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COURT OF CRIMINAL APPEALS
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PD-____-17
In the Court of Criminal Appeals of Texas
At Austin

FILED
COURT OF CRIMINAL APPEALS
12/1/2017
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———♦———

No. 01-15-00717-CR
In the Court of Appeals
For the First District of Texas
At Houston

———♦———

No. 1452040
In the 248th District Court
Of Harris County, Texas

———♦———

Dedric Dshawn Jones
Appellant

v.

The State of Texas
Appellee

———♦———

State's Petition for Discretionary Review

———♦———

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Oral Argument Requested

Statement Regarding Oral Argument

The State requests oral argument because it believes oral argument would aid this Court's decisional process in this case.

Identification of the Parties

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Trial Court:

Katherine Cabaniss, presiding judge

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Statement of the Case

The appellant was indicted for assault of a person with whom he had a dating relationship. (CR 6). The indictment alleged a prior misdemeanor conviction for assault of a family member, as well as two felony convictions, with one for an offense committed after the other felony conviction became final. (CR 6). The appellant pleaded not guilty, but a jury found him guilty as charged. (CR 93). The appellant pleaded "true" to the felony enhancement paragraphs, and the trial court assessed punishment at twenty-five years' confinement. (CR 95). The trial court certified the appellant's right of appeal, and the appellant filed a timely notice of appeal. (CR 94, 99).

On August 1, 2017, a divided panel of the First Court issued a published opinion reversing the trial court's judgment of guilt and remanding the case to the trial court. *Jones v. State*, ___ S.W.3d ___, No. 01-15-00717-CR, 2017 WL 3261352 (Tex. App.—Houston [14th Dist.] August, 2017). One justice dissented to the panel's ruling. *Id.* at *14 (Brown, J., dissenting).

The State filed a motion for extension of time to file a motion for rehearing, which was granted, and a motion for rehearing on August 23,

2017. The First Court denied the motion for rehearing on November 7, 2017.

Grounds for Review

1. The First Court erred in holding the trial court abused its discretion in excluding impeachment evidence. As the dissenting justice pointed out, the appellant's offer of proof failed to establish a causal or logical relationship between the excluded evidence and the witness's alleged bias. The First Court's opinion provides precedent for appellate courts to reverse trial courts based on speculation of what cross-examination *might* have revealed, rather than what the offer of proof showed it would reveal.

2. The First Court erred by failing to consider the weakness of the defensive evidence in conducting its harm analysis. The First Court looked only at the State's evidence, and ignored the fact that the appellant failed to produce evidence that would support a jury's finding that he acted in self-defense.

Statement of Facts

The evidence of the appellant's offense came from two witnesses, Adeline Gonzales and the appellant. Gonzales was living with Amy Jimenez (her daughter), Alice[1] (Jimenez's young daughter), and the appellant (Jimenez's boyfriend and Alice's father). (4 RR 37-38). According to Gonzales, the four of them were watching a movie one night when the appellant began making inappropriate comments. (4 RR 40). Gonzales took

[1] The State will use the pseudonym "Alice" to refer to the young child. *See* TEX. R. APP. P. 9.10 (prohibiting use in court documents of name of anyone who was a minor at the time of the offense).

Alice to a different room. (4 RR 40-41). The appellant went to the garage. (4 RR 42).

Sometime later Gonzales came out and told Jimenez that Alice needed some supplies for school. (4 RR 41). Jimenez went to the garage, where she had an argument with the appellant about going to the store. (4 RR 42-43). Gonzales opened the garage door and saw the argument. (4 RR 43). Gonzales saw Jimenez "whack" the phone the appellant was holding to get his attention. (4 RR 43-44). The appellant then struck Jimenez on the face, causing her lip to bleed. (4 RR 43-44).

The appellant testified to a similar version of events. In the appellant's story, after Jimenez called him out for making inappropriate comments during the movie, the appellant went to the garage and played games on his phone for an hour and a half. (4 RR 144). Jimenez came out to ask the appellant to check whether a freshly-painted part of the house had dried yet. (4 RR 143-44). The appellant believed Jimenez was trying to argue with him, so he ignored her. (4 RR 145-46). Jimenez then "karate kick[ed] the phone out of [his] hand." (4 RR 146). The appellant responded by slapping her. (4 RR 146).

First Ground for Review

The First Court erred in holding the trial court abused its discretion in excluding impeachment evidence. As the dissenting justice pointed out, the appellant's offer of proof failed to establish a causal or logical relationship between the excluded evidence and the witness's alleged bias. The First Court's opinion provides precedent for appellate courts to reverse trial courts based on speculation of what cross-examination *might* have revealed, rather than what the offer of proof showed it would reveal.

The First Court reversed the trial court's judgment based on a perceived violation of the appellant's constitutional right to confront witnesses. Specifically, the trial court prohibited the appellant from asking Gonzales whether she would get custody of Alice if the appellant's parental rights were terminated.

I. Background

A. At trial, the defense sought to impeach Gonzales with the fact that she wanted to obtain custody of Alice, but when given an opportunity to create an offer of proof failed to elicit evidence that Gonzales wanted to obtain custody of Alice.

Immediately prior to trial, defense counsel said that he wanted to cross-examine Gonzales about a Child Protective Services investigation and whether Gonzales had any connection to it:

> [Defense counsel]: … [I]t is my understanding that CPS is involved and the welfare of the children in whether or not parental rights were taken from [Jimenez], and [the appellant],

> and that one of the persons who may be — I don't know how to put this gently — would get the grandchild would be the mother. Again, it would go to motive as to why — if she sat up there and saw, based on the police report, if she saw mutual combat —
>
> The Court: So you want to ask [Gonzales] whether there's a CPS investigation and whether she gets the children if that CPS issue was sustained?"
>
> [Defense counsel]: Yes.

(4 RR 12). The trial court said that it did not believe the investigation and "any potential outcomes" would be relevant, "and in fact would be more prejudice to the defendant." (4 RR 13).

After Gonzales testified, the trial court allowed defense counsel to make an offer of proof regarding excluded evidence. (4 RR 89). Most of the questions revolved around other excluded evidence regarding whether Gonzales believed Jimenez was violent — hence defense counsel's preface that he was "asking these questions under [Rules of Evidence] 701 and 405." (4 RR 89). At the end of the proffer came the exchange about the CPS hearing at the heart of the First Court's reversal:

> Q; Do you know that there's a CPS — that there's a child custody battle going on to eliminate parental rights of both [Jimenez] and [the appellant]?
>
> A: Yes, sir.
>
> Q. Do you have an interest in that being done?

A. I don't understand what that means.

Q. Do you have a preference?

A. Do I have preference of what?

Q. That their parental rights be terminated or not?

A. I don't have any say in that. That damage has been done between the both of them.

Q. My understanding is the child is with an aunt; is that correct?

A. My sister.

Q. Your sister?

A. Yes. And before that she was with me. I've had her. I've always had her.

Q. The reason that you take care of the child is because of the relationship that [the appellant] and [Jimenez] have, correct?

A. I'm sorry?

Q. It's because of the type of relationship that [Jimenez] and [the appellant] have and the things that they do destructive toward each other, correct?

A. I'm not sure I want to answer that.

Q. The reason —

A. Yes, that's why I take care of her because I want her to be safe. She's a beautiful little girl. She deserves to be safe. (Witness crying).

(4 RR 93-94). After the offer of proof, defense counsel made no additional requests of the court regarding the admission of evidence, and the court made no ruling. (*See* 4 RR 94).

B. On direct appeal, the appellant claimed that the trial court erred in limiting his cross-examination of Gonzales, and a split panel of the First Court agreed.

On appeal to the First Court, the appellant claimed that the trial court reversibly erred by refusing to let him cross-examine Gonzales about her "desire to obtain custody of her grandchild." (Appellant's Brief at 14). A two-justice majority of the First Court panel, after discussing several sections of the Family Code regarding custody hearings, described this case as "a classic Confrontation Clause case" and claimed that it was "hard to imagine a more clear-cut case in which a criminal defendant should have been permitted to confront the sole eyewitness against him…." *Jones v. State*, ___ S.W.3d ___, No. 01-15-00717-CR, 2017 WL 3261352 at *11 (Tex. App.—Houston [14th Dist.] August, 2017, no pet. h.).

A dissenting justice did not seem to share the majority's lack of imagination. Justice Brown pointed out that the appellant had not established "Gonzales actually wanted or took steps to obtain custody of Alice." *Id.* at *14 (Brown, J., dissenting). The dissent further noted that the appellant's offer of proof had failed to show that Gonzales believed the

criminal case would impact the CPS case against the appellant, much less the CPS case against Jimenez. *Ibid.* Because the offer of proof did not establish a causal or logical connection between the CPS proceeding and any supposed bias Gonzales might have, the dissent believed that the appellant had failed to prove a violation of his right to confrontation. *Ibid.*, (*citing*, *inter alia, Johnson v. State*, 433 S.W.3d 546, 555 (Tex. Crim. App. 2014) and *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998)).

II. Why this deserves review:

A. The First Court's ruling is based on speculation, and it provides precedent for other courts to reverse family violence convictions based on speculation about custody matters.

The most notable part of the record in this case is that defense counsel said he wanted to cross-examine Gonzales about "whether she gets the children" if CPS terminated the appellant's and Jimenez's parental rights, but, when he was given an unfettered opportunity to make an offer of proof, he failed to ask that question. When the trial court made its ruling, it had no clue whether Gonzales would get custody of Alice after the CPS proceedings, and on appeal, this Court still doesn't know. Perhaps Gonzales is physically incapable of caring for a child; perhaps she has some criminal conviction that would discourage a family court judge from awarding her

custody; perhaps, like many grandparents, she's fine being a temporary caregiver but would not want full legal custody; or perhaps she is now Alice's legal guardian and the two are happily living together.

Given the lack of evidence that Gonzales wanted custody of Alice or had taken steps to obtain custody of Alice, the First Court instead relied on sections of the Family Code showing that Gonzales *could* have been eligible for custody. *See Jones*, 2017 WL 6261352 at *9-10 (citing TEX. FAM. CODE §§ 153.004, 153.131, 153.432, 161.001, and 263.307). However, under the Family Code, once a court terminates parental rights, there is no presumption that the child should go to a grandparent. *See* TEX. FAM. CODE § 161.207 ("If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child.").

Thus, while it is true that Gonzales *could* have obtained custody of Alice, it is also the case that any "suitable, competent adult" could have as well. Because its holding is unmoored from any factual basis showing that Gonzales wanted custody of Alice or had taken steps to obtain custody of Alice, the First Court's ruling in this case could be used as the basis for

requiring baseless, prejudicial cross-examination of third-party witnesses in any family-violence case where the defendant and complainant are co-parents. *See Jones*, 2017 WL 3261352 at *10 (pointing out that parent's conviction for violence against other parent removes statutory presumption in favor of parental custody, then speculating that "if" Jimenez's parental rights were also terminated, "appointment of a non-parent, like Gonzales, as sole managing conservator *could be* pursued.")(emphasis added).

B. Once the First Court's speculation is removed, nothing in the appellant's offer of proof shows a rational relationship between the Gonzales's testimony and her potential.

When evidence is excluded, an appellate court should review the trial court's decision not based on speculation about what evidence could have been adduced, but based on the offer of proof made by the proponent. *See* TEX. R. EVID. 103(a)(2). "The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful." *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009).

This Court has repeatedly held that a party wishing to cross-examine a witness about bias must show not just the possibility of a bias, but a factual basis showing a logical connection between the potential bias and the testimony. *See Irby v. State*, 327 S.W.3d 138, 150 n.43 (Tex. Crim. App.

2010) (collecting "numerous Texas cases in which the cross-examiner failed to show a logical connection between the fact or condition that could give rise to a potential bias or motive and the existence of any bias or motive to testify").

In this case, the appellant's offer of proof showed that there was an ongoing proceeding to terminate the appellant's and Jimenez's parental rights. It also showed that Gonzales wanted Alice to be safe.[2] What is missing is a logical connection between these facts that would suggest an actual bias, namely that Gonzales's desire to keep Alice safe had led her to involve herself in the custody case. Nothing in the record suggests that Gonzales stood to gain custody of Alice as a direct or indirect result of her testimony against the appellant, thus the appellant failed to show a factual basis for the bias he complained about on appeal.

This contrasts with the cases relied on by the First Court to show defendants have a right to cross-examine witnesses regarding bias stemming from custody disputes, *Fox v. State*, 115 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) and *Ryan v. State*, 04-08-00594-CR, 2009 WL 2045211 (Tex. App.—San Antonio July 15, 2009, no pet.) (mem. op. not

[2] While there is explicit testimony in this case that Gonzales wanted Alice to be safe, the State finds it unlikely that anyone wanted Alice to not be safe. The State does not believe a witness's testimony that she wants a toddler to be safe is sufficient to establish the witness wants legal custody of the toddler.

designated for publication). As Justice Brown's dissent in this case pointed out, both *Fox* and *Ryan* involved one parent testifying against another parent. Given the statutory presumption that favors keeping children with parents, the witnesses in those cases would have been the default conservators if the defendants had their parental rights terminated.

Fox and *Ryan* would be on point in this case if the appellant had sought to cross-examine Jimenez about the child custody proceedings. But Jimenez did not testify. Instead, the appellant sought to cross-examine a non-parent about a child custody proceeding, but his offer of proof did not establish that the non-parent had any interest in the child custody proceeding.

Because the appellant's offer of proof failed to establish a logical connection between the potential bias and Gonzales's testimony, he failed to show that he was entitled to cross-examine Gonzales on this subject. The trial court was within its discretion to find this line of cross-examination irrelevant. The First Court erred in holding otherwise and this Court should grant review of and reverse that holding.

Second Ground for Review

The First Court erred by failing to consider the weakness of the defensive evidence in conducting its harm analysis. The First Court looked only at the State's evidence, and ignored the fact that the appellant failed to produce evidence that would support a jury's finding that he acted in self-defense.

After determining that the trial court erred, the First Court conducted a harm analysis that looked solely at the State's evidence. *See Jones*, 2017 WL 3261352 at *13-14. The State's motion for rehearing urged the First Court to instead look at all the evidence in the case, including the appellant's testimony. Although the issue of self-defense was submitted to the jury, the appellant produced no evidence that would support a finding of self-defense; he never asserted that he struck Jimenez to prevent future harm. Instead, he claimed that he had a right to retaliate. After requesting (but not receiving) a response from the appellant, the First Court denied the State's motion for rehearing without comment. The State asks this Court to grant review to determine whether a constitutional-harm analysis should take into account a defendant's failure to support his supposed defense.

I. Background

A. The only difference in relevant testimony was whether Jimenez "whacked," "tapped," or "karate kicked" the appellant's phone before the appellant slapped her.

Gonzales testified that the appellant was sitting in the garage playing on his phone when Jimenez approached him and, in an effort to get his attention, "whacked" or "tap[ped]" his phone. (4 RR 43, 76). Gonzales said that after this, the appellant slapped Jimenez, causing her to bleed, which was the assault for which he was charged and convicted. (4 RR 43-44).

The appellant testified that he was sitting in the garage playing on his phone and Jimenez "karate kicked" the phone out of his hand to get his attention. (4 RR 145-46). So he slapped her. (4 RR 146). The appellant did not testify that he was afraid of additional violence. He provided no testimony at all regarding his state of mind at the time of the slap.

B. The defensive theory throughout the trial was that the appellant had a right to violently retaliate after Jimenez kicked his phone.

Defense counsel never presented argument or evidence regarding the appellant's state of mind at the time of the slap. At every turn, the defense presented the slap as retaliation, not as preventing future violence. In voir dire, defense counsel advised the jury about possible defenses: "If it's mutual combat and the other person starts it, doesn't have to be an assault.… That's

not just technically self, defense, which it is, but it means something. As a male or female, you don't have to stand to be hit." (2 RR 124-25). In his opening statement, defense counsel previewed the evidence: "[Jimenez] kicked [the phone] out of his hands. And when she did that, there may have been a reaction to it as to a hit on the face." (4 RR 19).

At the charge conference, defense counsel's original request was not for a self-defense instruction, but instead for a "mutual combat paragraph." (4 RR 163). The trial court asked what that was, and defense counsel replied that "if two people are involved in mutual combat, then it's not an assault." (4 RR 163). The trial court questioned whether such a justification existed in the Penal Code, and defense counsel replied that it was case law: "It's basically saying that if two people intentionally and knowingly engage in mutual combat, then neither side can say assault.…" (4 RR 163). The trial court then asked what language he wanted in the charge, and defense counsel replied," "It's basically that if you believe that two parties engage … into [a] mutually combative incident, then neither party can charge assault." (4 RR 163-64). After an off-the-record conversation, the trial court announced that, at the request of the defense, it was inserting a self-defense instruction in the charge. (4 RR 164).

In his jury argument, defense counsel argued that the right to self-defense was, in fact, a right to retaliate:

> It's called mutual combat. Also called self-defense.… You have a right to be in a place, somebody comes up to you and slaps you, you can slap them right back. You can use the exact force that was given to you. You can't use additional force. What that means is if somebody comes up to me because I'm in this courtroom I can't pull out a gun and shoot. … If somebody comes up to me and slaps me in this courtroom, I can slap them right back. Why? Because I don't want you to keep doing it and I don't have to retreat.

(4 RR 168).

Near the end of his argument, defense counsel told the jury it should acquit on the basis of mutual combat: "If I'm telling you what I heard from that witness stand and that's what you heard from the witness stand, if it is a boom-boom, I expect a not guilty on the last page of this charge. Because that's what — it's self-defense. It's mutual combat. It's consent to force." (4 RR 170).

C. The jury charge correctly instructed the jury that self-defense required a belief that slapping Jimenez was necessary to protect the appellant from bodily harm.

The self-defense instruction in this case is simple statement of the law. (*See* CR 87-89). Self-defense is a forward-looking defense, requiring that the actor acts with the intent to prevent future harm: "[A] person is justified in using force against another when and to the degree he reasonably believes

the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force." TEX. PENAL CODE § 9.31(a); (CR 87). The charge went on to give an apparent-danger instruction, which advised that the point of self-defense is to protect oneself from a perceived attack. (CR 87-88). The application paragraph of the self-defense charge instructed the jury to acquit the defendant on the basis of self-defense if it believed, at the time of the assault,

> it reasonably appeared to the [appellant] that his person was in danger of bodily injury and there was created in his mind a reasonable expectation or fear of bodily injury from the use of unlawful force at the hands of [Jimenez], and that acting under such apprehension and reasonably believing that the use of force on his part was immediately necessary to protect himself against [Jimenez's] use or attempted use of unlawful force, the [appellant] struck [Jimenez] to defend himself ….

(CR 88).

II. Reasons for review

A. By looking only at the State's evidence in its harm analysis, the First Court failed to take into account "any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment."

A trial court's constitutional error does not require reversal if the reviewing Court determines, beyond a reasonable doubt, that the error did

not contribute to the conviction. TEX. R. APP. P. 44.2(a). In the context of a trial court's erroneous denial of the right of cross-examination, a harm analysis requires the reviewing court to assume that the damaging potential of the cross-examination was fully realized and then ask whether the error was harmless beyond a reasonable doubt. *Jones*, 2017 WL 3261352 at *13.

This Court has held that a harm analysis under Rule 44.2(a) should consider "any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment." *Snowden v. State*, 353 S.W.3d 815 (Tex. Crim. App. 2011). This is an analysis that will vary greatly from case to case; at the margins it may be more art than science. *See id.* at 822 n.31 (discussing various factors that may factor into harm analysis for violation of right to confrontation).

But in a case where a defendant takes the stand and admits to the charged offense, a harm analysis that fails to consider whether he actually provided evidence of a defense does not satisfy the *Snowden* standard. If a defendant confesses to the offense but fails to adduce evidence of a defense, the jury's verdict in such a case would be based solely on the defendant's confession. Why, then, would an appellate court have a reasonable doubt as to whether the denial of cross-examination of a State's witness contributed

to the verdict? *See Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)(in conducting harm analysis for constitutional error, "the appellate court should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence"). A defendant's failure to prove his defense is a variant on the "overwhelming evidence of guilt" that this Court has long considered an appropriate factor in analyzing whether an error was harmless beyond a reasonable doubt. *See Harris v. State*, 790 S.W.2d 568, 588 (Tex. Crim. App. 1989) (recognizing overwhelming evidence of guilt as factor in harm analysis under old Rule 81(b)(2)'s harmless-beyond-a-reasonable-doubt standard).

B. The appellant's evidence that he slapped Jimenez in retaliation for kicking his phone was not evidence of self-defense. The appellant's testimony was nothing more than a bare confession.

The appellant said nothing about his state of mind at the time he struck the complainant. (*See* 4 RR 145-47). Without evidence that the appellant feared additional violence and struck the complainant based on a belief that doing so was necessary to prevent additional violence, the appellant's testimony did not raise an inference of self-defense, even if Jimenez struck the appellant first. *See Ivy v. State*, No. 07-15-00023-CR, 2016 WL 6092524, at *3 (Tex. App.—Amarillo Oct. 17, 2016, no pet.)

(mem. op. not designated for publication) (where complainant struck defendant in fight over cell phone and defendant responded by shoving her to ground and stepping on her, evidence did not raise self-defense because there was no evidence of defendant's mental state; "The simple fact that the complainant may have struck appellant first provides no clue as to the state of mind of appellant at that point in time."); *Daisy v. State*, No. 05-01-01791-CR, 2002 WL 31528723, at *3 (Tex. App.—Dallas Nov. 15, 2002, no pet.) (mem. op. not designated for publication) (where complainant testified that she started fight and defendant struck her in retaliation, evidence did not raise self-defense because there was no evidence that defendant was defending against additional violence; evidence "raised an issue of retaliation, but not self-defense"); *Reynolds v. State*, No. 07-11-00500-CR, 2012 WL 6621317, at *4 (Tex. App.—Amarillo, Dec. 19, 2012, no pet.) (mem. op. not designated for publication) (where defendant testified that complainant kicked him, and then defendant struck complainant, evidence was insufficient to raise self- defense because defendant did not testify that he struck complainant out of fear of future violence; "Self-defense is not to be confused with retaliation."); *Garcia v. State*, No. 05-12-01693-CR, 2014 WL 1022348, at *7 (Tex. App.—Dallas, March 13, 2014, pet. ref'd) (mem. op. not designated for publication) (where complainant rushed defendant

and defendant shot him, and defendant, when asked whether he was afraid, testified "I don't like being pummeled," evidence did not raise self-defense because there was no evidence of defendant's mental state at time of shooting).

In the absence of direct evidence of a defendant's state of mind, self-defense can be raised if other evidence shows observable manifestations of the defendant's fear. *See e.g. VanBrackle v. State*, 179 S.W.3d 708, 713 (Tex. App.—Austin 2005, no pet.) (testimony that after complainant pointed gun at defendant, defendant pushed gun away and called for help sufficient to raise self-defense in absence of testimony by defendant). But the other witness to the offense, Gonzales, did not testify about any manifestations of fear on the appellant's part. (*See* 3 RR 42-44, 75077).

The appellant's testimony explained why he committed assault. The fact that defense counsel asked the jury to acquit on the extra-legal basis that "she had it coming" does not render the appellant's testimony sufficient to show self-defense. The First Court's harm analysis in this case failed to take account of the fact that the appellant confessed on the witness stand and failed to adduce evidence of a defense. This Court should grant review of this issue and reverse the First Court's judgment.

Conclusion

The State asks this Court to grant review of the First Court's decision and to reverse its judgment.

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Certificate of Compliance and Service

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Date: November 30, 2017

Appendix

***Jones v. State*, ___ S.W.3d ___, No. 01-15-00717-CR, 2017 WL 3261352 (Tex. App.—Houston [14th Dist.] August, 2017)**

2017 WL 3261352
Only the Westlaw citation is currently available.

Court of Appeals of Texas,
Houston (1st Dist.).

Dedric D'Shawn JONES, Appellant
v.
The STATE of Texas, Appellee

NO. 01-15-00717-CR
|
Opinion issued August 1, 2017

Synopsis

Background: Defendant was convicted in the 248th District Court, Harris County, No. 1452040, of felony third-degree assault on a family member, second offender, based on incident in which defendant allegedly struck victim, his girlfriend, in the face. Defendant appealed.

Holdings: The Court of Appeals, Evelyn V. Keyes, J., held that:

[1] defendant's offer of proof sufficiently informed trial court of substance of evidence he sought to introduce regarding witness' alleged bias, and thus defendant preserved complaint about exclusion of evidence;

[2] defendant had right to cross-examine witness about her interest in outcome of termination of parental rights proceedings against defendant and victim, and about witness' possible bias; and

[3] trial court's error in denying defendant right to cross-examine witness about witness' interest in outcome of termination of parental rights proceedings and her possible bias was not harmless.

Reversed and remanded.

Harvey Brown, J., filed dissenting opinion.

On Appeal from the 248th District Court, Harris County, Texas, Trial Court Case No. 1452040

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Panel consists of Justices Jennings, Keyes, and Brown.

OPINION

Evelyn V. Keyes, Justice

***1** A jury convicted appellant, Dedric D'Shawn Jones, of the third-degree felony offense of assault on a family member, second offender.[1] After appellant pleaded true to the allegations in two enhancement paragraphs, the trial court assessed his punishment at twenty-five years' confinement. In two issues, appellant contends that (1) the trial court erroneously limited his cross-examination of a witness by refusing to allow him to cross-examine the witness about her interest in ongoing child-custody proceedings involving appellant's and the complainant's daughter, and (2) the trial court erroneously excluded evidence concerning the complainant's violent character.

1 *See* TEX. PENAL CODE ANN. § 22.01(b)(2) (West Supp. 2016).

We reverse and remand.

Background

A. Factual Background

On December 17, 2014, appellant was living in a house with his girlfriend, the complainant Amy Jimenez, their one-year-old daughter, and Jimenez's mother, Adeline Gonzales. All four of them started watching a movie in the living room of the house. Appellant made

inappropriate comments about a scene in the movie, and Jimenez told him to stop because Gonzales was in the room. Gonzales testified that "there was a lot of frustration in the room." She left the room with the baby, and appellant went into the garage. Gonzales later returned to the living room and told Jimenez that the baby needed some items from the store for school. Appellant's and Gonzales's accounts of what happened after this point differ dramatically.

According to appellant, after he left the living room, he stayed in the garage for about an hour and a half playing a game on his cell phone. Jimenez "came in the garage a few times" and talked to him. Defense counsel asked whether there was a fight every time Jimenez came into the garage, and appellant replied that there was no fight, but "she was trying to pick a fight[.]"

Appellant was sitting between two cars playing on his phone, basically ignoring Jimenez. She then got "in [his] face" and "karate kick[ed the] phone out of [his] hand." When asked by his counsel whether Jimenez slapped the phone down or kicked it, appellant replied, "She did a pretty good karate kick." He stated that the phone "hit the car, fell on the floor. I'm in a tight little space. She kind of hit my hand pretty hard." Appellant then slapped Jimenez. When asked whether Gonzales saw the confrontation, appellant replied, "I doubt it" because of the tight area and because Jimenez's back was "towards the window of the kitchen by the door" to the garage.

According to Gonzales, however, Jimenez went out to the garage, and she and appellant started arguing. Jimenez wanted the keys to the car to go to the store, and appellant would not answer her. Gonzales testified that she had the baby in her arms, and she opened the garage door to give Jimenez some money. She saw appellant take "a swing at [Jimenez] and he hit her in the face." The prosecutor then asked her, "Now prior to you seeing that, did you see [Jimenez] make any contact, physical contact with the defendant?" Gonzales replied, "She was trying to get his attention. He had a cell phone in his hand. She whacked the phone in his hand."

***2** Gonzales did not know what happened to the phone, but, in response to the prosecutor's statement, "So you're saying you saw [Jimenez] make contact with his phone," she replied, "Right, trying to get his attention." In response to the prosecutor's question, "What did that sound like when he struck your daughter?" Gonzales testified, "I mean, it was pretty hard because her whole face went back. I looked back at her. I saw blood coming out of her face," out of "[h]er lip, right here, mouth." Gonzales then started screaming to appellant, "I told you not to put your hands on her anymore." She stated, "I had the baby in my arms and I told [Jimenez], I said, Get out, get in your car, go your dad's house." Jimenez looked "pretty scared. She had a look on her face I had never seen before and I'm a mother. I felt what I was looking at and I said, Get out of here, get in your car and go. And I'll call you when you can come back." Gonzales then called 9-1-1. She testified that she did not see Jimenez kick appellant "at any point," explaining, "I was standing in the middle of them by that time and there was a car there."

Appellant did not immediately leave after the altercation with Jimenez. He demanded to kiss and hug his daughter. He testified, "[Gonzales] is real possessive of my daughter. She wouldn't let me get my daughter. So I stayed around longer. [Gonzales was] yelling at me. And I'm yelling at her, just trying to see my daughter real quick before I left." No other blows were thrown. Appellant testified that he went back into the house to get his wallet and identification, and when he discovered that Gonzales had called 9-1-1, he jumped the fence and went to the park. Appellant came back to the house after the police arrived, and he was arrested.

Jimenez had left the scene in response to Gonzales's order before any of this happened. Gonzales testified extensively, however, as to appellant's behavior after Jimenez left. According to her testimony, appellant ransacked the interior of the house and came back into the garage, "[s]creaming obscenities, calling me everything in the book and ransacking what he could. I had [the baby] in my arms. I was more afraid of that than anything else." She stated, "I was afraid to go back in the house." Appellant came back into the garage, and the baby was "crying, crying," and Gonzales was trying to calm her down. Appellant picked up a jack that was in the garage and started swinging it just a couple of feet from Gonzales while screaming obscenities at her, including "Get your own F'ing baby. This is my F'ing baby. You rotten F'ing B. It was going on and on." She stated that appellant also kicked the doors to her car. She kept screaming, "Get out of here, get out of here, get of here," and appellant said in response, "I'm going to get out of here when I kiss my baby."

According to Gonzales, appellant grabbed the baby, saying "I just want to hug my baby," while Gonzales still held the baby in her arms. Gonzales "kept telling [appellant] to leave [the baby] alone because she started crying. And he grabbed her little leg and he started doing this to her little body. And it scared me, because I said, My God, he could have ripped her spinal cord. I let her go." Appellant stepped away "because he was leaving

with [the baby]," holding her "like a rag doll under his arm. And she was crying and crying. He's screaming." Gonzales testified that the baby

> was pushing and pushing and she was screaming this loud cry like I never heard it before. [Appellant] finally puts her down because she's wiggling to get away from him. He puts her down and he kind of nudges her and I ran toward her and I grabbed her. I had her in my arms. I wouldn't let her go. He was still screaming at me, I'm going to get her. I'm going to get her. At that point I was going to do whatever I needed to do because I wasn't going to let her go.

When the police arrived, appellant went back inside the house and escaped out the back door over the fence.

Gonzales testified that Jimenez drove up a few minutes later, and "[s]he was mad, telling me, Mom, why did you call the police? Why did you call the police.... She's upset and she's screaming. I'm trying to regroup to what's just happening. The baby's still crying and it's a whole lot of commotion going on at the same time." Jimenez "had a big ball in her lip.... You could see a little dried blood on her face. She had a big ball on her lip here." Both Gonzales and Jimenez were interviewed by the police.

***3** When asked whether he told his side of the story to the police, appellant testified, "I didn't feel like my story means anything. Two angry women." He also testified that Jimenez did not file charges against him, she failed to receive a letter of non-prosecution to sign that he had sent to her, and she came to visit him every day he was in jail prior to trial. Appellant testified that Jimenez and Gonzales had a volatile relationship, but the court sustained as irrelevant the State's objection to the question of whether appellant had ever seen Jimenez strike her mother. Appellant finally testified that the other cases he had had involving family violence also had to do with knocking a phone out of someone's hand; he was charged and pled guilty in order "[t]o come home and take care of my child."

Houston Police Department Officer J. Portillo responded to Gonzales's 9-1-1 call. As he approached the house, he saw Gonzales and Jimenez walk into the garage. Both of them "seemed pretty upset and emotional." Officer Portillo observed redness on Jimenez's face and a cut on her upper lip. Although Jimenez ultimately spoke with Officer Portillo, she initially did not want to speak to police. Officer Portillo did not see any damage to property in the garage, and the inside of the house did not appear to have been ransacked, as Gonzales had testified.

B. Procedural Background

After voir dire but before the jury was sworn in, defense counsel sought permission to introduce evidence of an ongoing Child Protective Services ("CPS") proceeding to terminate the parental rights of both appellant and Jimenez to their daughter. Counsel argued:

> [Defense Counsel]: The third and last point, Judge, it is my understanding that CPS is involved and the welfare of the [child] in whether or not parental rights were taken from the complaining witness, [Jimenez], and the defendant, and that one of the persons who may be—I don't know how to put this gently—would get the grandchild would be the mother. Again, it would go to motive as to why—if she sat up there and saw, based on the police report, if she saw mutual conduct—
>
> The Court: So you want to ask Adeline Gonzales whether there's a CPS investigation and whether she gets the children if that CPS issue was sustained?
>
> [Defense Counsel]: Yes.

The trial court ruled that this evidence was not relevant. Defense counsel also sought permission to question Gonzales about Jimenez's reputation in the community for violence and, specifically, whether Jimenez had ever been violent towards Gonzales. The trial court ruled that this evidence was not relevant and was inadmissible under Rule of Evidence 608.

Later in the trial, after Gonzales had testified before the jury, defense counsel made an offer of proof concerning testimony from Gonzales that the trial court had excluded. Gonzales testified that Jimenez had threatened her on a few occasions in the past. She also testified that Jimenez had hit her on several occasions and that Jimenez had been the initial aggressor. With respect to the termination proceedings, defense counsel and Gonzales had the following exchange:

> Q. Do you know that there's a CPS—that there's a child custody battle going on to eliminate parental rights of both Amy and Dedric?
>
> A. Yes, sir.
>
> Q. Do you have an interest in that being done?

A. I don't understand what that means.

Q. Do you have a preference?

A. Do I have a preference of what?

Q. That their parental rights be terminated or not?

A. I don't have any say in that. That damage has been done between the both of them.

Q. My understanding is the child is with an aunt; is that correct?

A. My sister.

Q. Your sister?

A. Yes. And before that, she was with me. I had her. I've always had her.

Q. The reason that you take care of the child is because of the relationship that Dedric and Amy have, correct?

***4** A. I'm sorry?

Q. It's because of the type of relationship that Amy and Dedric have and the things that they do destructive towards each other, correct?

A. I'm not sure I want to answer that.

Q. The reason—

A. Yes, that's why I take care of her because I want her to be safe. She's a beautiful little girl. She deserves to be safe. (Witness crying.)

Q. In this particular case, it is your testimony that Amy hit Dedric first, correct?

A. She slapped the phone in his hands.

The jury ultimately found appellant guilty of the offense of assault on a family member. After appellant pleaded true to the allegations in two enhancement paragraphs, the trial court assessed his punishment at twenty-five years' confinement. This appeal followed.

Preservation of Error

[1]We first consider whether appellant preserved his complaint about his cross-examination of Gonzales for appellate review.

[2] [3] [4]The dissenting opinion argues that appellant failed to preserve his complaint for appellate review because his offer of proof about Gonzales's testimony regarding CPS termination proceedings was insufficient to establish Gonzales's alleged bias against appellant. A party may complain on appeal about a ruling excluding evidence if the error "affects a substantial right of the party" and the party "informs the court of [the evidence's] substance by an offer of proof, unless the substance was apparent from the context." TEX. R. EVID. 103(a). An offer of proof may consist of a concise statement by counsel that includes a reasonably specific summary of the evidence and the relevance of the evidence, or the offer may be in question-and-answer form. *Mays v. State*, 285 S.W.3d 884, 889–90 (Tex. Crim. App. 2009). "The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence." *Id.* at 890.

Here, before the jury was sworn in, defense counsel stated that he wished to question Gonzales about several matters, including an ongoing CPS proceeding to terminate the parental rights of appellant and Jimenez, noting that Gonzales could get custody of the child and this would be relevant to her motive to testify. The trial court ruled that this evidence was not relevant. Later, after questioning Gonzales, defense counsel put on an offer of proof concerning several topics, including Gonzales's knowledge of, and interest in, the ongoing termination proceedings. Gonzales testified that she was aware of the termination proceedings, but she did not "have any say" in whether the court terminated appellant's and Jimenez's parental rights. Gonzales then testified that the child was currently staying with her sister, although before that the child had always lived with Gonzales, and that she would take care of the child because she wanted the child to be safe. We conclude that this offer of proof sufficiently informed the trial court of the substance of the evidence that appellant sought to introduce, and appellant therefore preserved his complaint about the exclusion of this evidence. *See* TEX. R. EVID. 103(a); *Mays*, 285 S.W.3d at 889–90.

***5** The dissenting opinion complains about procedural defects concerning appellant's offer of proof. Specifically, the dissenting opinion argues that appellant's offer of proof failed to segregate admissible evidence from inadmissible evidence, such as Gonzales's testimony regarding Jimenez's past violent conduct, and that appellant failed to obtain a ruling on the admissibility of

the evidence relating to the termination proceeding.

The dissent cites this Court's opinion in *Sohail v. State* for the proposition that when a party proffers evidence containing both admissible and inadmissible evidence but does not segregate the evidence to offer only the admissible statements, the trial court may properly exclude all the statements. *See* 264 S.W.3d 251, 261 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). While this is a correct statement of the law, *Sohail* does not involve an offer of proof. Rather, in *Sohail*, the defendant sought to introduce into evidence during his case-in-chief a letter, an affidavit to dismiss a protective order, and a tape recording of the complainant's conversation with an unidentified individual, all of which included both admissible and inadmissible evidence. *Id.* The defendant did not attempt to redact the inadmissible statements from these exhibits. *Id.* at 260. As a result, this Court held that the trial court properly excluded the exhibits because they contained inadmissible evidence. *Id.* at 261.

The instant case involves an offer of proof, which, necessarily, is made after the trial court has already ruled that evidence is inadmissible and has excluded that evidence. *See* TEX. R. EVID. 103(a)(2); *Mays,* 285 S.W.3d at 889 (stating that to preserve error regarding trial court's decision to exclude evidence, complaining party must make offer of proof setting forth substance of proffered evidence). The reason appellant made his offer of proof, which contained testimony from Gonzales on several subjects, including the termination proceedings and Jimenez's past violent conduct, was that the trial court had already excluded all of this evidence.

The dissent also argues that appellant failed to obtain a ruling on the admissibility of the offered testimony concerning the termination proceedings. This is incorrect. After voir dire, but before the jurors had been sworn in, the trial court, defense counsel, and the State discussed on the record "issues of admissibility of certain pieces of evidence." Defense counsel stated that he wished to question Gonzales about the termination proceedings. The trial court stated, "I'm going to find the CPS investigation and any potential outcomes are not relevant to this trial and in fact would be more [prejudicial] to the defendant." The trial court did not defer ruling on admissibility—it immediately ruled right then that evidence concerning the termination proceedings was not relevant and was, thus, inadmissible. Later, after Gonzales testified in front of the jury, appellant put on his offer of proof. Appellant obtained a ruling on the admissibility of the evidence of the termination proceedings. He was not required to obtain a second ruling on the evidence after he made his offer of proof, which he made because the trial court excluded the evidence of the termination proceedings.[2] *See* TEX. R. EVID. 103(a).

[2] As support for the argument that appellant failed to obtain a ruling, the dissent cites *Geuder v. State,* 115 S.W.3d 11, 14–15 (Tex. Crim. App. 2003), which held that a pretrial motion in limine generally does not preserve error concerning the exclusion of evidence. *Geuder* did not address offers of proof or whether the complaining party, after obtaining a ruling excluding evidence, must obtain an additional ruling after making an offer of proof—a ruling which would have no function.

***6** We conclude that appellant preserved his complaint regarding Gonzales's bias for appellate review, and we turn to his appeal.

Denial of Cross-Examination

In his first issue, appellant contends that the trial court violated the Confrontation Clause by erroneously limiting his cross-examination of Gonzales concerning any interest she might have in ongoing child-custody proceedings involving appellant's and Jimenez's daughter. He contends that the inability to question Gonzales about her motivation in testifying against him—specifically her interest in possibly gaining custody of his child—together with his inability to question Gonzales regarding Jimenez's past history of violence, severely undermined his ability to present his defense that he slapped Jimenez in self-defense. Thus, appellant makes two critical arguments in this issue. First, he was denied the constitutional right of confrontation. Second, the ability to confront Gonzales as to her interest in the custody proceedings was essential to his ability to prove his defense of self-defense as she was the only witness besides himself who testified as to the facts of the confrontation between himself and Jimenez, upon which he was convicted and sentenced to twenty-five years' confinement. We agree with appellant.

A. Cross-Examination: The Constitutional Right of Confrontation

[5] [6] [7]Cross-examination serves three general purposes: to identify the witness with the community so that independent testimony regarding the witness's reputation for veracity may be sought, to allow the jury to assess the credibility of the witness, and to allow facts to be brought

out tending to discredit the witness by showing that his testimony was untrue or biased. *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996). Cross-examination is, by its nature, exploratory, "and there is no general requirement that the defendant indicate the purpose of his inquiry." *Id.* Rather, the defendant "should be granted a wide latitude even though he is unable to state what facts he expects to prove through his cross-examination." *Id.*

[8] [9] [10] [11]The classic case on the right of confrontation under circumstances similar to those in this case is *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In that case, the United States Supreme Court held that the Confrontation Clause means more than the right of an accused in a criminal prosecution to be allowed to confront the witnesses against him "physically." *Id.* at 315, 94 S.Ct. at 1110. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination," as this is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 315–16, 94 S.Ct. at 1110; *see Johnson v. State*, 433 S.W.3d 546, 551 (Tex. Crim. App. 2014) (quoting *Davis*, 415 U.S. at 315–16, 94 S.Ct. at 1110). The defendant is not only permitted to delve into the witness's story to test his perceptions and memory but is traditionally allowed to impeach or discredit the witness. *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110. A defendant's

> attack on the witness's credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial and is "always relevant to discrediting the witness and affecting the weight of his testimony."

***7** *Id.* (quoting 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)).

[12] [13]"[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998) ("Exposing a witness' motivation to testify for or against the accused or the State is a proper and important purpose of cross-examination."). "The possible animus, motive, or ill will of a prosecution witness who testified against the defendant is never a collateral or irrelevant inquiry, and the defendant is entitled, subject to reasonable restrictions, to show any relevant fact that might tend to establish ill feeling, bias, motive, interest, or animus on the part of any witness testifying against him." *Billodeau v. State*, 277 S.W.3d 34, 42–43 (Tex. Crim. App. 2009); *see Johnson v. State*, 490 S.W.3d 895, 909–10 (Tex. Crim. App. 2016).

Particularly pertinent to this case is the Supreme Court's holding in *Davis* that the defendant in that case had the right to attempt to show that a prosecution witness who was on probation was biased against the defendant because of the witness's "vulnerable status." 415 U.S. at 317–18, 94 S.Ct. at 1111; *see also Carroll*, 916 S.W.2d at 500 ("Appellant's cross-examination was clearly an attempt to demonstrate that [the witness] held a possible motive, bias or interest in testifying for the State.... A defendant is permitted to elicit any fact from a witness intended to demonstrate that witness's vulnerable relationship with the state."). The *Davis* Court observed,

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that *the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony which provided "a crucial link in the proof ... of petitioner's act."*

415 U.S. at 317, 94 S.Ct. at 1111 (quoting *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 1077, 13 L.Ed.2d 934 (1965)) (emphasis added).

[14] [15]The scope of appropriate cross-examination is necessarily broad. *Carroll*, 916 S.W.2d at 497. It encompasses all facts and circumstances that, tested by human experience, tend to show that the witness may shade his testimony for the purpose of establishing one side of the cause only. *Id.* at 497–98 (quoting *Jackson v. State*, 482 S.W.2d 864, 868 (Tex. Crim. App. 1972)). Accordingly, a defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias, or interest for the witness's testimony. *Lewis v. State*, 815 S.W.2d 560, 565 (Tex. Crim. App. 1991).

[16] [17] [18]A defendant's constitutional right to confrontation is violated when appropriate cross-examination is limited. *See Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435; *Carroll*, 916 S.W.2d at 497. The

trial court has no discretion to so drastically curtail the defendant's cross-examination as to leave him unable to show why the witness might have been biased or otherwise lacked the level of impartiality expected of a witness. *Johnson*, 433 S.W.3d at 555. However, the proponent of the evidence "must establish some causal connection or logical relationship between the [source of bias] and the witness' 'vulnerable relationship' or potential bias or prejudice for the State, or testimony at trial." *Carpenter*, 979 S.W.2d at 634 (analyzing admissibility of evidence of pending charges against witness); *see Irby v. State*, 327 S.W.3d 138, 147–48 (Tex. Crim. App. 2010) (same).

B. Law Concerning Defense of Self-Defense

***8** Appellant argues that he hit Jimenez in self-defense after she karate-kicked his phone out of his hands. Self-defense is statutorily defined and provides a defense to prosecution when the conduct in question is "justified." TEX. PENAL CODE ANN. §§ 9.02, 9.31 (West 2011). Under Texas Penal Code Chapter 9, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." *Id.* § 9.31(a). "The use of force against another is not justified," either "in response to verbal provocation alone" or "if the actor provoked the other's use or attempted use of unlawful force." *Id.* § 9.31(b)(1), (4).

[19]When a defense of self-defense is raised, as here, the reviewing court's task is to "determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of [the crime] beyond a reasonable doubt *and also* would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991) (emphasis added).

[20] [21] [22] [23]In a claim of self-defense, "a defendant bears the burden of production," while "the State then bears the burden of persuasion to disprove the raised defense." *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003) (citing *Saxton*, 804 S.W.2d at 913–14). The defendant's burden of production requires the defendant to adduce some evidence that would support a rational jury finding as to the defense. *See* TEX. PENAL CODE ANN. § 2.03(c) (West 2011) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."); *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007). "[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic*, 393 S.W.3d at 286 (citing *Shaw*, 243 S.W.3d at 657–58). "[A] defense is supported (or 'raised') if there is evidence in the record making a prima facie case for the defense." *Shaw*, 243 S.W.3d at 657. "A prima facie case is that 'minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.' " *Id.* (quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987)).

[24] [25] [26]If the defendant meets his burden of production, the burden of persuasion shifts back to the State. *Zuliani*, 97 S.W.3d at 594. The State's "burden of persuasion is not one that requires the production of evidence, rather it requires only that the State prove its case beyond a reasonable doubt." *Id.* (citing *Saxton*, 804 S.W.2d at 913). In order to prove the offense beyond a reasonable doubt, it must likewise disprove the defense of self-defense beyond a reasonable doubt. *Saxton*, 804 S.W.2d at 914. Thus, if appellant produced at least some evidence that would support a rational jury's finding that he hit Jimenez in defense to her use of force against him, the State would have to disprove his defense of self-defense beyond a reasonable doubt to prove the family violence charge against him beyond a reasonable doubt.

With appellant's defense in mind—that he slapped Jimenez in self-defense only after she karate-kicked him first—we turn to the effect of Gonzales's testimony against appellant. Appellant argues that his questioning could have shown that Gonzales was biased against him because of her interest as a potential managing conservator of his child and that, therefore, the trial court erred in not allowing him to question her as to ongoing parental rights termination proceedings against himself and Jimenez.

C. Relationship Between Family Violence Conviction and Child Custody Proceedings

***9** [27]Termination and custody proceedings always entail the determination of custody based on the conduct of the parents and the best interests of the child. The commission of family violence is a mandatory consideration in determining the custody of a child in both custody and termination proceedings. Texas Family Code section 153.004(c) requires that, in custody proceedings, the family court shall consider the commission of family violence in determining whether to deny, restrict, or limit possession of a child by a parent. TEX. FAM. CODE ANN. § 153.004(c) (West 2014). In a case to terminate parental rights brought by the

Department of Family and Protective Services ("DFPS") under Family Code section 161.001, DFPS must establish, by clear and convincing evidence, that (1) the parent committed one or more of the enumerated acts or omissions justifying termination and (2) termination is in the best interest of the child. *Id.* § 161.001(b) (West Supp. 2016); *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002).

[28]There is a strong presumption that the best interest of the child will be served by preserving the parent-child relationship. *See In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). However, prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016).

[29]A grandparent can have an interest in a child custody determination—whether in connection with termination proceedings or not—if the grandparent requests possession of a child by filing an original suit or a suit for modification. *Id.* § 153.432(a) (West 2014); *see In re Chambless*, 257 S.W.3d 698, 699–700 (Tex. 2008) (per curiam). However, Family Code section 153.131(a) creates a presumption in favor of a parent when a non-parent (such as DFPS or a grandparent or other relative) is seeking custody of a child.[3] TEX. FAM. CODE ANN. § 153.131(a) (West 2014). The parental presumption set out in Family Code section 153.131(a) is expressly made subject to section 153.004 of the Code. Section 153.004(b) provides "a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present ... physical ... abuse by that parent directed against the other parent...." *Id.* § 153.004(b). And, as stated above, section 153.004(c) requires that, in custody proceedings, the family court "*shall consider the commission of family violence* in determining whether to deny, restrict, or limit possession of a child by a parent...." *Id.* § 153.004(c) (emphasis added).

[3] Section 153.131(a) provides:

> Subject to the prohibition in Section 153.004, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

TEX. FAM. CODE ANN. § 153.131(a) (West 2014).

D. Confrontation Clause Analysis

Appellant was charged with assault on a family member, Jimenez—an act of family violence. The elements of assault on a family member, as relevant here, are (1) intentionally (2) causing bodily injury (3) to another person (4) who is a member of the defendant's family or a person with whom the defendant has a "dating relationship." TEX. PENAL CODE ANN. § 22.01(a) (West Supp. 2016) (defining assault). Under the Penal Code, the offense is enhanced from a Class A misdemeanor to a third-degree felony if the assault is against a family member or involves "dating violence" and the defendant has certain prior convictions, including a prior conviction for assault on a family member. *Id.* § 22.01(b)(2)(A); TEX. FAM. CODE ANN. § 71.0021 (West Supp. 2016) (defining "dating violence" and "dating relationship"); *id.* § 71.003 (West 2014) (defining "family"). The punishment for conviction of a third-degree felony—such as assault on a family member, second offender—when the defendant has two prior felony convictions is confinement for twenty-five years to life. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016).

***10** Because he had a prior conviction for assault on a family member as well as two prior felony convictions, appellant faced a sentence of twenty-five years to life upon conviction in this case for family violence. His defense at trial was that Jimenez "karate kick[ed]" his phone out of his hand when he would not respond to her and that he struck her in self-defense. The only witnesses to the offense with which appellant was charged who testified at trial were appellant and Gonzales. Jimenez, the complainant, did not testify.

At the time of trial, Jimenez and appellant were involved in ongoing child custody proceedings to determine whether their parental rights to their one-year-old daughter should be terminated. Although there is a strong presumption that the best interest of the child is served by preserving the parent-child relationship, under the plain language of Family Code sections 153.131(a) and 153.004(b) and (c), the parental presumption is removed by a showing that the parent seeking to be appointed managing conservator has a history or pattern of past or present physical abuse directed against the other parent. *See* TEX. FAM. CODE ANN. §§ 153.004(b), 153.131(a). Therefore, appellant's conviction for family-violence assault, combined with his past family-violence assault conviction, is exactly the type of evidence required to justify both the termination of his parental rights and the appointment of Jimenez as sole managing conservator or,

if Jimenez were likewise to have her rights terminated or to be shown to have a history of family violence, the parental presumption would be removed for both parents, and the appointment of a non-parent, like Gonzales, as sole managing conservator could be pursued. Thus, appellant had a "vulnerable status" with respect to testimony that he committed family violence. *See Davis*, 415 U.S. at 317–18, 94 S.Ct. at 1111; *Carroll*, 916 S.W.2d at 500.

In this criminal case, it was the jury's responsibility to determine beyond a reasonable doubt whether appellant committed an act of domestic violence against Jimenez—hitting her in the face—without justification or whether appellant raised a reasonable doubt as to whether his striking Jimenez was justified because Jimenez used unjustified force first against him by striking or "karate kicking" the phone from his hand. Only by making that determination could the jury determine whether appellant had the requisite intent to use unlawful force against Jimenez beyond a reasonable doubt and should be convicted of domestic violence or whether appellant had raised a reasonable doubt as to his intent and should be acquitted. And on this outcome-determinative issue, the weight and credibility of Gonzales's testimony was critical.

[30]The controlling question on appeal is whether, had appellant been able to cross-examine Gonzales on the termination proceedings and her interest in them, he could have made the jury aware of a bias or interest on her part that would have motivated her to testify against him on the underlying offense of domestic violence against Jimenez because of her interest in obtaining custody of his child or preventing appellant from maintaining custody of the child. Such a consideration directly impacts the weight to be given a witness's testimony by the jury. *See Davis*, 415 U.S. at 317, 94 S.Ct. at 1111. Thus, appellant's cross-examination of Gonzales's interest in the outcome of the parental rights termination proceeding *had the potential to raise a reasonable doubt* in the mind of the jury as to whether appellant assaulted Jimenez *without justification*, committing an act of domestic violence that could—and did—send him to prison for twenty-five years to life, or whether he acted with justification in response to Jimenez's initial, unjustified, and unlawful act of force and therefore should have been acquitted on the basis of his defense. *See Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913–14.

***11** We conclude that this is a classic Confrontation Clause case. Here, the converse of *Davis* is at issue: appellant, the defendant—as opposed to the witness against him, Gonzales—was in a particularly vulnerable status as a defendant in a domestic dispute in which a conviction carried a twenty-five-year to life sentence and was also mandatory evidence in determining his parental and custody rights. *See* TEX. FAM. CODE ANN. §§ 153.004, 153.131. Thus, he was extremely vulnerable to losing custody of his child should he be convicted of assaulting Jimenez without justification. The principal witness against him—indeed the only eyewitness who testified at trial besides himself—was Gonzales, the grandmother of the child. Her testimony on direct examination showed a deep possessory interest in the child, and she could not be excluded on the basis of anything in the record of this case as a possible managing conservator should appellant and Jimenez lose their parental rights, or should appellant lose his. Thus, cross-examination and impeachment of Gonzales directed toward revealing her "possible bias, prejudice or ulterior motives ... as they [might] relate directly to issues or personalities in the case" was not only relevant but " 'always relevant as discrediting the witness and affecting the weight of [the] testimony.' " *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110; *Johnson*, 433 S.W.3d at 551.

Under *Davis*, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony which provided 'a crucial link in the proof ... of [the defendant's] act' " of domestic violence against Jimenez. 415 U.S. at 317, 94 S.Ct. at 1111. Appellant argued that he struck Jimenez in self-defense. The only other eyewitness to the incident was Gonzales. The State asked Gonzales whether Jimenez made any physical contact with appellant before he struck her. Gonzales testified, "She was trying to get his attention. He had a cell phone in his hand. She whacked the phone in his hand." Gonzales did not see what happened to the phone. She also testified that she did not see whether Jimenez kicked appellant, stating, "I was standing in the middle of them by that time and there was a car there." Appellant testified it was unlikely that Gonzales even saw clearly what happened between him and [Jimenez] because "like the tight area we [were] in, ... [Jimenez's] back is towards the window of the kitchen by the door" and Gonzales came into the garage at approximately the moment the confrontation occurred.

Gonzales did not testify to anything else about the confrontation between Jimenez and appellant with which appellant was charged. Instead, she testified graphically and at length about her fears for her granddaughter's safety in appellant's presence and the danger she believed he presented to the child she was protecting from him. None of this testimony was relevant to the charged offense, but it was highly prejudicial to appellant, both in

his trial for striking and injuring Jimenez without justification and with respect to his ability to retain his parental rights to the child, both because appellant faced a minimum twenty-five year sentence for striking Jimenez without justification and because domestic violence is a mandatory consideration in the termination and custody proceedings that were then ongoing—proceedings in which the elimination of the parental presumption in favor of appellant would allow Gonzales to seek custody of the child.

It is hard to imagine a more clear-cut case in which a criminal defendant should have been permitted to confront the sole eyewitness against him to allow the jury to assess her credibility and to allow facts to be brought out regarding her interest in the child that might tend to discredit her by showing that her relevant testimony with respect to the charged offense was untrue or biased. *See Carroll*, 916 S.W.2d at 497; *see also Davis*, 415 U.S. at 316, 94 S.Ct. at 1110 (stating that partiality of witness is subject to exploration and is always relevant to discrediting witness and affecting weight of testimony, and stating that exposing witness's motivation in testifying is proper function of protected right of cross-examination).

***12** As appellant points out, an interest in the outcome of a child custody determination has twice been held by the intermediate appellate courts of this state to be a valid area for exposing bias through cross-examination in circumstances that did not involve termination proceedings or the potential of a long prison sentence for the party seeking cross-examination.

In *Fox v. State*, the Fourteenth Court of Appeals held that Rule of Evidence 608, prohibiting cross-examination on a witness's general character for truthfulness, did not preclude cross-examination of a mother as to whether she attempted to implant the suggestion of the father's sexual abuse of the children where, if the father were in jail or even accused of sexual abuse of a child, the mother would stand a far better chance of obtaining custody of all of the children in a separate divorce proceeding. 115 S.W.3d 550, 567–68 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). The court of appeals held that there was no legitimate reason for the trial court to limit the cross-examination because the subject of motivation and bias was not exhausted; the cross-examination was not designed to annoy, harass, or humiliate, but rather to show motive and bias; and the cross-examination did not endanger the witness. *Id.* at 567. Because the requested cross-examination was proper under the rules of evidence and required by the Confrontation Clause of the United States Constitution, the trial court abused its discretion in limiting the cross-examination. *Id.* at 568.

Ryan v. State, an unpublished decision, is also illustrative. *See* No. 04-08-00594-CR, 2009 WL 2045211 (Tex. App.—San Antonio July 15, 2009, no pet.) (not designated for publication). In that case, the court of appeals held that the trial court abused its discretion by limiting cross-examination of Ryan's ex-wife about custody of their oldest child. *Id.* at *3–4. The ex-wife testified that when she and Ryan had previously separated, the family court had awarded Ryan custody of the oldest child. *Id.* at *4. Ryan testified that, after he was arrested for assaulting his ex-wife in the underlying offense, she took both children, moved out of the residence, and did not return the oldest child to him. *Id.* The court did not permit Ryan to question his ex-wife about any subsequent custody disputes between them or the effect of any such disputes on her testimony. *Id.*

The court of appeals observed that the commission of family violence is a mandatory factor to be considered in determining custody of children. *Id.* at *4 (citing TEX. FAM. CODE ANN. § 153.004(c) ("The court *shall* consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.")) (emphasis added). Accordingly, the court held that questions regarding custody proceedings were relevant to the ex-wife's "motivation to exaggerate her testimony at trial." *Id.* Because the ex-wife's possible bias and motive as a result of the ongoing custody dispute were not made clear to the jury through thorough and effective cross-examination, the trial court abused its discretion by limiting defense counsel's cross examination. *Id.* at *5.

Both *Ryan* and *Fox* are directly on point and persuasive authority. Gonzales testified against appellant extensively on direct examination. First, she briefly testified about the incident with which appellant was charged, indicating that Jimenez tried to get appellant's attention by "whack[ing] the phone in his hand." She then testified extensively and emotionally concerning appellant's violence towards his and Jimenez's child as Gonzales tried to get him to leave the house after Jimenez had already left. Yet appellant was expressly prohibited from asking Gonzales whether she knew there was an ongoing child custody dispute to terminate the parental rights of both Jimenez and appellant and whether Gonzales had an interest in those proceedings. He was also prohibited from asking her whether she actually or potentially stood to obtain custody of the child in the accompanying custody proceedings.

***13** Without cross-examination, the jury in this case was

deprived of facts necessary to determine Gonzales's credibility and thus to make an informed judgment as to her motivation and the weight to be placed on her testimony, which was crucial to the proof of appellant's intent to strike and injure Jimenez without justification and therefore with criminal intent. *See Davis*, 415 U.S. at 317, 94 S.Ct. at 1111; *Douglas*, 380 U.S. at 419, 85 S.Ct. at 1077. Thus, Gonzales's testimony about appellant's family violence was critical to his conviction. Moreover, had the jury agreed that appellant raised a reasonable doubt as to his defense of self-defense, it could not have convicted him of domestic violence beyond a reasonable doubt—a mandatory consideration in determining whether he would lose custody of the child to Jimenez, Gonzales herself, or another in the then-ongoing parental rights termination proceedings. *See* TEX. FAM. CODE ANN. §§ 153.004, 153.131. Therefore, there was a direct and crucial link between the weight placed by the jury on Gonzales's testimony in appellant's trial for domestic violence and her own possible bias or interest in the parental rights termination proceedings and ultimate possession of the child. *See, e.g.*, *Van Arsdall*, 475 U.S. at 678–79, 106 S.Ct. at 1435 ("[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."); *Billodeau*, 277 S.W.3d at 42–43 ("The possible animus, motive, or ill will of a prosecution witness who testifies against the defendant is never a collateral or irrelevant inquiry, and the defendant is entitled, subject to reasonable restrictions, to show any relevant fact that might tend to establish ill feeling, bias, motive, interest, or animus on the part of any witness testifying against him"); *Carpenter*, 979 S.W.2d at 634 ("Exposing a witness' motivation to testify for or against the accused or the State is a proper and important purpose of cross-examination."); *Lewis*, 815 S.W.2d at 565 (defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose motive, bias, or interest for witness's testimony).

We hold that the trial court abused its discretion by denying appellant his constitutional right under the Confrontation Clause to question Gonzales about her interest in the outcome of ongoing parental rights termination proceedings against him and Jimenez and therefore her possible bias in testifying against him. We now determine whether the error was harmful.

E. Harm Analysis

[31]Constitutional error in a criminal case is subject to harmless error review. TEX. R. APP. P. 44.2. In such a case, the court of appeals must reverse a judgment of conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *Id.* This rule is based on the parallel federal rule of criminal procedure; and, therefore, decisions of the United States Supreme Court may be looked to for guidance in interpreting the state rule. *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). Accordingly, the Court of Criminal Appeals has adopted the Supreme Court's conclusion that it is the responsibility of the appellate court to assess harm after reviewing the record. *Id.* (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436–37, 115 S.Ct. 992, 994–95, 130 L.Ed.2d 947 (1995)).

[32] [33]In *Van Arsdall*, the United States Supreme Court applied the harmless error standard set out in *Chapman v. California*. *See* 475 U.S. at 680–81, 106 S.Ct. at 1436 (citing *Chapman*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). Under this standard, the reviewing court must inquire whether, assuming the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say the error was harmless beyond a reasonable doubt. *Id.* at 684, 106 S.Ct. at 1438. The reviewing court looks at "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

[34]Here, Gonzales was the State's principal witness against appellant, since Jimenez did not testify, and there were discrepancies between Gonzales's testimony and that of both appellant and Officer Portillo, who responded to Gonzales's 9-1-1 call. Her testimony contradicted appellant's description of the confrontation between himself and Jimenez. Having first testified that Jimenez "whacked" the phone in appellant's hand to get his attention, Gonzales subsequently testified that Jimenez merely "slapped the phone" in appellant's hand and that appellant then hit Jimenez in the face, knocking her back and causing her mouth to start bleeding immediately. Appellant, by contrast, testified that he "slapped" Jimenez in self-defense when Jimenez "karate kick [ed the] phone out of [his] hand," striking his hand and causing the phone to hit the car. Gonzales admitted she did not see what happened to the phone. According to Gonzales, Jimenez's mouth swelled into "a big ball on her lip." Officer Portillo testified that Jimenez "had redness to the face" and a cut on her upper lip and that her eyes were watering. Gonzales also testified that appellant "kicked her car doors in" and "ransacked" the house. Appellant testified that he went into the house to get his identification and wallet when Gonzales ordered him to

leave. Officer Portillo saw no evidence of ransacking or of damage to any property in the garage. Gonzales testified extensively, without rebuttal, to appellant's treatment of the child and of herself after Jimenez had left the scene in response to Gonzales's order and before appellant likewise left at Gonzales's command.

***14** Jimenez did not testify. Therefore, the only direct witness to the confrontation between Jimenez and himself, besides appellant, was Gonzales. Appellant contends that because he could not cross-examine Gonzales for bias or interest, the jury heard only her testimony that Jimenez merely slapped the phone out of his hand "to get his attention" and his testimony, which, he contends, it could have discounted as self-serving.

Considering the *Chapman* and *Van Arsdall* standard for harmless error in denial of cross-examination under these circumstances, Gonzales' testimony was of great importance to the prosecution's case against appellant for domestic violence, and her testimony was not cumulative, as no other eyewitness present at the time of the offense testified about the confrontation between appellant and Jimenez other than appellant himself, as Jimenez did not testify. *See Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438.

Most importantly, appellant's inability to confront Gonzales for bias or interest greatly affected the overall strength of the prosecution's case and of appellant's defense of self-defense. *See Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438. Appellant was charged with assault on a family member, i.e., with (1) intentionally (2) causing bodily injury (3) to another person (4) who is a member of the defendant's family or a person with whom the defendant has a "dating relationship." TEX. PENAL CODE ANN. § 22.01(a). Both appellant and Gonzales testified that Jimenez struck appellant's phone first. But Gonzales's testimony swiftly veered to the subsequent confrontation between her and appellant over the child and Gonzales's command that appellant leave the house. Thus, without evidence of Gonzales's interest in the child, there was nothing to support appellant's claim of self-defense in his confrontation with Jimenez other than his own testimony, testimony that was overwhelmed by Gonzales's testimony about her interest in protecting the child from appellant.

Had the jury been in possession of the facts into which appellant was forbidden to inquire on cross-examination of Gonzales, it could have made an informed judgment as to the weight to place on her testimony regarding the charged domestic violence offense—testimony which provided a crucial link to the proof of both appellant's act against Jimenez and his defense of self-defense. Accordingly, we hold that the trial court's error in denying appellant the right to cross-examine Gonzales about her interest in the termination of parental rights proceedings and the attendant custody dispute was harmful to appellant's case. *See Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438; *see also* TEX. R. APP. P. 44.2(a) (stating that, in cases involving constitutional error, appellate court must reverse judgment of conviction unless court determines beyond a reasonable doubt that error did not contribute to conviction).

We sustain appellant's first issue.[4]

[4] Because we sustain appellant's first issue, and therefore remand this case for a new trial, we need not address appellant's second issue concerning the exclusion of evidence of Jimenez's violent acts against Gonzales, as resolution of that issue would afford him no greater relief.

Conclusion

We reverse the judgment of the trial court and remand this case for a new trial.

Justice Brown, dissenting.

Harvey Brown, Justice, Dissenting.

Dedric D'Shawn Jones was indicted for assaulting his girlfriend, A. Jimenez. The key witness against him was Jimenez's mother, A. Gonzales. At the time of the assault trial, there was an ongoing Child Protective Services investigation and proceedings to terminate Jones's and Jimenez's parental rights to their daughter, pseudonymously referred to as Alice. In his assault trial, Jones sought to examine Gonzales about her knowledge of and interest in the termination proceedings, arguing that the termination proceedings provided Gonzales with a motive to exaggerate her testimony against him to the extent she wanted to be awarded custody of Alice. The trial court denied Jones's pre-trial request to examine Gonzales about the termination proceedings, and once the evidence began Jones made an offer of proof in an effort to preserve error. But the offer of proof was substantively defective—it failed to show bias stemming from the

termination proceedings. And it was procedurally defective as well—Jones failed to segregate admissible evidence from inadmissible evidence and failed to obtain a ruling on the offer of proof from the trial court. The court nevertheless holds that the trial court erred in refusing to permit Jones to examine Gonzales about the termination proceedings.

The court's analysis ponders what testimony Jones *might* have elicited from Gonzales and concludes that such speculative testimony—unpreviewed by Gonzales herself—should have provided a basis for opening cross-examination to include questions about the termination proceedings. Trial courts, facing the need to make quick rulings in the midst of trial while the jury patiently waits in the jury room, properly focus on the scope of the offered evidence and the procedures followed by the offering party. The court ignores that reality and veers off to consider what might have been offered. In effect, the court holds that when a trial court makes a pre-trial ruling limiting the scope of cross-examination, the proponent need not make a proper offer of proof demonstrating why the ruling was error to obtain reversal on appeal, so long as he conjures up some post-hoc justification for admitting the testimony in his appellate brief. Moreover, the proponent need not even obtain a ruling on the deficient offer. That is not how our law works.

Trial courts consider the evidence actually tendered during the offer of proof, knowing that litigants often over-promise and under-deliver once required to present the proof itself. Here, the offered testimony did not demonstrate that Gonzales was any more potentially biased or prejudiced beyond what was already apparent from the admitted evidence. This offer did not establish a basis for cross-examining Gonzales about the termination proceedings to establish a bias.

While the court speculates what Jones's offer of proof might have shown, trial courts do not. They examine the actual evidence. Trial courts can refuse a narrow offer of proof that invites speculation about what a fuller examination would have revealed without concern of committing error. At least they could before today. Now trial courts must consider whether an appellate court will speculate how a party could have offered more evidence beyond the offered evidence if the trial court were to allow examination about a subject matter. To engage in such speculation, the trial court will itself have to act, in effect, as an advocate for the party tendering the offer of proof to determine what else that party could have tried to show, all the while without any indication from the witness that such testimony is actually forthcoming.

Part of a trial court's analysis is also to consider whether a party has properly preserved its offer of proof. If the offer is procedurally flawed, the trial court does not need to keep the jury waiting any longer to reconsider its initial ruling and can refuse the offer without concern of committing error. At least it could before today. Now it appears not to matter whether the offering party properly segregates evidence or even obtains a ruling from the trial court; reversible error is possible even if not preserved.

The court's holding is legally incorrect. It sets forth an unworkable rule. And it will encourage the filing of meritless appeals. For these reasons, I respectfully dissent.

Exclusion of Evidence of Bias

The court holds that the trial court violated Jones's constitutional right of confrontation by refusing to permit him to examine Gonzales about her knowledge of and interest in the CPS investigation and proceedings to terminate Jones's and Jimenez's parental rights to their daughter, Alice. After voir dire but before the presentation of any evidence, Jones asked about introducing evidence regarding the CPS termination proceedings. The trial court stated that such evidence was not relevant. Jones objected.

Later, during trial, Jones called Gonzales to testify in an offer of proof. *See* TEX. R. EVID. 103(a).[1] Jones's attorney asked Gonzales whether she knew of a CPS investigation; Gonzales testified that she was aware of such an investigation but did not "have any say" in its outcome. Gonzales further testified that Alice was living with her sister (the child's great-aunt) during the trial, but that before that, she (Gonzales) had been taking care of her. Jones did not secure a ruling on the offer of proof once completed.

[1] "Although the terms 'offer of proof' and 'bill of exception' are often used interchangeably, they are governed by different rules and the method of error preservation under each is different. When a trial court excludes evidence, a party may preserve error by making a timely offer of proof." *Ethridge v. State*, No. 01-10-00027-CR, 2011 WL 2502542, at *3 (Tex. App.—Houston [1st Dist.] June 23, 2011, no pet.) (mem. op., not designated for publication) (citations omitted).

On appeal, Jones contends that this evidence showed that

Gonzales was potentially biased against him because she had an "apparent stake in the outcome of" the CPS investigation and termination proceedings. He argues that Gonzales had a potential motive to "exaggerate her testimony" against him because that would increase the likelihood that he would be convicted, which, in turn, would increase the likelihood of his parental rights being terminated and Gonzales ultimately being awarded custody of Alice. Therefore, his argument continues, the trial court violated his right of confrontation.

A. Standard of review and applicable law

The court properly sets forth the standard of review for an appellate court's review of a trial court's decision to admit or exclude evidence: an abuse of discretion. But by speculating about what evidence Jones may have been able to develop on cross-examination, the court ignores that standard.

In exercising its discretion, the trial court must consider whether limiting Jones's right to cross-examine Gonzales *based on* the offer of proof (that is, the questions and answers actually presented) denied him the right to expose a motive that would interfere with Gonzales's ability to be an impartial witness. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678–79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986) (recognizing that "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination").

Because of the constitutional right of confrontation, a trial court must permit a defendant to adduce evidence that would tend to establish ill feeling, bias, motive, or animus on the part of a witness testifying against him. *Johnson v. State*, 490 S.W.3d 895, 910 (Tex. Crim. App. 2016). But the bias must create an incentive to testify favorably for the prosecution. Thus, the proponent of the evidence "must establish some causal connection or logical relationship between the [source of bias] and the witness' 'vulnerable relationship' or potential bias or prejudice ... or testimony at trial." *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998) (holding that defendant was not entitled to impeach State's witness during cross-examination with evidence of pending federal charges against witness when testimony supporting defendant's offer of proof did "no more than establish the factual basis of the pending federal charges").

Even faced with potential bias, a trial court retains wide latitude under the Confrontation Clause to impose restrictions on cross-examination for testimony that is repetitive or only marginally relevant. *Id.* at 636 (Price, J., concurring) (citing *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435). A trial court's limitation on cross-examination into a witness's bias does not exceed its discretion or violate the defendant's right to confront a witness as long as the possible bias and motive of the State's witness is already shown in the record (i.e., the testimony is repetitive) or is readily apparent. *See Carmona v. State*, 698 S.W.2d 100, 104 (Tex. Crim. App. 1985) (effective cross-examination not denied when "defendant has otherwise been afforded a thorough and effective cross-examination and ... the bias and prejudice of the witness is ... patently obvious"). A trial court's discretion is exceeded only when it so drastically curtails the defendant's cross-examination as to leave him unable to show why the witness might have been biased or otherwise lacked the level of impartiality expected of a witness. *Johnson v. State*, 433 S.W.3d 546, 555 (Tex. Crim. App. 2014).

When a trial court excludes evidence pre-trial, that exclusion "is subject to reconsideration throughout trial...." *Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998) (per curiam). Therefore, to preserve error, the proponent must make an offer of proof. *Id.* The proponent may claim error on appeal "only if the error affect[ed] a substantial right" of the proponent and the proponent informed the trial court "of its substance by an offer of proof, unless the substance was apparent from the context." TEX. R. EVID. 103(a)(2); *see also* TEX. R. EVID. 103(c), (d); *Mims v. State*, 434 S.W.3d 265, 271 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (error preserved by "making an offer of proof that demonstrates what questions would have been asked and the expected answers to those questions").

"The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful." *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009) (quoting Steven Goode, Olin Guy Wellborn III & M. Michael Sharlot, 1 TEXAS PRACTICE—GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 103.3 (1993)). "A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence." *Holmes v. State*, 323 S.W.3d 163, 168 (Tex. Crim. App. 2009). When, as here, the offer of proof assumes a question-and-answer form, we consider that evidence—and not the lawyer's post-hoc statements about that evidence—to determine whether the trial court's ruling was erroneous. *See* TEX. R. EVID. 103(a)(2); *Moore v. State*, 275 S.W.3d 633, 635 (Tex. App.—Beaumont 2009, no pet.) ("Absent an offer of proof or a bill of exception setting forth the evidence [the

proponent] sought to introduce, nothing is presented for our review on appeal.").

B. The trial court did not err by excluding testimony regarding the CPS investigation

The court holds that the trial court erred by limiting Jones's cross-examination of Gonzales to not allow questions about the termination proceedings. The only evidence of the CPS termination proceedings was through Gonzales's testimony during Jones's offer of proof.[2]

[2] Jones contends that certain evidence presented to the jury also showed that Gonzales was biased. Specifically, Jones contends that evidence that Gonzales was "highly protective" of Alice and that Gonzales had falsely testified Jimenez was a "good kid" who never got in trouble showed that Gonzales was biased against him and had a motive to exaggerate her testimony. I agree that this evidence demonstrates a potential source of bias. It is not, however, a potential bias that is *related to the CPS termination proceedings.*

As the proponent of the evidence, Jones was required to establish, in his offer of proof, "some causal connection or logical relationship" between the excluded evidence and Gonzales's alleged bias. *See Carpenter*, 979 S.W.2d at 634. In light of Jones's theory of why the evidence was a source of potential bias, to establish the necessary causal connection or logical relationship, Jones's offer of proof was required to show that (1) Gonzales was aware of the then-pending CPS termination proceedings; (2) Gonzales wanted to gain custody of Alice; and (3) Gonzales believed that she could increase her chances of gaining custody of Alice by exaggerating her testimony against Jones, possibly under the belief that Jones might lose his parental rights if convicted.

In its entirety, the portion of Jones's offer of proof addressing the CPS termination proceedings was as follows:

> Q. Do you know that there's a CPS—that there's a child custody battle going on to eliminate parental rights of both [Jimenez] and [Jones]?
>
> A. Yes, sir.
>
> Q. Do you have an interest in that being done?
>
> A. I don't understand what that means.
>
> Q. Do you have a preference?
>
> A. Do I have preference of what?
>
> Q. That their parental rights be terminated or not?
>
> A. I don't have any say in that. That damage has been done between the both of them.
>
> Q. My understanding is the child is with an aunt; is that correct?
>
> A. My sister.
>
> Q. Your sister?
>
> A. Yes. And before that, she was with me. I had her. I've always had her.
>
> Q. The reason that you take care of the child is because of the relationship that [Jones] and [Jimenez] have, correct?
>
> A. I'm sorry?
>
> Q. It's because of the type of relationship that [Jimenez] and [Jones] have and the things that they do destructive towards each other, correct?
>
> A. I'm not sure I want to answer that.
>
> Q. The reason—
>
> A. Yes, that's why I take care of her because I want her to be safe. She's a beautiful little girl. She deserves to be safe. (Witness crying.)

Jones's limited offer of proof failed to show that the trial court erred by excluding testimony regarding the CPS termination proceedings for two reasons. First, Jones's offer of proof did not suggest bias stemming from the CPS termination proceedings. Second, Jones's offer of proof was procedurally defective. I consider each reason in turn.

1. Jones's limited offer of proof did not demonstrate bias

The testimony in Jones's limited offer of proof did not show and could not have led a reasonable jury to conclude that Gonzales was biased against Jones because she wanted custody of Alice.

First, Jones did not present any evidence suggesting that

Gonzales wanted custody of Alice. Nothing in the record indicates that Gonzales had requested custody of Alice or desired to take custody from either her daughter or from Alice's great-aunt (Gonzales's sister). Instead of asking her about her desire to obtain custody, the cross-examination asked whether she had an "interest" or a "preference" as to whether Jones's and Jimenez's rights to Alice should be terminated. Gonzales's response was that she did not have "any say" in the outcome and that the "damage" had already "been done between" Jones and Jimenez. Gonzales further testified that, while she had previously taken care of the child, at the time of trial the child lived with Gonzales's sister. Jones offered no evidence—through examination during his offer of proof or otherwise—that Gonzales desired or was seeking custody of Alice. Similarly, there was no evidence regarding why Gonzales did not have custody at the time of trial instead of her sister. Without evidence that Gonzales actually wanted custody of Alice, Jones was unable to establish the required causal connection or logical relationship between the CPS proceedings and Gonzales's allegedly biased testimony.

Jones's failure to establish whether Gonzales actually wanted or took steps to obtain custody of Alice distinguishes this case from the two cases the court relies on, *Fox v. State*, 115 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd), and *Ryan v. State*, No. 04-08-00594-CR, 2009 WL 2045211 (Tex. App.—San Antonio July 15, 2009, no pet.) (mem. op., not designated for publication). *Fox* and *Ryan* show that a direct interest in a child-custody dispute is a valid area for cross-examination to expose bias or potential bias. Both cases involved allegations of domestic violence. *Fox*, 115 S.W.3d at 554, 566; *Ryan*, 2009 WL 2045211, at *1, *3. In each case, the defendant-husband presented evidence that the complainant-wife requested custody of the children or had physical possession of the children at the time of trial and argued that her desire for custody was a source of bias in her testimony at the criminal trial. *See Fox*, 115 S.W.3d at 568; *Ryan*, 2009 WL 2045211, at *4. By contrast, Jones did not establish that Gonzales had sought or intended to seek custody of Alice in the event that Jones's and Jimenez's parental rights were terminated or that she had a direct interest in the termination proceedings. Thus, *Fox* and *Ryan* are inapposite here. Neither case supports Jones's argument or the court's holding.

Second, Jones's limited offer of proof did not suggest that Gonzales believed that what happened in Jones's criminal case could affect the CPS case's outcome. Even if the jury inferred that Gonzales wanted custody, the offer of proof did not support a determination that Gonzales believed that she could increase her chances of gaining custody by exaggerating her testimony against Jones. Again, without such evidence, Jones was unable to establish the required causal connection or logical relationship between evidence of the CPS proceedings and Gonzales's potential bias.

Third, Jones's offer of proof failed to address a variety of other highly relevant, related circumstances from which a factfinder might infer that Gonzales believed the CPS proceedings could result in her obtaining custody of Alice and was therefore potentially biased. There is no evidence that Gonzales had been interviewed by CPS, was scheduled to be a witness in the CPS proceeding, knew the claims made by CPS, or was otherwise involved in the termination proceedings. There is no evidence that Gonzales knew the status of the CPS proceedings or why the proceedings were instigated;[3] knew any of the law regarding parental-termination proceedings; or knew how a conviction against Jones might affect the termination proceedings. Nor is there any evidence that Gonzales believed she had the financial, physical, and legal ability to be granted custody of Alice when Alice was at the time in the custody of her great-aunt.[4]

3 Jones may have shied away from offering any details because it would have undermined his defense. Indeed, all the legal grounds for parental termination would have been at a minimum damaging character evidence, and some potential grounds would have directly damaged his defense that he only acted in self-defense, such as if there were any allegation by CPS that Jones was abusing Jimenez. *See* TEX. FAM. CODE § 161.001 (b)(1)(D) and (E) (providing that a parent's rights may be terminated if the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child" or "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child").

4 There was no evidence explaining why Gonzales did not have custody at the time of trial instead of her sister. Perhaps Gonzales thought it was important for Jimenez to live with her and that she would not be able to do so if Jimenez's parental rights were terminated. Perhaps she believed her sister would be a better guardian. Even if the proffered evidence had been presented to the jury, it would have had no way to know the answers to these questions; it could only have speculated, just as the court does now.

For these reasons, the offer of proof fell short of suggesting that Gonzales had any bias against Jones for the purpose of aiding her own efforts to obtain custody of Alice, much less that the trial court's exclusion of the evidence fell outside the zone of reasonable disagreement.

The offer of proof was, at best, repetitive of the evidence already before or readily apparent to the jury. The jury knew that Gonzales cared for Alice, wanted what was best of her, had once served as her primary caregiver, and believed Jones was creating an unhealthy environment for her. It was readily apparent that if he went to jail, Jones would not have custody of Alice. Thus, the jury already could infer that Gonzales had a reason to potentially exaggerate her testimony against Jones. The trial court permitted Jones to cross-examine Gonzales on her desire to protect Alice, and Gonzales testified repeatedly that her primary concern was Alice's safety. From this testimony, the jury could have inferred that Gonzales had an interest in testifying as she did, even without being made aware of parental termination proceedings.

The offer of proof presented nothing new, except that Gonzales was aware that termination proceedings were currently pending. But, as explained above, the offer of proof did not show that Gonzales's awareness of the pendency of those proceedings was a source of potential bias against Jones beyond what was already in the record or readily apparent. Thus, I would hold that Jones failed to demonstrate that the trial court's prohibition on cross-examination of Gonzales with respect to the termination proceedings resulted in the exclusion of admissible evidence of bias. *See Mays*, 285 S.W.3d at 889–90 ("primary purpose" of offer of proof is to enable appellate review by "set[ting] forth the substance of the proffered evidence"); *Mims*, 434 S.W.3d at 271 (offer of proof must show "what questions would have been asked and the expected answers to those questions" if examination had been permitted). It was Jones's burden in the offer of proof to "establish some causal connection or logical relationship between the pending" parental-termination proceedings and Gonzales's potential bias as a result. *Carpenter*, 979 S.W.2d at 634. He failed to do so.

The principal difference between my analysis and that of the court concerns whether we should consider what Jones's attorney *might* have shown by a full cross-examination or only what he actually did show in his limited offer of proof. According to the court, "the controlling question on appeal is whether, had [Jones] been able to cross-examine Gonzales on the termination proceedings and her interest in them, he could have made the jury aware of a bias or interest on her part that would motivate her to testify against him on the underlying offense of domestic violence against Jimenez because of her interest in his child." The court fundamentally misunderstands the scope of our review.[5] We are not supposed to consider what Jones "could have made the jury aware of"; instead, we consider what the testimony *from the offer of proof* would have shown the jury had it been admitted.[6] *See* TEX. R. EVID. 103(a)(2) (proponent must make offer of proof that informs trial court of substance of evidence unless substance is apparent from context); *Mims*, 434 S.W.3d at 271 (error is preserved by "making an offer of proof that demonstrates what questions would have been asked and the expected answers to those questions").

5 The court compounds its errors by raising arguments that were not presented in the trial court and are not presented now, concluding that Gonzales offered inadmissible, unfairly prejudicial evidence regarding the dangers Jones presented to Gonzales's granddaughter.

6 I note that the trial court did not—and could not properly—limit the offer of proof. *See* TEX. R. EVID. 103(c) (trial court must allow party to make offer of proof and, at party's request, must direct that offer of proof be made in question-and-answer form); *Dopico v. State*, 752 S.W.2d 212, 215 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (holding that trial court "erred by refusing to allow an offer of proof in question and answer form"); *Andrade v. State*, 246 S.W.3d 217, 226 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("The right to make an offer of proof is absolute...."). This underscores the fact that it was Jones's burden to show, *through his offer of proof*, a causal connection or logical relationship between the pending parental-termination proceedings and Gonzales's potential bias as a result. To the extent his offer fell short of what it might have revealed concerning Gonzales's bias, it did so because Jones failed to elicit helpful testimony and, as a result, failed to meet his burden.

In other words, we must consider the evidence from the offer of proof, not what we think a fuller cross-examination on the topic might have revealed. *See Mims*, 434 S.W.3d at 271. Thus, I would hold that Jones's specific offer of proof—which must frame our analysis—failed to suggest any bias related to the CPS termination proceeding and, therefore, that Jones failed to establish a right to examine Gonzales about that proceeding.

2. Jones's limited offer of proof was procedurally defective

Not only did Jones's offer of proof fail to demonstrate bias, it also suffered from two procedural defects.

First, Jones's offer of proof failed to segregate admissible evidence from inadmissible evidence. Jones's offer of proof included other items of evidence that the trial court had already excluded—i.e., evidence of a violent past between Jimenez and Gonzales and other instances of violence by Jimenez. For the first three-and-a-half pages of the transcript, consisting of 26 questions and answers, Jones cross-examined Gonzales regarding Jimenez's reputation for violence, threats against another woman who also had a child with Jones, threats against and physical violence against Gonzales, "fighting and fussing" with Jones, and an incident that occurred the night before Gonzales's trial testimony when someone let the air out of Gonzales's tires. The trial court did not abuse its discretion in excluding this evidence.[7]

[7] In a separate issue, Jones argues that he should have been allowed to present evidence of Jimenez's violent past for three reasons. I note that Jones did not preserve all of his arguments for appeal. But assuming that he did, they are all unavailing. First, Jones argues that the evidence was admissible under Rule of Evidence 404, specifically those provisions that apply when the defendant offers evidence of the defendant's or the complainant's character, and the prosecutor seeks to rebut that evidence. TEX. R. EVID. 404(a)(2)(A), (a)(3)(A). But this case presents the opposite situation: the testimony was given by a witness called by the State, and it is the defendant who seeks to rebut it. Second, Jones argues that the evidence was admissible under Rule of Evidence 405, which permits cross-examination into relevant specific instances of a person's conduct, but only when evidence of that person's character or character trait is admissible. TEX. R. EVID. 405(a)(1). Jones does not present any argument supporting admissibility of evidence of Jimenez's character, except in rebuttal, and does not brief his argument based on Rule 405. Accordingly, he has waived any argument by inadequate briefing. *See* TEX. R. APP. P. 38.1(i). Third, Jones argues that the evidence was admissible for the purpose of correcting a false or misleading impression created in the minds of the jurors by Gonzales's testimony that Jimenez had "always been a good kid" who "never was in trouble." Jones has failed to demonstrate that the cross-examination he sought to conduct of Gonzales was relevant to either the offense charged or the defense of self-defense. Whether Jimenez had a history of violence has no bearing on any element of the offense of assault of a family member. And Jones made no effort to demonstrate that he knew Jimenez had been violent with her mother in the past, causing him to reasonably believe it was "immediately necessary" to strike Jimenez in self-defense. *See* TEX. PENAL CODE § 9.31(a). Moreover, the offer of proof regarding Jimenez's violent past is extremely sparse. To the extent Jones preserved any arguments regarding rebuttal evidence related to Jimenez's past violence, the trial court's decision to exclude such evidence fell within the zone of reasonable disagreement.

Jones also included in his offer of proof inadmissible evidence that Jimenez disabled Gonzales's car by letting air out of its tires to prevent Gonzales from testifying at Jones's trial. Jones argues that this evidence was admissible to rebut Gonzales's testimony regarding Jimenez's character. Jones's argument fails because Jones did not offer any proof that Jimenez disabled Gonzales's car. On the contrary, Gonzales, who was the only witness on this topic, testified that she did not know who let air out of her car's tires, but that other cars were also affected. She also testified that she believed that "some kid," not Jimenez, was responsible and that Jimenez had no motive to disable the car. Thus, Jones did not present any evidence to the trial court that would tend to indicate that it was Jimenez who disabled the vehicle. The trial court properly excluded this evidence.

"When a trial judge is presented with a proffer of evidence containing both admissible and inadmissible statements and the proponent of the evidence fails to segregate and specifically offer the admissible statements, the trial court may properly exclude all of the statements." *Sohail v. State*, 264 S.W.3d 251, 260–61 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (quoting *Willover v. State*, 70 S.W.3d 841, 847 (Tex. Crim. App. 2002)).[8] Because Jones failed to segregate Gonzales's statements relating to Jimenez's violent conduct from her statements relating to the CPS termination proceedings, and because the former were properly excluded, the trial court was entitled to exclude the latter as well.

[8] *See* TEX. R. EVID. 103(a)(2); *Jones v. State*, 843 S.W.2d 487, 492–93 (Tex. Crim. App. 1992) ("Because appellant failed to specify which portion of the transcript he intended to introduce into evidence, the court was presented with a proffer containing both admissible and inadmissible evidence. When evidence which is partially admissible and partially inadmissible is excluded, a party may not complain upon appeal unless the

admissible evidence was specifically offered. Thus, since the substance of the specific evidence that appellant sought to introduce was not presented to the court, it was not an abuse of discretion for the trial court to exclude the transcript."), *abrogated on other grounds by Maxwell v. State*, 48 S.W.3d 196 (Tex. Crim. App. 2001); 2 Steven Goode & Olin Guy Wellborn III, TEXAS PRACTICE SERIES, GUIDE TO THE TEXAS RULES OF EVIDENCE § 103.2, at 20 (4th ed. 2016) (noting that when offer of proof fails to segregate admissible evidence from inadmissible evidence, appellant "will be told by the appellate court that it was his responsibility" to separate them "and an objection that was good as to part of the unsegregated mass may be sustained as to all."); G. Dix and J. Schmolesky, 43A TEXAS PRACTICE SERIES, CRIMINAL PRACTICE AND PROCEDURE § 53:130, at 1135 (3d ed. 2011) (observing that if evidence "is not only partly admissible but also partly inadmissible, the offer of proof must specifically identify and offer the admissible portion in order to preserve error").

Second, and perhaps more fundamentally, Jones failed to obtain a ruling from the trial court. Preservation of error requires not only "an offer by the defendant" but also "a ruling from the trial court." *Bohannan v. State*, No. 09-13-00090-CR, 2014 WL 5490936, at *5 (Tex. App.—Beaumont Oct. 29, 2014, pet. granted); *see Ites v. State*, 923 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (holding that State did not preserve error on trial court's improper exclusion of confession in part because there was no ruling sustaining objection to testimony). Jones's counsel never obtained a ruling on the admissibility of the offered testimony, and without a ruling, he did not preserve error.[9]

[9] The trial court's pretrial finding that the testimony was not relevant is analogous to a ruling on a motion in limine, which generally does not preserve error related to the exclusion of evidence. *See Geuder v. State*, 115 S.W.3d 11, 14–15 (Tex. Crim. App. 2003).

Conclusion

The court's holding is legally incorrect: it ignores well-established law governing offers of proof and appellate review of evidentiary rulings. The holding sets forth an unworkable rule that ignores the realties facing trial courts with busy dockets and limited resources. And it will encourage litigants to file meritless appeals—and encourage appellate courts to indulge them. For these reasons, I respectfully dissent.

All Citations

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