Review of Recent Juvenile Cases (2009)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

An oral request for an instruction on the mistake-of-fact defense and dictating a proposed instruction on the record does not satisfy the requirements of Rule 278 Civil Rules of Procedure.[In the Matter of F.L.R.](09-3-5)

On June 10, 2009, the Waco Court of Appeals held that while the defense of mistake-of-fact was raised by the evidence, counsel failed to preserve for appellate review the trial court's refusal to submit an instruction on the defense.

¶ 09-3-5. **In the Matter of F.L.R.,** No. 10-07-00231-CV, ___ S.W.3d ___, 2009 WL 1623186 (Tex.App.-Waco, 6/10/09).

Facts: A jury found that F.L.R. engaged in delinquent conduct by stealing an Under Armour sweatshirt valued at $50 or more but less than $500. The court placed F.L.R. on probation for twelve months. F.L.R. contends in his sole issue that he received ineffective assistance of counsel because his trial attorney failed to submit a written request for a jury instruction on abandoned property.

On the occasion in question, the complainant and F.L.R. were both students at Cleburne High School. The complainant had recently purchased a black Under Armour sweatshirt imprinted with the words "Texas Tech Red Raiders" from a sporting goods store in Arlington. After dressing out for football practice, he put the sweatshirt in his locker and locked it. After practice, he discovered that his sweatshirt was missing.

F.L.R.'s locker was next to the complainant's, and F.L.R. was in the locker room when he put the sweatshirt in his locker. Later that same day, F.L.R. sold the sweatshirt to another student who wore it to school the next day. When this student found out that the sweatshirt belonged to the complainant, he returned it to him. The complainant approached F.L.R. who told him that he had found the sweatshirt in the floor of the locker room. Later, they were summoned to a meeting with the coaches where F.L.R. said that he had found the sweatshirt under the bleachers outside. F.L.R. testified at trial that he found the sweatshirt in the bleachers.

At the charge conference, F.L.R.'s trial counsel orally requested an instruction on abandoned property and dictated a proposed instruction on the record. The court denied the request.

Held: Affirmed

Opinion: Viewed in the light most favorable to F.L.R., this evidence raises the mistake-of-fact defense. Counsel orally requested a jury instruction on this defense, but he did not submit a written request for the instruction as required by Rule of Civil Procedure 278. *See* Tex.R. Civ. P. 278 ("Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or

instruction has been requested in writing and tendered by the party complaining of the judgment."); *In re M.P.*, 126 S.W.3d 228, 230 (Tex.App.-San Antonio 2003, no pet.) (Rules of Civil Procedure govern the jury charge in a juvenile delinquency proceeding) (citing *In re A.A.B.*, 110 S.W.3d 553, 555-56 (Tex.App.-Waco 2003, no pet.)).

Counsel dictated the desired instruction on the record. This would suffice to preserve the issue for appellate review under article 36.15 of the Code of Criminal Procedure. This Court has specifically addressed the propriety of dictating a request on the record and has concluded that doing so does not suffice. The San Antonio Court has declined to follow *Woods,* concluding that it is inconsistent with the "common sense" approach encouraged by the Supreme Court in *State Department of Highways and Public Transportation v. Payne*. *See M.P.*, 126 S.W.3d at 230- 31 (citing *Payne*, 838 S.W.2d 235, 241 (Tex.1992)). Yet, every other court which has applied *Woods* since *Payne* was decided has declined to relax the requirement of Rule 278 that a written request must be made.

In *Payne,* the Supreme Court characterized Texas jury charge procedure as "a labyrinth daunting to the most experienced trial lawyer." The Court discussed the complexities and flaws of these procedures at length and reached the following conclusion:

> The flaws in our charge procedures stem partly from the rules governing those procedures and partly from caselaw applying those rules. Last year we asked a special task force to recommend changes in the rules to simplify charge procedures, and amendments are under consideration. Rules changes must await the completion of that process; we do not revise our rules by opinion. We can, however, begin to reduce the complexity that caselaw has contributed to charge procedures. The procedure for preparing and objecting to the jury charge has lost its philosophical moorings. There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

The Corpus Christi Court provided a persuasive explanation in *Gilgon* for why the requirements of Rule 278 have not been superseded in any way by *Payne:*

> *Payne* does not abandon the rules of civil procedure in favor of a test based on "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." Instead, *Payne* demands that we apply the rules "while they remain" despite the fact that the rules cannot always be reconciled with what the test "should be."

Gilgon, 893 S.W.2d at 565 (quoting *Payne*, 838 S.W.2d at 241). Rule 278 has not been amended since *Payne* was decided. "*Payne* demands that we apply [this rule]" as it still remains. *See id.*

Conclusion: Counsel's oral request for an instruction on the mistake-of-fact defense did not satisfy the requirements of Rule 278. The defense was raised by the evidence, but counsel failed to preserve for appellate review the trial court's refusal to submit an instruction on the defense. F.L.R. has met the first element of the *Strickland* test for ineffective assistance. *See Davis v. State*, 278 S.W.3d 346, 352 (Tex.Crim.App.2009) (counsel's failure to request accomplice-witness instruction met first element of *Strickland*).

In some instances, the denial of a proper defensive instruction will prevent a defendant from arguing a defensive issue. Here, however, F.L.R. fully argued his theory that the sweatshirt had been abandoned.

For these reasons, we conclude that there is not a reasonable probability the outcome would have been different but for counsel's deficient performance.

We overrule F.L.R.'s sole issue and affirm the judgment.