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Editors: [3]Tim Crooks, [4]Kathleen Nacozy

Supreme Court

Supreme Court capital-sentencing case law did not require a court to instruct the jury that mitigating circumstances need not be proved beyond a reasonable doubt; nor was such an instruction constitutionally necessary in these cases to avoid confusion.*Kansas v. Carr*, 136 S. Ct. 633 (2016).

A Kansas jury sentenced respondent Gleason to death for killing a co-conspirator and her boyfriend to cover up a robbery. A Kansas jury sentenced the two other respondents, the Carr brothers, to death after a joint sentencing proceeding; the Carrs were convicted of charges stemming from a crime spree of kidnapping, murder, rape, and robbery. The Kansas Supreme Court vacated the death sentences in each case, holding that the sentencing instructions violated U.S. Const. amend. VIII by failing ?to affirmatively inform the jury that mitigating circumstances need only be proved to the satisfaction of the individual juror in that juror?s sentencing decision and not beyond a reasonable doubt.? It also held that the Carrs? Eighth Amendment right ?to an individualized capital sentencing determination? was violated by the trial court?s failure to sever their sentencing proceedings. The U.S. Supreme Court reversed and remanded.

The sentencing courts were not required to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. The Eighth Amendment was satisfied by instructions that, in context, made clear that each juror must individually assess and weigh any mitigating circumstances. The instructions said that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt but that mitigating circumstances must merely be ?found to exist.? No juror would have reasonably speculated that ?beyond a reasonable doubt? was the correct burden for mitigating circumstances. Ambiguity in capital-sentencing instructions gives rise to constitutional error only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence, a bar not cleared here. Even assuming that it would be unconstitutional to require the defense to prove mitigating circumstances beyond a reasonable doubt, the record belies Ds? contention that the instructions caused jurors to apply such a standard here.

Furthermore, the Constitution did not require severance of the Carrs? joint sentencing proceedings. The Court presumed that the jury followed its instructions to give separate consideration to each defendant. In light of all the evidence at the guilt and penalty phases relevant to the jury?s sentencing determination, the contention that the admission of mitigating evidence by one Carr brother could have ?so infected? the jury?s consideration of the other?s sentence to amount to a denial of due process is beyond the pale. ?Only the most extravagant speculation would lead to the conclusion that any supposedly prejudicial evidence rendered the Carr brothers? joint sentencing proceeding fundamentally unfair when their acts of almost inconceivable cruelty and depravity were described in excruciating detail by the sole survivor, who, for two days, relived the Wichita Massacre with the jury.?

Fifth Circuit

In sentencing Ds convicted of various offenses related to fraudulent real estate loans, the district court reversibly erred in setting the restitution amount; the court erroneously used the difference between the original loan amount and the foreclosure proceeds.*United States v. Beacham,* 774 F.3d 267 (5th Cir. 2014).

The proper amount of restitution owed to a victim who purchased a fraudulently procured loan on the secondary market is what the victim paid for the mortgage, less any proceeds obtained through foreclosure. The government did not carry its burden of establishing the proper restitution amount as it pertained to the secondary-market purchasers. The Fifth Circuit vacated Ds? sentences and remanded because the Fifth Cir-cuit could not tell how the restitution orders fit into the sen-tencing court?s ?balance of sanctions.?

The Fifth Circuit upheld the denial of qualified immunity for prison officials in this lawsuit Louisiana prisoners filed challenging solitary confinement conditions.*Wilkerson v. Goodwin,* 774 F.3d 845 (5th Cir. 2014).

Coupled with the extraordinary length of time the prisoners were held in solitary, the conditions in the Louisiana prisons in question were sufficiently restrictive to constitute an ?atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,? giving rise to a cognizable liberty interest. Furthermore, this liberty interest was clearly established at the relevant time.

District court was not collaterally stopped from applying a 16-level crime of violence enhancement to D on the basis of a prior Florida aggravated-battery conviction simply because another district judge of that same court had, in a prior illegal-reentry prosecution of D, sustained an objection to a 16-level enhancement on the basis of that Florida conviction.*United States v. Ramos Ceron,* 775 F.3d 222 (5th Cir. 2014).

At least on plain-error review (applicable in the absence of an objection on this ground below), there was an inadequate district court record to evaluate the collateral-estoppel claim, and D cited no authority applying collateral estoppel to a prior Sentencing Guidelines ruling. Furthermore, in sentencing illegal-reentry D, the district court did not err in applying the ?crime of violence? enhancement under USSG §?2L1.2(b)(1)(A)(ii) on the basis of D?s prior Florida aggravated battery conviction; the offense had the requisite ?force? element.

Where D (convicted on his guilty plea of fraud and unlawful procurement of naturalization) alleged, in a 28 U.S.C. §?2255 motion, that his attorney provided ineffective assistance by failing to warn him of the immigration consequences of his plea, the district court did not reversibly err in granting the government?s motion for summary judgment.*United States v. Kayode,* 777 F.3d 719 (5th Cir. 2014).

Although D sufficiently alleged deficient performance in this regard under *Padilla v. Kentucky,* 559 U.S. 356 (2010), D did not meet his burden to show prejudice from this deficient performance.

18 U.S.C. §?924(c)(1) does not authorize multiple convictions for a single possession of a firearm; in this case, it would have been error for the jury to base two §?924(c)(1) convictions on a single firearm possessed, even if it was possessed in connection with more than one predicate crime.*United States v. Campbell,* 775 F.3d 664 (5th Cir. 2014).

The jury should have been required to decide whether D possessed a second, separate firearm. However, on plain-error review, D was not entitled to relief from his second §?924(c)(1) conviction (for which he received a consecutive mandatory min-i-mum sentence of 25 years in prison) because the error here was not clear or obvious.

District court harmlessly erred in applying a 16-level crime of violence enhancement to illegal-reentry D on the basis of D?s prior conviction for stalking (Tex. Penal Code §?42.072); that offense was not an enumerated crime of violence and likewise did not have as an element the use, attempted use, or threatened use of physical force.*United States v. Rodriguez-Rodriguez,* 775 F.3d 706 (5th Cir. 2015).

The district court?s error was harmless because the district court imposed the same sentence, in the alternative, as a non-Guideline sentence. The district court?s ?alternative sentence? rendered the Guideline application error harmless because, in imposing it, the district court contemplated the correct Guideline range and justified the sentence with permissible factors.

D?s charges for production of child pornography (18 U.S.C. §?2251(a)) were not subject to the five-year stat-ute of limitations in 18 U.S.C. §?3282(a); a §?2251(a) vio-la-tion is ?an offense involving the sexual or physical abuse of a child under the age of 18 years? that, under §?3283, could be prosecuted until the child attained age 25.*United States v. Diehl,* 775 F.3d 714 (5th Cir. 2015).

(2) There was sufficient evidence on the interstate-commerce element of 18 U.S.C. §?2251(a). The evidence showed that the images were produced in Texas, but were later found on computers in other states and Australia. Moreover, there was specific evidence from which it could be inferred that D himself transmitted the images across state lines via the internet and physically transported the images across state lines.

(3) Even though D?s 600-month sentence was a substantial upward variance from the advisory Guideline imprisonment range of 210 to 262 months, that sentence was neither procedurally nor substantively unreasonable.

Where D received a sentence reduction under Fed. R. Crim. P. 35(b), resulting in the entry of an amended judgment, that fact did not restart the one-year period for filing a 28 U.S.C. §?2255 motion under §?2255(f)(1).*United States v. Olvera,* 775 F.3d 726 (5th Cir. 2015).

The modification of a sentence does not affect the finality of a criminal judgment. Nor was D?s motion timely under 28 U.S.C. §?2255(f)(3); the rule of *Alleyne v. United States,* 135 S. Ct. 2151 (2013), does not apply retroactively to cases on collateral review.

D was not entitled to authorization to file a successive 28 U.S.C. §?2255 motion; he failed to show that any of the Supreme Court decisions on which he relied announced ?a new rule of constitutional law, made retro-active to cases on collateral review by the Supreme Court[.]?*In re Jackson,* 776 F.3d 292 (5th Cir. 2015).

Federal prisoner failed to show that *Begay v. United States,* 553 U.S. 137 (2008), *Johnson v. United States,* 559 U.S. 133 (2010), and *Descamps v. United States,* 133 S. Ct. 2276 (2013), announced ?a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,? as required by 28 U.S.C. §?2255(h)(2).

Where D was convicted of failing to register as a sex offender (18 U.S.C. §?2250(a)), district court abused its discretion in imposing a lifetime special condition of supervised release requiring D to

install computer filtering software to block/monitor access to sexually oriented websites for any computer he possessed or used.*United States v. Fernandez,* 776 F.3d 344 (5th Cir. 2015).

Neither the failure-to-register offense nor D?s criminal history had any connection to computer use or the internet; the district court?s general concerns about recidivism or that D would use a computer to perpetrate future sex crimes were insufficient to justify the imposition of the software-installation special condition. The Fifth Circuit vacated that condition and remanded for entry of a corrected judgment.

Even if the frisk of D violated the Fourth Amendment, the evidence in question?child pornography on D?s cell phone?was obtained by D?s consent, which was the product of an intervening independent act of free will on D?s part that purged the taint of any alleged con-stitutional violation.*United States v. Montgomery,* 777 F.3d 269 (5th Cir. 2015).

Although the temporal proximity of the discovery of the evidence to the alleged constitutional violation was a factor that favored D, the other two factors ((1) intervening circumstances, particularly D?s unsolicited consent to search the cell phone, and (2) the flagrancy of any police misconduct) did not. Collectively, the factors favored the government. Because the discovery of the evidence was sufficiently attenuated from the alleged constitutional violation, the evidence did not have to be suppressed as fruit of the poisonous tree.

Court of Criminal Appeals

State?s notice of appeal from a suppression order was untimely under Tex. Code Crim. Proc. art. 44.01(d) and Tex. R. App. P. 26.2(b) because the time for filing a no-tice of appeal from an order adverse to the State begins to run with the trial court?s signing of that order, regardless of whether the State receives notice that the order is signed.*State v. Wachtendorf,* 475 S.W.3d 895 (Tex.Crim.App. 2015).

?The issue in this case is whether the time for filing a notice of appeal from an order adverse to the State should begin to run with the trial court?s signing of that order if the State re-ceived no timely notice that the order had been signed. The State asserts that it was not notified that the trial court had signed an order granting Appellee?s motion to suppress until the period for filing its notice of appeal had expired. Having re-ceived no notice of this triggering event, the State filed an untimely notice of appeal, and the Third Court of Appeals dismissed its appeal for want of jurisdiction. . . . We granted the State?s petition . . . to address its argument that the timetable for its notice of appeal should not be triggered by an event for which it obtained no notice and had no actual knowledge. We shall affirm the judgment of the court of appeals.?

Tex. Penal Code §?38.15(a)(1) was not unconstitutionally applied to Ds where the police skirmish line was a lawful exercise of police authority and, therefore, did not violate Ds? First Amendment rights. *Faust v. State,* Nos. PD-0893-14, PD-0894-14 (Tex.Crim.App. Dec 9, 2015).

Ds, while protesting a gay pride parade, each disobeyed a police officer?s order not to cross a skirmish line, resulting in their arrest for Interference with Public Duties under Tex. Pe-nal Code §?38.15(a)(1). After a consolidated bench trial, each D was convicted and sentenced to two days in jail and assessed a $286 fine. Ds appealed, asserting that §?38.15(a)(1) was unconstitutionally applied to them in violation of U.S. Const. am. 1. COA agreed and reversed their convictions. CCA reversed COA and reinstated the trial court orders.

Section 38.15(a)(1) was not unconstitutionally applied. The police order not to cross the skirmish line during the pro-tests was content neutral because the officers intended to pre-vent direct and close confrontation between Ds and the parade-goers, the officers? decision to prevent all members of the church from crossing the skirmish line was reasonable given previous instances of violent confrontations erupting be-tween members and parade supporters, and Ds had ample alternative channels of communication open to

them as they were free to continue their protesting in all directions except one.

Under a de novo standard of review, D made a substantial showing that he was incompetent to be executed; the case was remanded for the appointment of at least two mental health experts and a determination on the merits of his competency.*Mays v. State,* 476 S.W.3d 454 (Tex.Crim.App. 2015).

D was convicted of capital murder and sentenced to death. He subsequently challenged his competency to be executed. The trial court denied D?s motion because he failed to make a substantial showing of execution incompetence; D here argued that the trial court erred. CCA agreed, finding that D made a substantial showing that he was incompetent to be executed pursuant to Tex. Code Crim. Proc. art. 46.05. D presented evidence that in 1983 he was involuntarily committed to a state hospital, in 2007 he was diagnosed with dementia, during his 2008 trial numerous witnesses described him as mentally ill and exhibiting a pattern of irrational behaviors, in 2009 a neuropsychologist determined he suffered from impaired memory and dementia, an attorney who met with D in 2015 noted that he exhibited various odd behaviors and appeared delusional, and two experts expressed substantial doubts about his competency to be executed. CCA set aside the order denying relief and remanded to the trial court for further competency proceedings. The stay of execution remained in effect pending the outcome of the competency proceedings in trial court.

Where defense counsel filed an untimely Tex. R. App. P. Order 11-003 motion to withdraw or modify the execution date of D convicted of three capital murders, CCA ordered D?s two counsel to appear in person because their Rule 11-003 statements did not explain why it was impossible to file a timely motion for stay of exe-cu-tion.*In re State ex rel. Risinger,* 479 S.W.3d 250 (Tex.Crim.App. 2015).

If a defendant pleads true to an enhancement paragraph, a court of appeals cannot imply a trial court?s finding of true regarding that prior conviction used for enhancement when the trial judge, in his own words, refused to make such a finding.*Donaldson v. State,* 476 S.W.3d 433 (Tex.Crim.App. 2015).

?The trial court did not make any affirmative findings of ?true? regarding the federal mail-fraud conviction in these cases. After being admonished on the enhancements, appellant pleaded true, and the trial court sentenced her within a proper punishment range for appellant?s second- and third-degree convictions. However, the trial court also sentenced appellant within the enhanced punishment range in the two state-jail-felony cases. Under [CCA precedent], appellant?s pleas of true would be sufficient to satisfy the State?s burden of proof for the enhancement allegations. Moreover, those pleas would support an implied finding in the absence of any other evidence that the trial court rejected the State?s proof on the enhancement. . . . But implying a finding that the trial court found the enhancement allegation true is not appropriate in this case. The trial court expressly stated it was not making a finding of true, and it sentenced appellant within a proper range of punishment in her other three convictions. Moreover, the trial court expressed its concern throughout the plea hearing that it could not use the federal mail-fraud conviction as a basis for enhancement. Under Texas law, the mail-fraud conviction would not be considered final for purposes of enhancement because appellant committed the subsequent offense prior to the revocation of the appellant?s probation on the mail-fraud case. But under federal law, appellant?s mail-fraud conviction was final for purposes of enhancement upon issuance of the mandate from appellant?s federal appeal. . . . The trial court?s confusion regarding his ability to use the federal conviction for purposes of enhancement supports the conclusion that the trial court did not intend to find the prior enhancement true, par-ticularly in light of the express refusal to find the mail-fraud enhancement true in any of appellant?s cases, even if the refusal was based on a mistake of law.

?The trial court was within its discretion to reject a finding of true on the prior mail-fraud conviction. However, it lacked the authority to assess punishment outside the statutory range for a state jail felony once it refused to find the prior mail-fraud enhancement allegation true. Because the trial court imposed punishment for the state-jail felonies outside the maximum range of punishment, those sentences are illegal.

. . . We reverse the judgment of the court of appeals, and remand this case to the trial court for a new punishment hearing on those two counts.?

The State?s warrantless acquisition by court order of four days of cell-site-location data recorded by D?s cell-phone service provider did not violate U.S. Const. amend. IV because a third party, the provider, gathered and maintained the data as business records of the service provided to his phone, and he did not have a legitimate expectation of privacy in the data.*Ford v. State,* 477 S.W.3d 321 (Tex.Crim.App. 2015).

?We agree with the San Antonio Court of Appeals that, because a third-party, AT&T, gathered and maintained the information as business records of the service provided to Ford?s phone, Ford did not have a reasonable expectation of privacy in the data. The State did not violate Ford?s Fourth Amendment rights when it obtained that information by way of a court or-der under Article 18.21 §?5(a) of the Texas Code of Criminal Pro-cedure?an order available on a showing short of probable cause. We will affirm.?

Officers? use of a drug-detection dog sniff at the door of D?s apartment resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, constituting a warrantless search in violation of U.S. Const. amend. IV; the court properly granted D?s motion to suppress.*State v. Rendon,* 477 S.W.3d 805 (Tex.Crim.App. 2015).

?[W]e are asked to decide whether it constitutes a search within the meaning of the Fourth Amendment for law-enforcement officers to bring a trained drug-detection dog directly up to the front door of an apartment-home for the pur-pose of conducting a canine-narcotics sniff. We hold that it does. Consistent with [*Florida v. Jardines,* 133 S. Ct. 1409 (2013)], we conclude that the officers? use of a dog sniff at the front door of the apartment-home of [D] resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, thereby constituting a warrantless search in violation of the Fourth Amendment. We, therefore, affirm the judgment of the court of appeals, which had affirmed the trial court?s rulings granting appellee?s motions to suppress.

?[A]pplication of the property-rights baseline renders the present case a straightforward one. Here, the officers took a drug-detection dog directly up to the threshold of appellee?s front door, at which point the dog alerted to the presence of illegal narcotics on the bottom left portion of the door. This threshold at the door of an apartment-home located at an upstairs landing that served only two apartments is objectively ??intimately linked to the home, both physically and psychologically,?? and thus was part of the curtilage. . . . The officers? presence at that location was for the express purpose of conducting a search for illegal narcotics, which exceeded the scope of any express or implied license that is generally limited to knocking on someone?s door. . . . Under a strict application of the ?traditional property-based understanding of the Fourth Amendment,? we conclude that the dog sniff at the threshold of appellee?s apartment?s door was an unlawful search within the meaning of the Fourth Amendment. . . . We, therefore, narrowly hold that the curtilage extended to appellee?s front-door threshold located in a semi-private upstairs landing and that the officers? conduct in bringing a trained narcotics-detection dog into that constitutionally protected area constituted an unlicensed physical intrusion in violation of the Fourth Amendment.?

Though the trial court erred by defining ?penetration? and ?female sexual organ? in its jury instructions during D?s trial for aggravated sexual assault of a child under Tex. Penal Code §?22.021(a)(1)(B)(i) as those terms were not statutorily defined, the error was harmless.*Green v. State,* 476 S.W.3d 440 (Tex.Crim.App. 2015).

COA erred by reversing D?s conviction; the definitions accurately described the common meanings of the terms, the trial court instructed the jury to disregard any instruction that might have seemed to indicate its opinion about the evidence, the defense was not affected as it was focused on undermining complainant?s credibility by showing that no sexual touching of any kind had occurred, and the definitions conflicted with

complainant?s testimony. ?Although we agree with the court of appeals? error analysis in that the trial court should not have defined those terms that are undefined in the applicable stat-ute, we disagree that appellant was harmed by the erroneous instructions. We, therefore, sustain in part the State?s sole ground that asserts that the court of appeals erred by finding reversible error in the jury instructions. We reverse the judgment of the court of appeals and remand this case to that court to address appellant?s remaining points of error.?

D, a public servant, committed theft by deception when he purchased an airline ticket for county-approved travel with a county credit card but used the voucher from the cancellation of the ticket for personal travel without correcting the impression that the ticket would be used for county-approved business.*Fernandez v. State,* 479 S.W.3d 835 (Tex.Crim.App. 2016).

D was a Justice of the Peace in Val Verde County. He directed his chief deputy clerk to make arrangements for him to attend a conference in Orlando; the clerk booked a Southwest Airlines ticket. The nonrefundable ticket was paid for with a county-owned credit card issued in D?s name. County Auditor Frank Lowe testified that he received documentation supporting the county-business nature of the trip. Near the trip, D became ill and instructed the clerk to cancel the travel arrangements. When the clerk canceled the ticket, its price was converted into a ticket voucher in D?s name.

Two months later, D asked the clerk for the reservation number of the flight and told her to call his son and give him the number. The clerk complied. Later that month, Lowe was reviewing the county?s expenses and noticed the county was nearing its annual limit for travel. Upon seeing this, Lowe con-tacted Southwest Airlines and attempted to get a refund for the ticket; Lowe learned the voucher had been used for a flight to Phoenix. Val Verde County has a personnel policy that prohibits the use of county property for personal use. Believing the voucher had been used for non-county-related travel, Lowe reached out to the County Attorney, who in turn reached out to the Attorney General. After the initiation of the Attorney General?s investigation, D attempted to tender payment for the voucher to the county auditor?s office, but his tender was refused.

Lowe testified that he had not been made aware that there was any county business in Phoenix and had not received any documentation pertaining to the Phoenix trip, as was customary for county-related travel. D?s son testified in D?s defense that he was the one who initially suggested that his father use the voucher to fly to Phoenix and that at all times D intended to repay the county for the amount.

D was convicted of theft by a public servant by way of deception, and COA and CCA affirmed. D obtained the county?s consent to use the airline voucher when he instructed his chief deputy clerk to pass along the voucher number to his son, because without the voucher number, D would have been unable to access and use the Southwest Airlines credit that re-sulted from the original Orlando ticket. By conveying the voucher number to D, the county, by way of its agent, assented to its use by D. However, when D directed the clerk to give the voucher number to his son, D failed to correct the impression he had created previously that the county funds expended on the ticket would be used for county-approved travel.

Sufficient evidence supported D?s conviction for felony assault against a family member, and the court?s error in omitting ?bodily injury? in the jury charge did not cause egregious harm because the application paragraph required the jury to find a specific type of bodily injury.*Marshall v. State,* 479 S.W.3d 840 (Tex.Crim.App. 2016).

A jury convicted D of felony assault against a family member under Tex. Penal Code §?22.01. On appeal, COA held that the evidence was legally sufficient but the omission of the words ?bodily injury? from the jury charge?s application para-graph egregiously harmed D. CCA reversed COA and reinstated the jury verdict.

CCA agreed that the evidence was sufficient, but disagreed that the jury charge egregiously harmed D. Sufficient evidence supported D?s conviction because complainant testified that she was unable to take deep

breaths while D pressed a pillow tight against her face. Even though complainant testified that she never lost consciousness and never was completely unable to breath, that is not required to prove bodily injury under Tex. Penal Code §?1.07(a)(8); any impediment to normal breathing is a bodily injury. The trial court?s error in omitting ?bodily injury? in the jury charge did not cause egregious harm because the application paragraph required the jury to find a specific type of bodily injury?impeding normal breathing, which is a bodily injury per se.

CCA rejected capital-sentenced D?s 27 points of error, including insufficiency of the evidence and media influence.*Buntion v. State,* No. AP-76,769 (Tex.Crim.App. Jan 27, 2016).

In 1991, a jury convicted D of capital murder. Tex. Penal Code §?19.03(a)(1). Based on the jury?s answers to the special issues in Tex. Code Crim. Proc. art. 37.071, §§?2(b) and 2(e), the trial judge sentenced D to death. Art. 37.071, §?2(g). His conviction and sentence were affirmed on direct appeal. D?s initial state habeas application was denied. His subsequent application was granted, and the case was remanded for a new pun-ishment hearing. The trial court held a new punishment hearing in 2012. Based on the jury?s answers to the special issues, the trial judge sentenced D to death. Art. 37.0711, §?3(g). Direct appeal to CCA was automatic. Art. 37.0711, §?3(j).

CCA found D?s 27 points of error to be without merit and affirmed the trial court?s sentence of death. Primarily, the evidence was sufficient to sustain the jury?s affirmative answer to the future dangerousness special issue where it showed that D shot an officer several times during a traffic stop, he fled the scene and committed several violent offenses to evade capture, his conduct after his arrest indicated he lacked remorse, he had a prior criminal record, and his character for violence had not changed during his time in prison. Furthermore, the trial court did not abuse its discretion by denying D?s motion for change of venue due to pretrial publicity under Tex. Code Crim. Proc. art. 31.03(a), where the court declined to find that a recording of an interview D gave to a television news reporter that was played for the jury was prejudicial, and the court rejected that discussion in the media of parole or early release denied D a fair trial.

The record did not support the offense of capital murder; it did not show D murdered a victim when kidnapping another victim.*Griffin v. State,* No. AP-76,834 (Tex.Crim.App. Jan 27, 2016).

In 2012, a jury convicted D of capital murder. Tex. Penal Code §?19.03(a)(2). Based on the jury?s answers to the special issues in Tex. Code Crim. Proc. art. 37.071, §§?2(b) and 2(e), the judge sentenced D to death. Direct appeal to CCA was automatic. Art. 37.071, §?2(h). After reviewing D?s points of error, CCA found the record did not support capital murder. CCA reversed the trial court?s judgment and sentence of death and remanded to the trial court for reformation of the judgment and a new punishment hearing.

Evidence did not show Tex. Penal Code §?19.03(a)(2) cap-i-tal murder because it did not show D murdered a victim when kidnapping another victim, since only after death did he restrict the second victim?s movements without consent, Tex. Penal Code §?20.01(1)(B)(i); he assaulted the second victim only after the murder was complete; and nothing showed his intent to kidnap the second victim on entering the first victim?s apartment, as he killed the first victim before knowing the second victim was there and did not try to abduct the second victim after the murder. The evidence was not insufficient for capital murder for not showing facilitation of a kidnapping because Tex. Penal Code §?19.03(a)(2) did not require facilitation. The judgment was reformed to a murder conviction because the evidence was only insufficient as to an aggravating element.

Court of Appeals

Even though counsel was deficient for failing to investigate D?s mental health history, D could not show he was prejudiced where he received a relatively short sentence of 20 years? imprisonment for burglary of a habitation.*Morrow v. State,* No. 06-15-00013-CR (Tex.App.?Texarkana Feb 19, 2016).

The evidence was sufficient to support D?s burglary conviction under Tex. Penal Code §?30.02(a)(3) where the victim testified that during their divorce proceeding she and D agreed she would have possession of the home, D moved out, and she thereafter occupied the home without him. COA affirmed the trial court.

Trial court erred by allowing the audio recording of D?s confession into evidence where the recording was conclusive evidence that the ?right to terminate? warning was not given due to officer?s unintelligible reading of it; the error was not harmless.*Baiza v. State,* No. 11-14-00067-CR (Tex.App.?Eastland Mar 31, 2016).

The trial court erred by allowing the audio recording of D?s confession into evidence under Tex. Code Crim. Proc. art. 38.22 where the recording of the statement was conclusive evidence that the ?right to terminate? warning was not given due to the officer?s very quick reading of the warnings, to the point that they were unintelligible. The error was not harmless under Tex. R. App. P. 44.2 where the only direct evidence of sexual assault was the complainant?s account in her testimony, D?s theory throughout the trial was that the sex was consensual but his admission on the audio recording refuted that theory, and the State emphasized D?s admission during closing arguments. COA reversed and remanded for a new trial.

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