
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, PETER CHICKRIS, AND MARY MARTIN
SUBJECT: 09/24/08 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 10/04/08
CC: JACK THOMPSON

***Clarke v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1454-07, 09/24/08].**

COCHRAN, J., *delivered the opinion of the Court, in which MEYERS, PRICE, WOMACK, JOHNSON, and HOLCOMB, JJ., joined.* KELLER, P.J., *filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined.*

FACTS: Without an agreed recommendation, defendant pleaded guilty to sexual assault of a child. The court sentenced him to ten years imprisonment. The presentence investigation report contained erroneous extraneous offense evidence indicating that previously, defendant may have sexually assaulted his sister. The State was aware that the information in the PSI was false, but did not inform the defense or the trial court of the error. The trial court denied defendant's motion for a new trial without addressing his *Brady* claim. Finding defendant did not properly preserve his *Brady* claim for appellate review, the court of appeals affirmed. The Court of Criminal Appeals reversed and remanded to the court of appeals. The CCA held that defendant preserved the error for review, and the trial court was authorized to consider the *Brady* claim that was raised without objection at hearing on motion for new trial.

APPELLATE PROCEDURE—ERROR PRESERVATION

To preserve error for appeal, a complaint must be made to the trial court by a timely request, objection, or motion that states the grounds for the ruling requested with sufficient specificity to make the trial court aware of the complaint. This procedure is not required if the specific grounds of the complaint are apparent from the context. ***Clarke v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1454-07, 09/24/08].**

APPELLATE PROCEDURE—ERROR PRESERVATION

To meet the specificity requirements for error preservation, the complaining party need only let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do

something about it. That is all that is required. *Clarke v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1454-07, 09/24/08].

MOTION FOR A NEW TRIAL—AMENDMENTS

No amendments to a motion for a new trial are allowed if 1) those amendments are made after the expiration of the initial thirty-day period for filing the motion and 2) the opposing party objects. If the opposing party does not object, the trial court may still consider the merits of an untimely amendment to a motion for new trial. *Clarke v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1454-07, 09/24/08].

BRADY INFORMATION – STATE’S DUTY TO DISCLOSE

Deliberate deception of a court and jurors by the knowing presentation of false evidence is incompatible with rudimentary demands of justice; in a similar vein, the State may not permit false evidence, even if unsolicited, to go uncorrected. Suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution. A new trial, however, is not automatically required when a post-trial review of the prosecutors’ files discloses evidence that might possibly have been useful to the defense, but was not likely to have changed the verdict. *Clarke v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1454-07, 09/24/08].

MOTION FOR NEW TRIAL – UNTIMELY AMENDMENT – FORFEITURE OF RIGHT TO OBJECT

The lateness of an amendment to a timely original motion for new trial affects neither the jurisdiction nor the authority of the trial court to rule; and, the State, as the opponent of a tardy amendment to a motion for new trial, can forfeit its otherwise-peremptory right by inaction.

Clarke v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1454-07, 09/24/08].

Brown v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

Meyers, J., *delivered the opinion of the Court, in which* Price, Johnson, Keasler, Hervey, Holcomb, and Cochran, JJ., *joined*. Keller, P.J., *concurred in points of error one and two and otherwise joined*. Womack, J., *concurred*.

FACTS: A jury convicted defendant of capital murder and he was sentenced to death. On direct appeal, the Court of Criminal Appeals (CCA) affirmed. The CCA held that: 1) accomplice's testimony, implicating defendant in robbery and killing of officer, was sufficiently corroborated to be admissible under accomplice-witness rule; 2) defendant's request for jury shuffle was untimely; 3) prosecutor's response to defense counsel's suggestion in closing argument that witnesses gave false testimony at the direction of prosecutor was improper; but 4) such misconduct was not prejudicial error.

EVIDENCE—ACCOMPLICE-WITNESS RULE

The accomplice-witness rule creates a statutorily imposed review that is not derived from federal or state constitutional principles defining the legal and factual-sufficiency standards.

***Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].**

EVIDENCE—ACCOMPLICE-WITNESS RULE

The accomplice-witness rule holds that, before a conviction may rest upon the testimony of an accomplice-witness, the accomplice's testimony must be corroborated by independent evidence tending to connect the accused with the crime. The corroborative evidence, however, does not need to be sufficient in itself to establish guilt, nor must it directly link the accused to the commission of the offense. ***Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].**

DEFINITION—ACCOMPLICE-WITNESS

An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. As a matter of law, a witness is a person who is susceptible to prosecution for the offense with which the accused is charged or a lesser included offense. ***Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].**

ACCOMPLICE-WITNESS RULE – STANDARD OF REVIEW

When reviewing a challenge under the accomplice-witness rule, the reviewing court views the evidence in the light most favorable to the jury's verdict. ***Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].**

EVIDENCE—ACCOMPLICE-WITNESS - CORROBORATION

Sufficient accomplice-witness corroboration may be furnished by the suspicious conduct of a defendant (e.g. attempting to procure a false alibi). Under most circumstances, an admission or confession will be sufficient to corroborate the accomplice-witness testimony. ***Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].**

EVIDENCE—ACCOMPLICE-WITNESS RULE

The fact that accomplice-witness testimony may be subject to impeachment (e.g. as an admitted perjurer and drug user) does not affect the testimony's admissibility, but will affect the weight and veracity the finder of fact will give to that evidence. ***Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].**

VOIR DIRE—JURY SHUFFLE

While either party may request to have the entire panel of jurors shuffled, a request to shuffle in a capital case must be made *before* the trial judge propounds questions to the venire panel concerning principles applicable to the case on trial. In a capital case, voir dire commences when the trial judge begins his examination of the panel. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

POST VOIR DIRE—JURY SHUFFLE

To allow either party to shuffle the names of the jury panel after voir dire begins would: 1) be disruptive, 2) unduly prolong the trial, and 3) permit selection of jurors to be based on information already elicited on voir dire. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—STATEMENTS NOT BASED ON THE RECORD

It is the duty of trial counsel to confine their arguments to the record; and, it is improper for trial counsel to reference facts that are neither in evidence nor inferable from the evidence. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—ALLOWABLE DISCUSSION

Proper jury arguments generally include: 1) a summation of the evidence; 2) reasonable deduction from the evidence; 3) an answer to the arguments of opposing counsel; and / or 4) a plea for law enforcement. Arguments that go beyond these four areas often contain the unsworn, but persuasive testimony of the attorney. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—ALLOWABLE DISCUSSION

Error occurs when facts not supported by the record are interjected into a jury argument; however, that error is not reversible unless, in light of the record as a whole, the argument is extreme or manifestly improper. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

JURY ARGUMENT—PROPER SCOPE

Proper jury argument includes answering jury argument made by opposing counsel during the argument itself. It is not the appropriate vehicle for challenging opposing counsel's trial tactics. The proper way to challenge the cross-examination tactics of opposing counsel is to object when the objectionable tactics are used and correct any misinformation or false

impressions through further examination. A timely objection also gives the trial court and / or the opposing party the opportunity to correct the error or remove the basis for objection. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—ALLOWABLE DISCUSSION

Defense counsel has wide latitude in drawing inferences from the evidence, but such inferences must be reasonable, fair, legitimate, and offered in good faith. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—STRIKING AT DEFENDANT THROUGH COUNSEL

A prosecutor may not stray beyond the scope of argument invited by defense counsel. A prosecutor runs a risk of improperly striking at a defendant over the shoulder of counsel when the argument is made in terms of the defense counsel personally and when the argument explicitly impugns defense counsel’s character. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—IMPROPER ARGUMENT—NON-CONSTITUTIONAL

An improper argument error is non-constitutional in nature; and, if an improper argument does not affect the substantial rights of the defendant, the reviewing court must disregard the error. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

HARM ANALYSIS—SUBSTANTIAL RIGHTS

To determine if a defendant’s substantial rights are affected, the reviewing court balances: 1) the severity of the misconduct; 2) any curative measures; and 3) the certainty of the conviction absent the misconduct. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].

CLOSING ARGUMENT—ALLOWABLE DISCUSSION

When evaluating the severity of prosecutorial misconduct during closing arguments, the reviewing court must assess whether the jury argument was extreme or manifestly improper. To make this assessment, the court must look at the entire record of final arguments to determine if there was a willful and calculated effort on the part of the State to deprive the defendant of a fair and impartial trial. *Brown v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,294, 09/24/08].