No. 01-24-00444-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

ANNUAL DAVIDSON, III
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1706895
From the 174th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Not Requested

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IDENTITY OF PARTIES AND COUNSEL

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PRESIDING JUDGE:	Hon. Denise Collins, *visiting judge* 174th District Court Harris County, Texas 1201 Franklin Houston, Texas 77002
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STATEMENT OF THE CASE

Annual Davidson, III was charged with the offense of murder by a grand jury on April 8, 2021. CR at 60. A court trial began May 22, 2024, and Mr. Davidson was found guilty on May 24. CR at 794; 4 RR at 1. The trial court sentenced Mr. Davidson to 20 years imprisonment. CR at 794. Notice of appeal was timely filed on June 7. CR at 810.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Davidson does not request oral argument. This case presents an application of well-established evidentiary principles. The straight-forward nature of the question presented suggests that oral argument would likely not assist the Court in reaching a decision in this matter.

ISSUE PRESENTED

The Trial Court Erred in Allowing the State to Comment on Mr. Davidson's Constitutionally Guaranteed Right not to Testify

STATEMENT OF FACTS

Witnesses Present at the Home During the Offense

Complainant Joseph Kasavage rented space in Defendant Annual Davidson, III's garage as living quarters. 4 RR at 21. At the time of the Kasavage's death, he lived at the home along with Davidson, and Davidson's cousin, mother, and two children. 4 RR at 24.

On January 13, 2021, the day before the offense, Davidson spent most of the day with a group of friends. 4 RR at 28. That evening, the group went to Davidson's home because Davidson had told them that his children had accused Kasavage of touching them inappropriately. 4 RR at 30. The friends went to Davidson's home to talk to the children. 4 RR at 30.

After speaking with the children, witness Jamel Woolfolk did not believe Kasavage had done anything nefarious. 4 RR at 34. Woolfolk says that the children's answers were the same when Davidson spoke to them as when she did. 4 RR at 36. Friend Marcus McLemore also spoke with the children. McLemore would later tell police that the children denied being touched by Kasavage. 5 RR at 135. However, despite their denials, McLemore was still concerned about the possible molestation. 5 RR at 135. As McLemore was

talking to the children, Davidson came into the room and heard their responses. 5 RR at 131.

McLemore confronted Kasavage about the allegations and Kasavage denied them. 5 RR at 137. Kasavage then wanted to speak with Davidson about the allegations, even though McLemore told Kasavage he should leave. 5 RR at 178. Davidson went into the garage where Kasavage was, and the two began to argue. 4 RR at 38.

Davidson began to yell, and then Woolfolk heard "thuds" coming from the garage. 4 RR at 39. Woolfolk then heard Kasavage scream "stop hitting me," and then Kasavage went silent as the "thuds" continued. 4 RR at 41. Woolfolk then left the house and went to a hotel. 4 RR at 42. She did not call for an ambulance because she believed the Davidson and McLemore were taking Kasavage to the emergency room. 4 RR at 43.

After the fight was over, Davidson did not say anything to McLemore about Kasavage having a weapon or trying to hurt him. 5 RR at 156. Davidson then told McLemore that they were taking Kasavage to the hospital. 5 RR at 157. Davidson was too upset to drive. 5 RR at 162. McLemore testified that during the drive Davidson suggested that they throw Kasavage over a bridge into a river. 5 RR at 166.

Later the morning of January 14th, Woolfolk received a video call from Davidson, who appeared to be in a hospital. 4 RR at 45. He told Woolfolk that Kasavage was fine. 4 RR at 45. Woolfolk was shocked by this because she had already been in contact with the hospital, where she had claimed to be Kasavage's sister, and knew that Kasavage had died. 4 RR at 45, 71.

Woolfolk was more than just a friend to Davidson and Kasavage. She was also their drug dealer, who occasionally assisted them in shooting up methamphetamine. 4 RR at 54-55. At the time of the alleged offense, Woolfolk was also using methamphetamines, which she smoked daily, including July 13. 4 RR at 72-73.

Emergency Room Doctor and Medical Examiner

Dr. Andrew Corona was an emergency room doctor and was present at the hospital when Kasavage was brought in by Davidson. 4 RR at 79-80, 84. When asked how Kasavage's injuries occurred, Davidson said that Kasavage had fallen and hit his head on concrete. 4 RR at 88. After examining Kasavage and speaking with radiology after Kasavage's CT scan, Dr. Corona did not believe this could be the cause of the injuries. 4 RR at 89-90. Eventually, Davidson told Dr. Corona that he hit Kasavage with a piece of wood after learning that Kasavage had sexually assaulted his children. 4 RR at 90.

Kasavage's drug screening at the hospital showed positive results for both methamphetamine and cocaine, and a blood alcohol concentration of 0.23. 4 RR at 111, 121.

Dr. Pramod Gumpeni was the medical examiner who performed Kasavage's autopsy. 4 RR at 136-37. Dr. Gumpeni's examination showed that Kasavage had sustained multiple blunt force injuries to the head, as well as some to the face, and sides and back of the head. 4 RR at 138. Dr. Gumpeni testified that Kasavage suffered at least three blows to the head. 4 RR at 143. Kasavage's cause of death was blunt trauma of the head with subdural hemorrhage, brain injury, and skill fractures. 4 RR at 146.

Police Investigation

Justin Brown, detective with the Houston Police Department, performed the initial walkthrough of the house, and determined that the location of the altercation between Kasavage and Davidson was in the garage. 5 RR at 14015, 21. Brown saw a wooden club lying on the garage flood. 5 RR at 21. Brown later collected a buccal swab from Davidson. 5 RR at 36.

Brown spoke with Davidson's son while inspecting the Davidson home. The son told police that Kasavage did enter his bedroom and, after Kasavage

left, the child was unable to go back to sleep. 5 RR at 54. Davidson had not given Kasavage permission to enter the children's bedroom. 5 RR at 55.

At the scene, Davidson was crying hysterically, and told police that he was concerned about Kasavage going inside his children's bedroom. 5 RR at 49-50. Davidson was trying to figure out if that was true when he and Kasavage got into a fight. 5 RR at 50. At the time he spoke with police at his house, he was limping and in pain. 5 RR at 44. Davidson also had a bloody lip. 5 RR at 64.

Punishment

Davidson testified during the punishment phase of his trial. He told the court that he was the divorced father of two children, who at the time of trial were eleven and twelve years old. 6 RR at 26. Their mother had no contact with the children since the divorce and Davidson had full custody. 6 RR at 26-27.

The night of the offense, Davidson asked Kasavage to leave but Kasavage would not go. 6 RR at 27. When Davidson threatened to call the police, Kasavage became physical. 6 RR at 28. At that point, Davidson "lost it." 6 RR at 28. Davidson told the court that he took responsibility for his actions that night and regrets what he did. 6 RR at 29.

SUMMARY OF THE ARGUMENT

During the State's closing argument, the prosecutor referenced Davidson's election not to testify, commenting on his right to remain silent, in violation of the Fifth Amendment to the United States Constitution and Article I, §10 of the Texas Constitution. The trial court overruled Defense Counsel's objections to this prohibition, thus committing Constitutional error, which harmed Davidson.

ARGUMENT

The Trial Court Erred In Allowing the State to Comment on Mr. Davidson's Constitutionally Guaranteed Right not to Testify

Mr. Davidson did not testify in his own defense during his trial. All evidence of what transpired between him and Kasavage was relayed through friends who were at the house the night of the offense, investigating police officers, a treating emergency room physician, and the medical examiner. During the State's closing argument in the culpability phase, the prosecutor commented on Davidson's election not to testify.

I. Preservation of Error

State's closing argument proceeded thusly:

> **State:** Annual Davison, III's actions were not justified. There has been no credible evidence to this Court that shows the defendant acted in self-defense He had several opportunities to tell a story of self-defense, but he never mentioned self-defense.
>
> **Defense Counsel:** For purposes of the record, Judge, I would object to that as a comment on his right to testify (sic).
>
> **Court:** Overruled.

6 RR at 11.

II. Standard of Review.

If the Court determines that a prosecutorial remark impinges upon an appellant's privilege against self-incrimination under the constitution of Texas or of the United States, it is error of constitutional magnitude. U.S. CONST. AMEND. V; TEX. CONST. art. I, § 10; *Snowden v. State*, 353 S.W.3d 815, 817 (Tex. Crim. App. 2011). When confronted with a constitutional error, a reviewing court must analyze the error under Texas Rule of Appellate Procedure 44.2(a), reversing the judgment unless it can conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. *See id*. at 818-819; TEX. R. APP. PROC. 44.2(a).

III. Analysis

A. Argument Generally

Proper jury argument falls within one of four general areas: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) responses to the defendant's argument, or (4) pleas for law enforcement. *McFarland v. State*, 989 S.W.2d 749, 751 (Tex. Crim. App. 1999). Jury argument exceeding these bounds constitutes error. *Ortiz v. State,* 999 S.W.2d 600, 605 (Tex. App. – Houston [14th Dist.] 1999, no pet.).

B. Defendant's Right to Silence

Argument which comments on the defendant's failure to testify, "violates the privilege against self-incrimination and the freedom from being compelled to testify contained in the Fifth Amendment of the United States Constitution and Article I, §10 of the Texas Constitution." *Bustamante v. State,* 48 S.W.3d 761, 764 (Tex. Crim. App. 2001). Additionally, Tex. Code Crim. Proc. art. 38.08 provides that if a defendant invokes his right not to testify during his trial, it shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by the prosecuting attorney. *Hall v. State,* 13 S.W.3d 115, 117 (Tex. App. – Ft. Worth 2000), *pet. dism. improv. granted*, 46 S.W.3d 264 (Tex. Crim. App. 2001); TEX. CODE CRIM. PROC. art. 38.08.

To violate the right against self-incrimination, the offending language must be viewed from the factfinder's standpoint and the language used must have been manifestly intended to be or was of such a character that the factfinder necessarily and naturally take it as a comment on the defendant's failure to testify. *Orellana v. State*, 489 S.W.3d 537, 549 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Bustamante*, 48 S.W.3d at 764.

C. When Right to Silence is Implicated

Language that might be construed as only an implied or indirect allusion to the defendant's failure to testify may constitute reversible error if it calls for a denial of an assertion of fact or contradictory evidence that only the defendant is on a position to offer. *See Garret v. State,* 632 S.W.2d 350, 353 (Tex. Crim. App. [Panel Op.] 1982).

In *Mercer v. State*, the Court of Criminal Appeals reversed and remanded for a new trial after the prosecutor, in closing arguments of the punishment phase, improperly commented on the appellant's failure to testify by stating "You see, probation, to be effective in my judgment—the individual is going to have to accept his responsibility and say— 'I did this thing.'" *Mercer v. State*, 658 S.W.2d 170, 171 (Tex. Crim. App. 1983). Similarly, in *Koller v. State*, the Court of Criminal Appeals reversed and remanded for a new trial after the

prosecutor improperly commented that "he [the defendant] has never said I was wrong and I'm sorry." *Koller v. State,* 518 S.W.2d 373, 375 (Tex. Cr. App. 1975).

The comments in *Mercer* and *Koller* concerned taking responsibility or showing remorse, both which can only be accomplished by the accused.

Similarly, the Prosecutor's comments in the present case, were clearly more than an implied or indirect allusion to Davidson's election not to testify. It referred to evidence that only he could have provided. No other witness in the trial testified to exactly what occurred in the garage when Davidson confronted Kasavage about molesting his children. Witness could hear sounds, but none could see whether Kasavage was the first aggressor or wielded a weapon. When argument points to a lack of evidence that only the defendant personally could supply it has been held to be improper. See *Garret* 632 S.W.2d at 353.

IV. Harm

Once this Court determines that the prosecutor's argument violated Davidson's constitutional right to silence under both the Fifth Amendment of the United States Constitution and Article I, § 10 of the Texas Constitution, the Court must then determine whether the error was harmful. *Bustamante,* 48

S.W.3d at 764. Under Tex. R. App. Proc. 44.2(a), constitutional error that is subject to harmless error review must be reversed unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. Proc. 44.2(a); *Crocker v. State*, 248 S.W.3d 299, 305-06 (Tex. App.–Houston [1st Dist.] 2007, pet. ref'd)

For many years, the appellate courts of Texas employed a presumption that in a trial before the court, the trial court, as trier of fact, disregarded any inadmissible evidence. *See Tolbert v. State,* 743 S.W.2d 631, 633 (Tex. Crim. App. 1988); *Morgan v. State,* 692 S.W.2d 877, 879 (Tex. Crim. App. 1985). This was a rebuttable presumption and the appellant bore the burden of proving the trial court relied upon or considered the inadmissible evidence in reaching its verdict or determining the punishment. *See Tamminen v. State,* 653 S.W.2d 799, 803 (Tex. Crim. App. 1983).

The presumption, however, strained credulity because there was no principled basis upon which to presume the trial court that ruled the evidence admissible would not consider it. Indeed, the presumption should have been the exact opposite: Why would a trial court admit evidence, over objection, if the trial court did not intend to consider it? *Young v. State*, 994 S.W.2d 387, 389 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *citing* Sean Doran, John

D. Jackson, and Michael L. Seigel, *Rethinking Adversariness in Nonjury Criminal Trials,* 23 AM. J.CRIM. L. 1, 31 (1995). Eventually, the absurdity of the presumption was recognized and expressly overruled by the Court of Criminal Appeals in *Gipson v. State,* 844 S.W.2d 738, 741 (Tex. Crim. App. 1992).

In the case before us, the trial court can be presumed to consider the prosecutor's comments about Davidson's election not to testify, as the court overruled the objection to it. This is not a case where a trial court is presumed to ignore an argument, in her judicial wisdom, that she knew to be improper. The judge in Davidson's case did not believe the argument ran afoul of the Constitution. This Court must now reverse Davidson's conviction unless it finds beyond a reasonable doubt that the trial judge's consideration of Davidson's invocation of his Fifth Amendment right did not contribute to his conviction or punishment. The trial court's action – a swift conviction and assessment of the maximum penalty allowable under Tex. Penal Code 19.02(d), after finding that Davidson acted in sudden passion – suggest otherwise. *See* TEX. PENAL CODE §§ 19.02(d), 12.33.

PRAYER

Davidson prays this Court find that his to remain silent under the United States and Texas Constitutions was violated by the State's remarks during closing argument, that the trial court erred in admitting them, and that error was harmful. Davidson prays this Court reverse his conviction and remand this case to the trial court for a new trial.

Respectfully submitted,

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A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was also sent on the same date by first-class mail to:

/s/ Miranda Meador
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/s/ *Miranda Meador*
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MIRANDA MEADOR

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