
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Twenty minutes not considered reasonable amount of time for closing argument in capital trial. [Dang v. State](06-1-16).

On January 24, 2006, the Court of Criminal Appeals, on remand for harm analysis, held that error could not be deemed harmless, and the court was correct to reverse the trial court's judgment and remand the case for a new trial. See original opinion *Juvenile Law Reporter Vol. 19, No. 2, ¶ 05-2-13.*

¶ 06-1-16. **Dang v. State**, ___ S.W.3d ___, No. 14-00-00560-CR, 2006 Tex.App.Lexis 534 (Tex.App.—Houston [14th Dist.], 1/24/06).

Facts: Defendant, a juvenile, was tried as an adult. He was convicted of capital murder and sentenced to life in prison. On remand from the Texas Court of Criminal Appeals, the court was required to conduct a harm analysis regarding a trial court's restriction of defense counsel's closing argument during defendant's capital murder trial. See *Dang v. State*, 154 S.W.3d 616, 2005 Tex. Crim. App. LEXIS 107 (Tex. Crim. App., 2005), *Juvenile Law Reporter Vol. 19, No. 2, ¶ 05-2-13.*

Held: The court reversed defendant's conviction and remanded the case for a new trial.

Opinion: The right to present argument in the trial court is guaranteed by the *Sixth Amendment*. *Herring v. New York*, 422 U.S. 853, 865, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). It is further protected by *Article I, Section 10 of the Texas Constitution*. *Ruedas v. State*, 586 S.W.2d 520, 522 (Tex. Crim. App. 1979). While the error presented here is not "structural" in nature, n1 it does constitute "constitutional" error. n2 See *TEX. R. APP. P. 44.2(a)*. When presented with constitutional error, we are obliged to reverse the judgment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *TEX. R. APP. P. 44.2(a)*.

n1 See *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

n2 "Constitutional error" within the meaning of *Texas Rule of Appellate Procedure 44.2(a)* is an error that directly offends the United States Constitution or the Texas Constitution. *Fox v. State*, 115 S.W.3d 550, 563 (Tex. App.--Houston [14th Dist.] 2002, pet. ref'd).

When counsel has been improperly restricted in presenting a final argument, the difficulty in conducting a harm analysis is that we must speculate whether counsel could have delivered an argument that might have affected the outcome of the trial. Here, the State presented a great deal of evidence to indicate that appellant was guilty, at least as a party, of the murder of the deceased. For example, it is undisputed that

appellant possessed a firearm. Moreover, a bullet fired from appellant's weapon was recovered from the victim's body.

However, it is also undisputed that appellant was not the only person who was armed with a weapon. In fact, all but one of the bullets that struck the deceased were allegedly fired from the accomplice's weapon. Moreover, it is undisputed that *after* the victim was killed, appellant and his accomplice both fired into the exterior door of the premises to make it appear that entry was forced. Whether defense counsel could have made a convincing argument that a bullet fired by appellant through the door of the premises struck the victim's corpse is unknown because he was prevented from developing such an argument. Whether counsel could have made a persuasive argument that appellant was not a party to the murder is doubtful. But while it is unlikely the error contributed to the conviction, we cannot say, beyond a reasonable doubt, that it did not. Thus, under the standard set forth in *Rule 44.2(a)*, we cannot say the error was harmless.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

CONCURRING OPINION ON REMAND

This court should apply a nonconstitutional rather than a constitutional harm analysis in this case. However, because the error is harmful under a nonconstitutional harm analysis, the court correctly reverses the trial court's judgment and remands for a new trial.

The Court of Criminal Appeals held the trial court abused its discretion by limiting defense counsel's closing argument to twenty minutes and by denying defense counsel's request for an additional three minutes. *Dang v. State*, 154 S.W.3d 616, 617 (Tex. Crim. App. 2005). The Court of Criminal Appeals remanded the case to this court to conduct a harm analysis. *Id.* at 622. On remand, appellant asserts that this error is constitutional and that this court must apply a constitutional harm analysis. See *TEX. R. APP. P. 44.2(a)*. A constitutional error within the meaning of *Texas Rule of Appellate Procedure 44.2(a)* is an error that directly offends the United States Constitution or the Texas Constitution, without regard to any statute or rule that also might apply. See *Fox v. State*, 115 S.W.3d 550, 563 (Tex. App.--Houston [14th Dist.] 2002, *pet. ref'd*). On original submission in this court, appellant did not assert that the trial court's restriction on the duration of closing argument violated his constitutional rights; rather, he asserted that the trial court abused its broad discretion in determining the time allowed for closing arguments.ⁿ¹ Appellant asserted the same error in the Court of Criminal Appeals. See *Dang*, 154 S.W.3d at 622-23 (Meyers, J., concurring) (stating that only ground asserted by appellant in Court of Criminal Appeals was whether trial court abused its discretion in limiting the time for closing argument). In analyzing appellant's ground of error, the Court of Criminal Appeals, citing rules and statutes, ultimately concluded that appellant had an implied statutory right to a reasonable time for closing argument. See *Dang*, 154 S.W.3d at 619-20.

ⁿ¹ On original submission in this court, the majority opinion indicated in passing that, at some point, restrictions on closing argument could violate the *Sixth Amendment* and that such violations should be avoided. See *Dang v. State*, 99 S.W.3d 172, 189 (Tex. App.--Houston [14th Dist.] 2002), *rev'd*, 154 S.W.3d 616 (Tex. Crim. App. 2005). However, because appellant did not assert a violation of the *Sixth Amendment* in this case, the court did not consider whether the trial court violated appellant's rights under the *Sixth Amendment*. See *id.* at 188-91.

The Court of Criminal Appeals determined that the trial court did not provide appellant a reasonable time for closing argument and so abused its broad discretion; however, the Court of Criminal Appeals did not determine that the trial court's improper limitation on appellant's time for argument directly

offended any part of either the United States Constitution or the Texas Constitution. *See Dang*, 154 S.W.3d at 619-22 & 622-24 (Meyers, J., concurring) (stating that, although the majority correctly concluded that trial court abused its discretion in limiting the time for closing argument, the concurring justices also believed that the trial court's actions violated appellant's rights under the *Sixth Amendment of the United States Constitution*). Justice Hudson, the author of the dissenting opinion on original submission, and three concurring justices on the Court of Criminal Appeals have stated that the trial court violated appellant's rights under the *Sixth Amendment of the United States Constitution*, but the Court of Criminal Appeals did not find such a violation. *See Dang*, 154 S.W.3d at 619-22 & 622-24 (Meyers, J., concurring); *Dang v. State*, 99 S.W.3d 172, 192-99 (Tex. App.--Houston [14th Dist.] 2002) (Hudson, J., dissenting), *rev'd*, 154 S.W.3d 616 (Tex. Crim. App. 2005).

On remand, appellant asserts that the Court of Criminal Appeals's reliance on its *Walker v. State* precedent shows that this error is constitutional because the *Walker* court characterized unreasonable limitations on closing argument as a constitutional violation. *See Dang*, 154 S.W.3d at 620; *Walker v. State*, 32 Tex. Crim. 175, 22 S.W. 685, 686 (Tex. Crim. App. 1893). Although *Walker* cited *article I, section 10 of the Texas Constitution*, it also cited *article 4 of the Texas Code of Criminal Procedure*. *See TEX. CONST. art. I, § 10* (stating that in all criminal prosecutions, the accused shall have the right to be heard by counsel); *TEX. CODE CRIM. PROC. art. 1.05* (stating, in current codification of former *article 4* cited in *Walker*, that in all criminal prosecutions, the accused shall have the right of being heard by counsel). In *Dang*, the Court of Criminal Appeals described *Walker* as finding a statutory rather than a constitutional violation and did not mention that the *Walker* court had cited the constitutional right to representation by counsel. *See Dang*, 154 S.W.3d at 620; *Walker*, 22 S.W. at 686. The Court of Criminal Appeals's discussion of *Walker* in *Dang* is consistent with the rest of the *Dang* opinion, which shows that the Court of Criminal Appeals did not find any constitutional violation. *See id.* While an appellate court may conclude that a trial court's unreasonable and arbitrary limitation on a defendant's closing argument violates the Texas Constitution or the United States Constitution, the Court of Criminal Appeals did not do so in this case. *See id.* Because the Court of Criminal Appeals did not reverse based on a constitutional error within the meaning of *Texas Rule of Appellate Procedure 44.2(a)*, this court should apply a nonconstitutional harm analysis. n2 *See Fox*, 115 S.W.2d at 563.

n2 Research reveals no Texas case that addresses the issue of what type of harm analysis to perform when the trial court abuses its broad discretion to determine the length of closing argument. There are very few cases holding that trial courts have so erred, and these cases do not address the harm analysis that should be applied. There is a dictum from one century-old Court of Criminal Appeals case that indicates that a normal harm analysis, rather than a constitutional harm analysis, should be applied to such error. *See Huntly v. State*, 34 S.W. 923, 923 (Tex. Crim. App. 1896) (stating that "the right to limit argument of counsel is within the sound discretion of the court; and this court will not reverse because of such limitation unless the bill shows that there was an abuse of this discretion, and that the appellant was probably prejudiced by such limitation in the argument").

The Court of Criminal Appeals concluded that, in determining whether a trial court has abused its discretion in limiting closing argument, the reviewing court should consider various nonexclusive factors on a case-by-case basis. These factors are nearly identical to those considered by this court on original submission: (1) the quantity of the evidence, (2) the duration of the trial, (3) conflicts in the testimony, (4) the seriousness of the offense, (5) the complexity of the case, (6) whether counsel used the time allotted efficiently, and (7) whether counsel set out what issues were not discussed because of the time limitation. *See Dang*, 154 S.W.3d at 621. After deciding that all of these factors weighed in appellant's favor, the Court of Criminal Appeals concluded the trial court had abused its discretion. *See id.* at 621-22.

The factors in the legal standard for determining error substantially overlap with the factors this court must consider in determining whether the trial court's limitation on appellant's closing argument had a substantial and injurious effect or influence in determining the jury's verdict. *See Dang, 154 S.W.3d at 621* (listing factors and noting that some of the factors may be more appropriate for determining preservation of error or whether appellant was harmed by the error, though the opinion is silent as to which factors fall into which categories); *King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)* (stating that an error affects a substantial right when that error had a substantial and injurious effect or influence in determining the jury's verdict). In analyzing these factors to determine error, the Court of Criminal Appeals reached a different conclusion than the majority of this court on original submission.

Because the test for error in limiting closing argument subsumes consideration of harm, and because the Court of Criminal Appeals rejected this court's prior evaluation of the relevant factors in the error analysis and has not prescribed a separate analytical framework for assessing harm, it would be difficult, if not impossible, to conclude that the trial court's error is not harmful. This is especially true given that, in assessing this type of error, the reviewing court views the record in the light most favorable to the trial court, a standard that does not apply in assessing harm. *See Granados v. State, 85 S.W.3d 217, 236 (Tex. Crim. App. 2002)* (stating that reviewing court views record in light most favorable to trial court in determining whether it abused its discretion); *Ovalle v. State, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000)* (stating that appellant does not have burden of proof to show error is harmful). If the Court of Criminal Appeals considered the foregoing factors in the light most favorable to the trial court and found error, then surely, an evaluation of similar factors without this advantageous lens, could not logically yield a different result. The Court of Criminal Appeals's rejection of this court's prior error analysis, n3 in effect, forecloses any possibility of finding the error harmless. Because the trial court's error in limiting appellant's closing argument to twenty minutes affected a substantial right of appellant, the judgment of the trial court must be reversed.

n3 In viewing the record in the light most favorable to the trial court, a majority of this court on original submission evaluated the reasonableness of the twenty-minute time limitation based on the following facts and circumstances:

- (1) There were several different theories under which appellant could be found guilty.
- (2) The only issues were whether appellant's statements were voluntary and whether appellant was guilty of capital murder, felony murder, murder, or not guilty of any offense at all.
- (3) The primary issue was whether appellant was guilty of capital murder or a lesser-included offense.
- (4) Though eleven witnesses testified in the span of a day, only one witness testified for the defense.
- (5) There was limited trial testimony and the state presented all of it, except for appellant's father, who was not present during the commission of the offense.
- (6) The evidence was not voluminous or contradictory; there were few conflicts in testimony.
- (7) The entire trial, including voir dire, lasted less than two days.
- (8) Trial counsel asked the court for only three additional minutes to complete his argument.

Citing analogous cases in which no abuse of discretion was found, this court held the trial court did not act arbitrarily, unreasonably, or without regard to guiding legal principles. *See Dang, 99 S.W.3d at 188-91.*

The Court of Criminal Appeals also held that this court erred in holding that the trial court did not abuse its discretion by denying defense counsel's request for an additional three minutes for closing argument. Though it is difficult to imagine that an additional three minutes during closing argument would have had more than a slight effect on the jury's verdict, because the trial court reversibly erred in imposing the twenty-minute limitation, there is no need to reach this issue.

Conclusion: For these reasons, the error cannot be deemed harmless, and the court is correct to reverse the trial court's judgment and remand this case for a new trial.