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

Court ordered psychiatrist testifying that appellant had the capacity to commit murder and knew the wrongfulness of his action, did not violate appellant's rights. [Marthiljohni v. State](05-3-30A)

On August 4, 2005, the Corpus Christi Court of Appeals held that Court ordered psychiatrist testifying that appellant had the capacity to commit murder and knew the wrongfulness of his action did not violate his rights under the *Fifth Amendment*, *Sixth Amendment*, and former *article 46.02, section 3(g) of the Texas Code of Criminal Procedure.*

05-3-30A. Marthiljohni v. State, MEMORANDUM, No. 13-03-687-CR, 2005 Tex.App.Lexis 6194 (Tex.App.— Corpus Christi, 8/4/05).

Facts: Appellant, James Phillip Martheljohni, II, a minor, was convicted of murder and now appeals from this conviction claiming ineffective assistance of counsel and violations of his rights under the *Fifth Amendment*, *Sixth Amendment*, and former *article 46.02, section 3(g) of the Texas Code of Criminal Procedure.*

Appellant was arrested for the September 23, 2002 murder of his stepmother. During a detention hearing, appellant's counsel raised the issue of mental illness. Both the State and defense counsel moved the juvenile court to order a Fitness to Proceed examination pursuant to *section 55.11 of the Texas Family Code*. The examining psychiatrist found appellant fit to proceed. Appellant was certified as an adult and tried for murder. During the trial, the examining psychiatrist testified that appellant had the capacity to commit murder and knew the wrongfulness of his action. A jury found appellant guilty and sentenced him to forty years' imprisonment.

Held: Affirmed

Memorandum Opinion: We first address the State's claim that *article 46.02, section 3(g)* does not apply because counsel for appellant and the State jointly requested a psychiatric examination of appellant under *Texas Family Code section 55.11* (mental illness test for juveniles), rather than pursuant to *article 46.02*. *See TEX. FAM. CODE ANN. § 55.11* (Vernon 2002). The psychiatrist examined appellant on October 20, 2002 for approximately one and one-half hours and made two reports. The psychiatrist's report entitled "Competency to Stand Trial Evaluation" concludes appellant "is competent to stand trial pursuant to Article 46.02." The psychiatrist's report entitled "Criminal Responsibility Evaluation" concludes that appellant was able to fully appreciate the wrongfulness of his conduct but cites no statute.

We note only one exception to the applicability of *article 46.02, section 3(g)*. When the defendant raises an insanity defense, the hearing that follows is not subject to *article 46.02, section 3(g)*. *See*, *e.g.*, *Riles*

v. State, 595 S.W.2d 858, 861 (Tex. Crim. App. 1980); *DeRusse v. State, 579 S.W.2d 224, 230 (Tex. Crim. App. 1979)*. However, appellant did not raise an insanity defense, so this exception does not apply. Moreover, the psychiatrist's assessment cited *article 46.02* showing that he was mindful of that statute and its provisions, and applied its provisions during the assessment. We see no reason to deny application of *article 46.02, section 3(g)*.

The State further claims that because the defense counsel did not object to the admission of the psychiatrist's testimony, appellant has not preserved error for appeal. The record does not show an objection to admission of the testimony. However, the erroneous admission of statements made by a defendant during his or her *section 3(g)* competency examination is not waived for a failure to object. *See Perry v. State, 703 S.W.2d 668, 671 (Tex. Crim. App. 1986)*.

B. Statements at Trial

We now turn to the substance of the testimony. Appellant argues both prosecution and defense counsel violated *section 3(g)* when they asked the examining psychiatrist questions relating to the ultimate issue of appellant's guilt or innocence. Appellant complains of the psychiatrist's statements that appellant could appreciate right from wrong and had the mental capacity to commit murder. The State asserts that no statement made to the psychiatrist by appellant is reiterated in the psychiatrist's testimony. Rather, the State claims the testimony was limited to the issues of capacity and competency.

We see nothing here that implicates *section 3(g)*. The purpose of these statements is to establish competency and shows only that this expert concluded that appellant could be held liable for his own actions.

Appellant next cites defense counsel's question regarding evidence in the psychiatrist's collateral sources that showed appellant had spoken with others about committing the murder. Other juveniles, through their statements, claimed that appellant had spoken with them about committing the murder. Testimony based on collateral source evidence, and not statements made by the appellant during his competency hearing, does not implicate *section 3(g)*. Even if it did, this evidence was already a part of the record. If the revealed statements are already in the record, the error is harmless. *Perry v. State, 703 S.W.2d 668, 671 (Tex. Crim. App. 1986)*; *Caballero v. State, 587 S.W.2d 741, 743 (Tex. Crim. App. 1979)*.

Finally, the examining psychiatrist testified that although appellant claimed his father had committed the crime, the psychiatrist doubted the truth of this claim based on information that became available after the competency examination: "much information has come out since I saw him in October of 2002 that, perhaps, what he said was not truthful." Appellant claims this testimony is inadmissible under *section 3(g)*. The psychiatrist's comment that subsequent information shed doubt on appellant's statement does not implicate *section 3(g)* because it is merely an opinion based on evidence already in the record. *Id*. We note that expert witness testimony in the form of an opinion that is otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the jury. *See TEX. EVID. R. 704*. Even if this testimony were inadmissible, appellant's defense argument that his father committed the murder is a part of the record; thus error, if any, is harmless. *Perry, 703 S.W.2d at 671*

C. Constitutional Rights

Citing *Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981)*, appellant argues that the State violated his *Fifth Amendment* right against self-incrimination by using his competency evaluation statements against him and his *Sixth Amendment* right to counsel by failing to give notice that the mental examination could result in adverse statements being used against him at trial. "No person . . . shall be compelled in any criminal case to be a witness against himself." *U.S. CONST. amend. V*. In *Estelle*, the

State examined the defendant without the knowledge of his counsel and failed to put the examiner's name on the witness list until the eve of trial. *Estelle, 451 U.S. at 459*. The defendant was not informed that his statements could be used against him at trial. *Id. at 461*. The State used his statements as affirmative evidence of future dangerousness in order to persuade the jury to award the death penalty. *Id. at 466*. The Supreme Court concluded these "distinct circumstances" implicated the *Fifth Amendment*. *Id*.

Here, those distinct circumstances do not appear. Appellant's own counsel joined with the State in requesting a competency examination. The psychiatrist stated in his report that appellant was notified that the assessment would not be confidential and that the psychiatrist might testify in court. The psychiatrist did not reveal any statements made by appellant that were not otherwise already a part of the record. Based on these facts, we find nothing to implicate a violation of appellant's *Fifth Amendment* right to protection from self-incrimination under *Estelle*.

The defendant is entitled to effective assistance of counsel in all criminal prosecutions. *U.S. CONST. amend. VI*. In *Estelle*, the State denied the defendant the benefit of consulting with counsel before his competency examination. *Estelle, 451 U.S. at 471*. The Court noted the defendant's decision to participate in such an examination should have been made with the benefit of counsel, and because that option was denied him, his *Sixth Amendment* right to counsel was violated. *Id*. Here, defense counsel joined in the request for the competency examination; therefore, the evidence does not show appellant was denied the benefit of counsel before deciding to participate.

Conclusion: Accordingly, appellant's first issue is overruled.