2d 130 (Tex.Cr.App. 1997)(see ☙, Vol. 5, No. 5; 02/10/1997) *** The Court explained that the following constitute abandonments: "(1) abandonment of one or more of the alternative means in which an offense may be committed," "(2) abandonment of an allegation in the charging instrument if the effect of such abandonment is to reduce the prosecution to a lesser included offense," and "(3) abandonment of surplusage." *** Concerning the third type, the Court stated that "[s]urplusage is unnecessary language not legally essential

to constitute the offense alleged in the charging instrument" and that the charging instrument may be altered to delete surplusage. However, unnecessary language is not surplusage where the State has described "that which is legally essential to charge a crime" such as describing "a necessary person, place, or thing with unnecessary particularity." The Court of Criminal Appeals has referred to this exception to the "general surplusage rule" as the "***Burrell*** exception" because of its affiliation with that case. In ***Gollihar v. State***, 46 S.W.3d 243 (Tex.Cr.App. 2001)(see ☙, Vol. 9, No. 20; 05/21/2001), the Court of Criminal Appeals was later called upon to ascertain the relationship between "the law relating to surplusage," "variance law," and "legal sufficiency of the evidence and how it is raised" when addressing the proper way to analyze the sufficiency of the evidence in cases where there is a disparity between the allegations in the charging instrument and what the evidence establishes at trial. The Court ultimately determined that for purposes of performing a sufficiency review, "a hypothetically correct charge need not incorporate allegations that give rise to immaterial variances." When doing so, the Court also "reaffirm[ed] the fatal variance doctrine and overrule[d] surplusage law and the ***Burrell*** exception." The Court explained that "[a]llegations giving rise to immaterial variances may be disregarded in the hypothetically correct charge, but allegations giving rise to material variances must be included." *** (**Surplusage Remains Without *Burrell* Exception**) As set out above, "[s]urplusage is unnecessary language not legally essential to constitute the offense alleged in the charging instrument." Moreover, absent the ***Burrell*** exception, "the charging instrument may be altered to delete language which is not descriptive of what is legally essential to the validity of the indictment." Although section 43.24 includes a knowing mental state concerning whether the defendant was aware of the harmful nature of the material and a reckless mental state about whether a minor was around when the material was displayed, the Penal Code does not specify a mens rea element for the display component of the offense. See ***Celis v. State***, 416 S.W.3d 419 (Tex.Cr.App. 2013)(see ☙, Vol. 21, No. 20; 05/20/2013). *** Assuming that the remainder of surplusage law without the ***Burrell*** exception still applies to the law concerning changes to charging instruments following ***Gollihar***, the trial court did not err by allowing the information to be altered because the deleted portion constituted surplusage and could be abandoned without complying with the requirements of Article 28.10. *** (**Materiality**) Although [Appellant] contends that allowing the State to modify the information affected his ability to present a defense because he could no longer argue that his display of the videos was not intentional or knowing, he admitted to the police that he chose to and wanted to show "pornographic" videos to L.M. and precleared their use with Mother, effectively conceding that his actions were intentionally and knowingly undertaken. See Penal Code § 6.03 (defining intentional and knowing mental states); see also ***Gollihar***, 46 S.W.3d at 258 (noting that defendant admitted to conduct at issue). Moreover, [Appellant] elicited testimony from Mother indicating that she saw one of the videos that he showed L.M. Additionally, the information before and after it was altered informed [Appellant] that he had been charged with displaying harmful material to a minor by displaying "harmful material, namely pornography, by video," while knowing that the material was harmful and being reckless about whether a minor was present who would be offended or alarmed. *** The information tracked the language of the statute and gave him notice of what he had been charged

with. *** Further, the needless allegation did not prevent [Appellant] from pursuing through the testimony and other evidence admitted at trial his affirmative defense that the display was for an educational purpose. *** Additionally, [Appellant] is not in danger of being prosecuted again for the same crime in a later proceeding. *** For these reasons, assuming that the materiality test applies, we conclude that the trial court did not err by allowing the State to delete the immaterial allegations. (***Burrell* Exception Still Applies**) As set out above, the Burrell exception explained that items included in a charging instrument that are not elements of the charged offense may not be deleted as surplusage when they are "descriptive of what is legally essential to the validity of" the charging instrument. Moreover, the Court of Criminal Appeals has determined that the inclusion of unnecessary culpable mental states, even though not essential allegations, were descriptive and explanatory of what was legally essential and, therefore, could not be excluded as surplusage. *** Accordingly, under ***Burrell***, the phrase could not be removed as mere surplusage over [Appellant]'s objection because the change constituted an amendment. *** For that reason, assuming ***Burrell*** still applies, the requirements of Article 28.10 needed to have been complied with. *** As pointed out by [Appellant], the Court of Criminal Appeals has explained that it is error under Article 28.10 to make an amendment over a defendant's objection on the day of trial before a jury is selected and before the commencement of the trial on the merits as happened in this case. *** Even assuming that the analysis from Sodipo compels a conclusion that the amendment was erroneous and did not comply with Article 28.10, that would not end the analysis. As pointed out by [Appellant], the Court of Criminal Appeals determined in ***Sodipo*** and ***Eastep*** that violations of Article 28.10 were not subject to a harm analysis. *** However, those cases were decided before the Court issued an opinion that fundamentally changed how Appellate courts evaluate harm in criminal appeals. ***Cain v. State***, 947 S.W.2d 262 (Tex.Cr.App. 1997)(see ☙, Vol. 5, No. 24; 06/23/1997), superseded in part on other grounds by Rule 44.2, Tex.R.App.Pro.

Holding (**Harm Analysis**): Although the Court did not in that case address all potential errors under Article 28.10, our sister Court of Appeals has determined that, under ***Cain***, other errors under Article 28.10 are "not categorically immune to a harmless-error analysis" and applied a nonconstitutional-error harm analysis to the alleged error. ***Marks v. State***, 525 S.W.3d 403, 415 (Tex.App. - Houston [14th] 2017)(see ☙, Vol. 25, No. 16; 05/01/2017). We agree with our sister court that a violation of Article 28.10 is subject to a nonconstitutional-error harm analysis. *** Nonconstitutional errors must be disregarded unless they affect substantial rights. *** [We] must conclude that any error resulting from the trial court's allowing the State to alter the information did not have "a substantial and injurious effect or influence in determining the jury's verdict" and therefore did not affect [Appellant]'s substantial rights.

Sidebars

(**John G. Jasuta**) Rule # 1.

(**David A. Schulman**) I'll start by saying that the opinion is absolutely correct. I question, however, whether 29 pages were needed to find any error would be harmless. The opinion reads like a briefing attorney's work assignment for an entire semester.