



TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282



Web Site: www.texindbar.org

⌘ Vol. 21, No. 45, November 11, 2013

Case Name: [Walter Cornet v. The State of Texas](#)

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- OFFENSE: Aggravated Sexual Assault
- COUNTY: El Paso
- COURT OF APPEALS: El Paso 2012
- C/A CITATION: Unpublished (No. 08-09-0054-CR)
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-0205-13 DATE OF OPINION: November 6, 2013
- DISPOSITION: Court of Appeals Affirmed
- OPINION: [Alcala, J.](#) VOTE: 9-0
- TRIAL COURT: 384th D/C; Hon. Patrick Garcia
- LAWYERS: [Ruben Morales](#) (Defense); [Douglas Fletcher](#) (State)

(Background Facts) The complainant was Appellant's stepdaughter. In June 2006, when she was eight years old, she told a forensic interviewer that Appellant had, on one occasion, told her to sit on his face, at which point he made oral contact with her anus. The complainant also said that Appellant had, on one occasion, showed her various "sex toys" and placed one between her legs so that she could "feel the vibration." Appellant responded to these accusations by providing a written statement to police that was admitted at his trial. His statement indicated that, based on prior comments by the complainant, he suspected that she had been sexually active with her brothers. He said that on one occasion in March 2006, the complainant entered his bedroom, lifted her dress, and exposed herself, causing him to notice that she was not wearing underwear. Because she covered her genital area with her hand, Appellant stated that he decided to examine her to see if she had any physical evidence of sexual contact or injury. To examine the complainant, Appellant laid her down on the bed and spread her legs while she was on her stomach. After that, he opened her buttocks to visually check her anus and labia. He claimed that his fingers made contact with her labia, which he "spread to see if her hymen was intact," and he noticed that "she did not have a hymen," but he did not "know if it had been developed or had been broken." He believed that his fingers may have gotten wet at that time and made contact with her anus while he was examining her. He determined that the "examination was inconclusive and her anus did not appear to be stretched/ripped [sic]." He maintained that there was no intent for any sexual gratification. Although Appellant requested a jury instruction on the medical-care defense on the count pertaining to the digital penetration, the trial court denied his request for that instruction.

⌘ [324 Court's Charge / Defensive Charges \("Medical Care Defense" / Harmless Error Analysis\):](#)

On direct appeal, in a 2010 unpublished opinion, the Court of Appeals determined that the trial

court properly excluded the medical-care-defense instruction. The Court of Criminal Appeals reversed and reversed and remanded the case for a harm analysis. [Cornet v. State](#), 359 S.W.3d 217 (Tex.Cr.App. 2012)(see [§§](#), [Vol. 20, No. 4](#); 01/30/2012). On remand, the Court of Appeals held that the exclusion of the instruction was harmless for two reasons. First, the court explained that, despite the absence of the instruction, the jury implicitly considered appellant's defensive theory and "inferentially resolved the issue" against appellant by finding him guilty. Second, the court observed that the jury had sufficient evidence before it to disbelieve Appellant's defensive testimony regarding his medical-care examination. Appellant challenges this reasoning and cites to several decisions by Courts of Appeals holding that the omission of a defensive instruction is harmful error because it deprives defendants of their sole defense. Appellant also contends that reviews for charge error harm are distinct from, and are not to be mistaken for, evidence-sufficiency reviews. The State responds that, in finding appellant guilty of aggravated sexual assault of a child, the jury implicitly determined that he had criminal intent, and, therefore, necessarily rejected his defensive theory.

Holding: Our review of the totality of the record shows that the error in the omission of the medical-care-defense instruction was harmless. Had Appellant been tried solely for the digital penetration count or only for offenses to which the medical-care-defense instruction applied, we likely would have no information from which to determine whether the jury would have found Appellant's medical-care-defense evidence credible. *** Or had Appellant been acquitted of one offense that required proof of criminal intent to arouse sexual desire, but convicted of another offense that did not have that criminal intent, then we would have affirmative information from which to determine that the error in the omission of the medical-care-defense instruction was harmful. *** But here it is clear that the jury did not believe appellant's medical-care defense. By convicting Appellant of orally contacting the complainant's anus, an offense to which the medical-care defense is inapplicable, the jury clearly determined that it did not believe Appellant's testimony that he was examining the child for her medical care and that he did not penetrate her sexual organ or orally contact her anus. Because the totality of the record reveals the jury's implicit rejection of the medical care defense, we hold that the absence of that instruction was harmless.