the Jasuta / Schulman report

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TIBA's Case of the Week

Fourteenth Court of Appeals

Case Name: ***Leopoldo Rodriguez Pena v. The State of Texas***

- **OFFENSE**: Continuous Sexual Abuse of a Child
- **COUNTY**: Brazos
- **C/A CASE No**. 14-22-00941-CR
- **DATE OF OPINION**: December 12, 2024 **OPINION**: Justice Meg Poissant
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 272nd D/C; Hon. John Brick
- **LAWYERS**: Clint Sare (Defense); Doug Howell (State)

(**Background Facts**): Appellant is the stepfather of three sisters, L.G., V.M., and A.P, who are the complainants in this case. At trial, the complainants described sexual abuse by Appellant that occurred when each child was in elementary school and continued for a period of years. The complainants described the abuse as sexual touching, vaginal, anal and oral penetration, and being forced to perform masturbation on Appellant. After years of these acts, the complainants told their mother that Appellant had been touching them. Their mother immediately took them to the police department to make a police report. The complainants were separately interviewed at the local children's assessment center by a forensic interviewer and described the sexual acts Appellant had performed with them. Two of the complainants also described how Appellant took photographs of them with his cellphone during some of these acts or while they were in states of undress.

[291 **Hearsay & Confrontation / Computer Generated Reports**]: After the children reported the accusations to the police department, officers accompanied the complainants' mother to their home to retrieve some belongings. At the home, police sergeant Mike Clark spoke briefly with Appellant and observed Appellant texting and receiving calls on a cellphone. The police, with Appellant's consent, took the black cellphone, Appellant's work phone, to perform a search of it. After observing the interviews of the complainants at the children's assessment center, Sergeant Clark determined that he should also be looking for a white cellphone in Appellant's possession. Police then obtained an arrest warrant and a search warrant. When they arrested Appellant on April 25, 2017, they found a white Samsung cellphone in the car he was driving at the time of his arrest. The white phone was subsequently admitted at trial as State's Exhibit 11. Kenneth Sikes,

an evidence technician responsible for digital forensic analysis for the Brazos County District Attorney's Office, testified that law enforcement sent Appellant's cellphone to the Regional Computer Forensics Laboratory, which is run by the Federal Bureau of Investigation. At the lab, the data on the cellphone was extracted with Cellebrite software. Sikes's testimony, however, was based on his analysis of the extracted data. He testified that he used the "actual extraction," meaning the "hard data," in his analysis. When Sikes began to testify about the conclusions he reached in his analysis of this extracted data, counsel objected based on the Confrontation Clause, asserting that Appellant could not "cross-examine anyone who actually did the report. [Sikes is] just reading the result of what someone else did. He cannot verify or anything like that." The trial court overruled the objection. Sikes then testified that there was very little data on the 2014 white cellphone because it had been reset to factory settings on April 23, 2017, at 5:14 p.m., which was the day of the complainants' outcry and shortly after police left Appellant's home with his black cellphone. Appellant contends that his Sixth Amendment right to confrontation was violated when the trial court overruled his objection to testimony about data that had been extracted from Appellant's cellphone by a third party who did not testify at trial.

Holding: Citing ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009) or ***Bullcoming v. New Mexico***, 564 U.S. 647 (2011), Appellant argues Sike's testimony rests on results of a cellphone extraction that he did not perform, violating Appellant's right to cross-examine the person who extracted the data, in violation of the Confrontation Clause. These two cases involve certification of laboratory or forensic test results as a substitute for live testimony. *** Unlike ***Melendez-Diaz*** and ***Bullcoming***, , this case does not involve certifications by an out-of-court witness or laboratory or forensic test results that are more than a machine generated number. *** The State argues that the data from which Sikes formed his conclusions did not implicate the Confrontation Clause because they were raw data extracted from Appellant's cellphone by a computer software called Cellebrite, and they did not involve another person's opinions about or interpretations of the data. We agree. The software used to extract data from the cellphone, Cellebrite, has previously been described by a Texas court as "a simple data transfer" for which no "specialized knowledge" is required. ***Wright v. State***, 618 S.W.3d 887 (Tex.App. - Fort Worth 2021)(see ☙, Vol. 29, No. 5; 02/08/2021). *** The parties do not cite a Texas case that directly addresses whether cellphone extraction reports and data are testimonial statements or hearsay that trigger the Confrontation Clause, and we have found none. However, federal courts have already addressed the issue and concluded that they do not. See ***United States v. Hill***, 63 F.4th 335 (5th Cir. 2023). *** This court has also previously addressed whether use of raw data in other contexts violates the Confrontation Clause. ***Paredes v. State***, 439 S.W.3d 522 (Tex.App. - Houston [14th] 2014)(see ☙, Vol. 22, No. 30; 07/28/2014), see also, ***Paredes v. State***, 462 S.W.3d 510 (Tex.Cr.App. 2015)(see ☙, Vol. 23, No. 23; 06/08/2015). In ***Paredes***, we concluded that raw DNA data were non-testimonial and thus did not violate the Confrontation Clause. Like the Cellebrite-extracted data here, the data in ***Paredes*** were not found in a formal report and were not admitted into evidence. It was not the data's primary purpose to create an out-of-court substitute for trial testimony. Second, like here, the raw data had been used by a testifying witness to develop her own opinions,

and it was the testifying witness's analysis -- not the raw data -- that asserted facts relevant to Appellant's prosecution. In ***Paredes*** and here, the testifying witness was subject to cross-examination. *** Consistent with our analysis in ***Paredes*** and the analysis and conclusions in ***United States v. Hill***, we conclude that the extracted cellphone data were not testimonial statements and did not violate the Confrontation Clause.

Sidebars

(**Troy McKinney**) Computer generated data extractions, at least in the absence of "AI" analysis, an issue for another day, are neither hearsay nor testimonial.

(**David A. Schulman**) The concept that a computer generated printout is not hearsay is nothing new. See ***Murray v. State***, 804 S.W.2d 279 (Tex.Cr.App. 1991)(finding that a computer generated printout demonstrating which keycard was used to unlock a hotel room door is not hearsay).

[**249 Juries / Preservation of Error**]: The jury returned its guilty verdict on November 18, 2022. Because of the impending Thanksgiving holiday, the trial court asked the jury to return for the punishment phase of trial on Friday, December 2, 2022. However, on December 2, one of the jurors reported to the trial court that she and her elderly father, for whom she was the medical caregiver, were ill. The trial court proposed to replace this juror with the alternate juror, who had been present throughout the guilt-innocence phase of trial. In response, Appellant made the follow objection: "*We would object on, to having the juror replaced at this time. There was* [*sic*] *lengthy deliberations. Kind of have no idea. The alternate juror wasn't necessarily present with that. And I understand that this is a separate proceeding. But given the nature of the case and what's been through, [sic] would object to the replacement of the juror at this time*." The trial court overruled Appellant's objection, and the alternate joined the jury for the punishment phase of trial. On appeal, Appellant contends that Article 37.07, § 2(b)(2), C.Cr.P., does not allow an alternate juror to be placed on the jury for only the punishment phase of trial. He argues instead that this statute requires, in pertinent part, that "if a finding of guilty is returned, . . . (2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the *same* jury . . .."

Holding: [Appellant]'s argument on appeal does not comport with the objection he lodged in the trial court. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. ***Mendez v. State***, 138 S.W.3d 334 (Tex.Cr.App. 2004)(see , Vol. 12, No. 26; 07/05/2004). Simply stated, to preserve error, an objection must be timely, specific, and pursued to an adverse ruling. ***Martinez v. State***, 98 S.W.3d 189 (Tex.Cr.App. 2003)(see , Vol. 11, No. 6; 02/17/2003). Appellant did not make a specific objection at trial and did not state the legal ground that he now argues on appeal.

(**Troy McKinney**) The COA should have addressed the alternate punishment juror on the merits to avoid a future IAC claim for not making the proper objection.

(**David A. Schulman**) I started to write that the opinion left me somewhat confused. After looking at Appellant's brief, I believe the Court is correct. The trial objection clearly did not argue that Appellant's right to the "same jury" was being violated. Trial counsel was less than articulate with the objection and I'm of the belief that a post-Conviction *habeas corpus* claim will follow.

(**John G. Jasuta**) I believe that requiring the specificity of objection that this case does, and which has become the norm, is ridiculous. A lawyer nowadays has to have an absolute command of the law equal to an Appellate judge to preserve error. Everyone in the room knew the objection was about an alternate juror who had not been involved with deliberations on guilt/innocence being a part of the jury who decides punishment. It's true that the "magic words" weren't spoken but does anyone really not understand the point of the objection? An objection will be sufficient to preserve error for Appellate review if the objection communicates to the trial judge what the objecting party wants, why the objecting party thinks himself or herself entitled to relief, and does so in a manner clear enough for the judge to understand the objection and made at a time when the trial court is in a position to do something about it. ***Lankston v. State***, 827 S.W.2d 907 (Tex.Cr.App. 1992).

Ed Note: The Court of Appeals also rejected Appellant's sufficiency claim, which argued that the complainants' allegations were implausible.