Affirmed and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-96-00402-CR

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VAN NESS VANNORSDELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 9423332

O P I N I O N

Van Ness Vannorsdell appeals his conviction for attempted capital murder, asserting error with regard to the trial court's rulings on jurisdiction, prosecution statements during voir dire, the State's challenges for cause, admission of illegally seized evidence, the jury charge, improper closing argument, conducting a separate hearing on cumulation of sentences, admission of victim impact evidence, and prosecution hearsay assertions on the cumulation of sentences. We affirm.

Challenge to "Grant" Court

The first of appellant's twenty-six issues challenges the trial court's denial of his pre-trial "Objection to So-Called 'Grant' Court and its Jurisdiction." That objection asserted that the trial court lacked jurisdiction under the federal Voting Rights Act[1] because it was a fictional court created without a lawfully authorized judicial district by non-African-American district judges in order to effectively elect another non-African-American district judge to the exclusion and dilution of the voting rights of African-American registered voters.

Appellant does not: (1) contend that the trial court was created or its judge appointed in violation of applicable State statutes and rules; (2) challenge the validity or constitutionality of the underlying provisions allowing courts to be created or judges appointed in such manner; (3) specify the portion(s) of the Voting Rights Act that he contends were violated by the complained of actions; or (4) cite authority that any such violation of the Voting Rights Act: (a) deprives the trial court of jurisdiction;[2] or (b) affords him standing to challenge the authority of the trial judge.[3] Under these circumstances, appellant's first issue provides no basis upon which it can be sustained and is overruled.

Challenge to District Judge

Appellant's second issue complains that Judge Duggan was not authorized to preside over this case in the 248th District Court because: (1) Judge Duggan was assigned to the 184th District Court; (2) the sitting judge of the 248th District Court was not absent but was at the time trying a case in his own courtroom; and (3) there was no transfer of this case or exchange of benches. Appellant does not challenge the validity of Judge Duggan's

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1 *See* 42 U.S.C.A. § 1973 (West 1994).

2 *See Randall v. State*, 875 S.W.2d 43, 44 (Tex. App.—Fort Worth 1994, no pet.) (noting that remedies available under the Voting Rights Act focus on enforcement of the right to vote).

3 *See id.*(noting that standing under the Voting Rights Act is limited to a private litigant who seeks judicial enforcement of his right to vote).

assignment to the 184th District Court, but only: (a) whether such assignment authorizes an assigned judge to preside there over a case from a different court; and (b) whether an assigned judge can hear cases from a particular court at the same time as the sitting judge of that court is also doing so.

Appellant's complaint is deficient in two respects. First, appellant has cited no authority providing that an assigned judge is prohibited either from presiding over cases from a court other than that to which he is assigned or from presiding over such cases while the sitting judge of the other court is also doing so.[4] Secondly, appellant did not challenge the authority of Judge Duggan to preside over the case until after he had presented several pretrial matters to Judge Duggan and obtained rulings from him on them. Therefore, even if the challenge had any legal basis, there is considerable doubt as to its timeliness and thus whether it had already been waived. Under these circumstances, appellant has failed to demonstrate error in the denial of his challenge to Judge Duggan, and his second issue is overruled.

Voir Dire

References to Juvenile Certification

Appellant's third issue argues that the trial court erred by overruling his objections during voir dire to various references by the State to the fact that appellant had been certified to stand trial as an adult for an offense he committed while a minor. Among other things, the prosecutor stated:

> I really do need to know how you feel about sitting and judging someone who might have been younger than 17 at the time they committed the offense. This case has been certified from a juvenile court with a juvenile Judge and has been brought here so that we can treat this case as an adult case. Is there anybody here who feels hey, that we should maybe handle juvenile cases differently than we are here, that we shouldn't be certifying these cases and handling them as adult cases? Does anybody feel that way?

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[4] On the contrary, as to the latter contention, the Court of Criminal Appeals has expressly held that two district judges may simultaneously conduct judicial proceedings for the same district. *See Ex parte Holmes*, 754 S.W.2d 676, 680 (Tex. Crim. App. 1988).

Appellant objected to such statements on the ground that the jury would never be instructed regarding age or certification and, therefore, this voir dire assertion deprived appellant of the right to a fair trial by an impartial jury under the Texas Constitution. Appellant also moved to discharge the entire panel based on improper voir dire. Both the objection and motion were overruled. Appellant complains on appeal that these references related non-evidentiary facts to the jury and that he was harmed by it in that the trial court sustained the State's challenge for cause against four jurors "who had been polluted by such inflammatory no-evidentiary [sic] facts."

A trial judge has wide discretion in controlling voir dire examination. *See Allridge v. State*, 850 S.W.2d 471, 479 (Tex. Crim. App. 1991). A question is proper if it seeks to discover a juror's views on an issue applicable to the case. *See Collier v. State,* 959 S.W.2d 621, 623 (Tex. Crim. App. 1997). Therefore, the permissible areas of voir dire questioning are broad. *See Linnell v. State*, 935 S.W.2d 426, 428 (Tex. Crim. App. 1996).

We do not agree with appellant's suggestion that prospective jurors may only be questioned on matters that will be expressly addressed in the jury charge. Rather, we believe that the concept of issues "applicable to the case" extends to any consideration that could influence jurors' determination of the ultimate issues of guilt and punishment. Appellant has cited no authority prohibiting disclosure to the jury of a minor defendant's certification to stand trial as an adult, and the State could not know at the time of voir dire whether appellant or the trial judge would bring appellant's certification to the attention of the jury during trial. If that fact were disclosed, his being tried as an adult for a crime committed while a minor could conceivably cause a prospective juror to be more sympathetic to appellant in determining guilt or punishment. The State was entitled to uncover and take into consideration any such feelings in making its decisions on asserting challenges for cause and exercising peremptory challenges. Because appellant's third issue thus fails to demonstrate error by the trial court in overruling appellant's objection to the State's references to appellant being certified to stand trial as an adult, it is overruled.

Challenges for Cause

Appellant's fourth through seventh issues challenge the trial court's sustaining of four challenges for cause by the State. These challenges were based on the respective venire members' concerns regarding certification of a juvenile to be tried as an adult or with their inability to consider the full range of punishment.

A trial court's error in sustaining challenges for cause requires reversal only if the record shows that it deprived the appellant of a lawfully constituted jury. *See Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998), *cert. denied*, 120 S.Ct. 444 (1999). In this case, because "[a]ppellant has not shown that any error in granting the State's challenge[s] for cause to these veniremembers denied him a fair and impartial jury," any such error was harmless. *See Brooks v. State*, 990 S.W.2d 278, 289 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 384 (1999); *Jones*, 982 S.W.2d at 394. Therefore, appellant's fourth through seventh issues are overruled.

Admission of Weapon Used in Offense

Appellant's eighth issue challenges the admission into evidence of the weapon used in the offense because appellant contends it was illegally seized by police. Appellant does not base this complaint on a pretrial motion to suppress but, rather, on his trial objection under article 38.23 of the Texas Code of Criminal Procedure on the ground that "the seizure of the gun itself was in violation of Article 1 Section 9 of the Texas Constitution." However, Article 1, section 9 of the Texas Constitution states:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Appellant's objection did not apprise the trial court of which aspect of article 1, section 9, had been violated, which facts gave rise to the violation, or how those facts constituted a violation. *See* TEX. R. APP. P. 33.1 (requiring trial objection to state grounds for ruling

sought with sufficient particularity). Therefore, this complaint presents nothing for our review and appellant's eighth issue is overruled.

Jury Charge on Guilt/Innocence

Attempted Capital Murder

Appellant's ninth issue is "whether the trial court committed reversible error by charging the jury on attempted capital murder at all." We interpret the thrust of appellant's complaint in this issue to be that the indictment and application paragraph of the jury charge described the requisite intent as being to *commit the offense* of capital murder rather to *cause the death* of the complainant.[5]

To the extent this issue complains of the language of the indictment, it presents nothing for our review because appellant did not object to the indictment on this ground in the trial court. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2000) (if defendant fails to object to defect of form or substance in indictment before trial commences, he may not raise the objection on appeal or in any other post-conviction proceeding).

To the extent this issue complains of the charge, appellant's brief concedes that the charge contained the necessary intent language. Because we cannot discern any other complaint in this issue, let alone any reason that the jury should not have been charged on attempted capital murder at all, we overrule appellant's ninth issue.

Appellant's tenth issue argues that the trial court erred by charging the jury on attempted capital murder rather than robbery. However, because the jury was charged on the lesser offense of robbery and because the argument under this issue is unintelligible, appellant's tenth issue is overruled.

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[5] *See Flanagan v. State*, 675 S.W.2d 734, 741 (Tex. Crim. App. 1982) (holding that the offense of attempted murder requires a specific intent to kill rather than to merely cause serious bodily injury); *Caraveo v. State*, 752 S.W.2d 18, 19 (Tex. App.—Fort Worth 1988, no pet.).

Law of Parties and Conspiracy

Appellant's eleventh issue contends that the trial court improperly applied the law of parties[6] because the charge allowed the jury to convict appellant of attempted capital murder as a party based on another person's intent to commit that crime rather than on appellant's intent to do so. Appellant's twelfth issue argues that the trial court erred in improperly applying the law of conspiracy[7] to attempted capital murder. Appellant does not contend that the language of the charge departs from what is set forth in the applicable statutes, but instead that the law of parties and conspiracy simply cannot be applied to an attempt offense because a person cannot attempt or conspire to commit a crime that requires an unintended result. Because appellant's brief does not state how the offenses of attempted capital murder or robbery require an unintended result in this case, we can find no merit in these contentions. Accordingly, issues eleven and twelve are overruled.

Appellant's thirteenth issue asserts that the trial court erred in charging the jury on a conspiracy theory of attempted capital murder, *i.e.*, that another person attempted to cause the death of the complainant, because a conspiracy theory was not alleged in the indictment. However, the Court of Criminal Appeals has long held that a conspiracy theory need not be alleged in the indictment.[8] Therefore, appellant's thirteenth issue is overruled.

Closing Argument on Guilt / Innocence

Appellant's fourteenth through nineteenth issues complain of the trial court overruling his objections to statements made by the prosecutor during closing argument. We first outline the scope of permissible jury argument that is common to these six issues.

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6 *See* TEX. PEN. CODE ANN. § 7.02(a) (Vernon 1994).

7 *See* TEX. PEN. CODE ANN. § 7.02(b) (Vernon 1994).

8 *See Montoya v. State*, 810 S.W.2d 160, 165 (Tex. Crim. App. 1989) (conspiracy theory, *i.e.*, law of parties under section 7.02(b), may be applied to a case even though no such allegation is contained in the indictment).

A proper jury argument must fall within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *See Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). Prosecutors may not inject their personal opinions into argument, lest they convey to the jury that they have bases for their conclusions in addition to the evidence before the jury. *See Fowler v. State*, 500 S.W.2d 643 (Tex. Crim. App. 1973). Error also exists when facts not supported by the record are interjected into the argument, but such error is not reversible unless, in light of the record, the argument is extreme or manifestly improper. *See Guidry*, 9 S.W.3d at 154. Moreover, counsel is allowed wide latitude in drawing inferences from the evidence as long as they are reasonable and offered in good faith. *See Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996). Similarly, most error is cured by withdrawal of the question or an instruction to disregard. *See id.*

Appellant's fourteenth issue complains that the prosecutor improperly argued, "I'm not here to prosecute people who . . . I don't believe did a crime."[9] However, even if the overruling of appellant's objection to this argument was error, non-constitutional error that does not affect substantial rights must be disregarded. *See* TEX. R. APP. P. 44.2(b). In considering the harmfulness of improper argument under rule 44.2(b), the Court of Criminal Appeals has adopted the three-factor test used in the federal courts: (1) severity of the misconduct, *i.e.*, the magnitude of the prejudicial effect of the prosecutor's remarks; (2) measures adopted to cure the misconduct, *i.e.*, the efficacy of any cautionary instruction by

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[9] *Compare Clayton v. State*, 502 S.W.2d 755, 756-57 (Tex. Crim. App. 1973) (reversing conviction because objection was overruled to prosecutor's argument that the District Attorney "couldn't pay me enough to . . . prosecute a man I didn't know in my heart to be guilty" and argument was not clearly invited by defense counsel's argument); *Fowler v. State*, 500 S.W.2d 643, 643-44 (Tex. Crim. App. 1973) (reversing conviction because objection was overruled to prosecutor's argument that he "was not going to prosecute a man that I don't feel in my own heart is guilty"); *with Sikes v. State*, 500 S.W.2d 650, 652 (Tex. Crim. App. 1973) (affirming conviction despite objection being overruled to prosecutor's argument, "I think [defendant] is just as guilty as he can be," because context of statement reflected that it was an analysis of the evidence and reasonable deduction therefrom).

the trial court; and (3) the certainty of conviction absent the misconduct, *i.e.*, the strength of the evidence supporting conviction. *See Mosley v. State*, 983 S.W.2d 249, 259-60 (Tex. Crim. App. 1998), *cert. denied*, 119 S.Ct. 1466 (1999).

Applying these factors to the present case, the magnitude of the prejudicial effect of the statement was slight in that its context did not suggest it was based on facts not in evidence, and the matter was not referred to again or otherwise emphasized by the State. Moreover, the nature of the adversary process is such that jurors can ordinarily expect prosecutors to believe that the defendants they are prosecuting are guilty and would thus not be swayed in their assessment of the case by merely hearing a prosecutor say so.

The second factor favors appellant's position in that the trial court overruled his objection and took no curative action. However, the largely uncontroverted testimony of the complainant, identification of appellant by a customer, and ballistics test results strongly supported appellant's conviction.[10] Therefore, although the comment made by the prosecutor was improper and could result in reversal under different facts, it was not sufficiently harmful to do so in this case. Accordingly, appellant's fourteenth issue is overruled.

Appellant's fifteenth issue asserts that the trial court erred in overruling his objection to the State's argument, "There's no issue we have the right person here." Although appellant claims on appeal that this argument improperly labels appellant's presence at the scene and at the time of the charged offense as uncontroverted, he made no such objection at the trial court. Therefore, this complaint presents nothing for our review. *See, e.g., Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999) (noting that to preserve issue for review, complaint on appeal must comport to objection at trial).

Appellant also complains that the remark called the jury's attention to the absence of evidence that only appellant's testimony could supply, thereby amounted to a comment on appellant's failure to testify, and improperly allowed it to be taken as a circumstance against

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[10] Indeed, of appellant's twenty six issues on appeal, none challenge the sufficiency of the evidence of appellant's guilt.

him. *See* TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1979). However, to constitute such a violation, the complained of comment must, when viewed from the jury's perspective, be of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify. *See Fuentes v. State*, 991 S.W.2d 267, 275 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 541 (1999). Thus, an indirect or implied allusion to an accused's failure to testify is not sufficient. *See id*. Rather, the remark must refer to appellant's failure to testify, *i.e*., evidence that could come only from the defendant, and not merely to the defense's failure to produce evidence. *See id*.; *Goff v. State*, 931 S.W.2d 537, 548 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1171 (1997).

In this case, the complained of statement, "There's no issue we have the right person here" does not refer to appellant's failure to testify at all, let alone to evidence that only appellant could have provided. Rather, it is an obvious deduction from the evidence. Accordingly, appellant's fifteenth issue is overruled.

Appellant's sixteenth and seventeenth issues complain of his objection being overruled to the prosecutor's statement, "Perhaps the defendant would prefer to be convicted on evidence where maybe [the complainant] . . . would have been shot in the heart, maybe if she'd been brain dead that would have been better . . . ." Appellant's eighteenth issue challenges the related statement, "[T]hey don't want you to find him guilty of attempted capital murder because he didn't hit her in the right place." Appellant contends that these remarks also reminded the jury of appellant's failure to testify. As in the preceding issue, the complained of statements do nothing of the kind. Instead, they merely respond to defense counsel's argument that the evidence of specific intent to commit capital murder was insufficient due to the non-lethal location of complainant's gunshot wound (the buttocks). Because the sixteenth through eighteenth issues thus fail to demonstrate error, they are overruled.

Appellant's nineteenth issue argues that the trial court erred in overruling his objection to the prosecutor's statement, "You know this is something she's going to live with for the rest of her life." Appellant first complains that this argument exhorted the jury to consider

the complainant's future hardships resulting from being the first one to hear the verdict in determining appellant's guilt or innocence. However, because this was not a ground on which appellant objected to the statement at trial, it presents nothing for our review. *See, e.g., Trevino*, 991 S.W.2d at 855. In addition, the case appellant cites for this proposition pertains to evidence concerning a victim's future physical hardship as a paraplegic resulting from the offense[11] and not to the emotional effect on the complainant of the jury's verdict as to the guilt of the defendant, as in this case. Appellant's argument attempting to analogize the prosecutor's statement to victim impact testimony similarly overlooks the distinction between the effect on a complainant of the offense versus the verdict regarding the defendant's guilt. Because appellant's nineteenth point of error is thus lacking in merit, it is overruled.

Jury Charge on Punishment

Appellant's twentieth and twenty-first issues contend that the trial court erred in charging the jury on the possibility of parole and good time credit under article 37.07, section 4(b),[12] and in failing to charge the jury on the possibility that sentences for multiple offenses could run cumulatively rather than concurrently under article 42.08(a).[13] Because, appellant offers no authority relieving a trial court of its obligation to charge the jury under article 37.07, section 4(b),[14] or even authorizing, let alone obligating, a trial court to charge the jury under article 42.08(a), his twentieth and twenty-first issues provide no basis upon which they can be sustained and are thus overruled.

Closing Argument on Punishment

Appellant's twenty second issue contends that the trial court erred in overruling his objection to the State's argument that it was undisputed that the ballistics evidence showed

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11 *See Miller-El v. State*, 782 S.W.2d 892, 895-97 (Tex. Crim. App. 1990).

12 *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b) (Vernon Supp. 2000).

13 *See id.* art. 42.08(a).

14 Nor does appellant challenge the validity of article 37.07.

the bullet found in the cooler matched the gun. Appellant claims this argument "may have been construed" by the jury as a reference to appellant's failure to testify. As with the statements challenged in appellant's fifteenth through eighteenth issues, we fail to perceive how the statement could have been so construed. Moreover, the applicable standard is not how the statement *may* have been so construed, but how it necessarily would have been construed. *See Fuentes*, 991 S.W.2d at 275. Accordingly, appellant's twenty second point of error is overruled.

Appellant's twenty-third issue argues that the trial court erred in overruling his objection to the prosecutor making reference to juvenile certification during closing argument in the punishment phase because it injected a fact that was not in evidence. As with his similar argument in issue three, appellant cites no authority directly supporting this contention. In response to issue three, we explained why we believe it was not error for the prosecutor to voir dire the jury panel on the matter of juvenile certification. Having previously been mentioned during voir dire, certification was not a new matter being injected for the first time during closing argument. To the extent it was allowable to mention certification during voir dire, we can see no basis to conclude that it was improper or harmful to mention it a second time during argument on punishment. Therefore, appellant's twenty-third issue is overruled.

Cumulation Hearing

Authority to Hold Separate Hearing

Appellant's twenty-fourth issue contends that the trial court was not authorized to hear evidence on the issue of cumulation of sentences in a separate hearing after the hearing on and imposition of punishment. However, the cases appellant cites in support of this argument are inapposite.[15] The decision whether to order punishment to run concurrently or

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[15] *See Ex parte Moser*, 602 S.W.2d 530, 533 (Tex. Crim. App. 1980) (stating "The Legislature having statutorily created assessment of punishment by the jury, the Legislature may alter or abolish that procedure . . ."), *overruled on other grounds*, *Polk v. State*, 693 S.W.2d 391 (Tex. Crim. App. 1985); *Morgan v. State*, 515 S.W.2d 278, 280 (Tex. Crim. App. 1974) (holding that evidence of a defendant's prior criminal record is limited to proof of final convictions).

cumulatively is within the trial court's discretion. *See* TEX. CODE CRIM. PROC. ANN. Art. 42.08(a) (Vernon Supp. 2000). Because appellant has cited neither authority nor a rationale for depriving trial courts of the discretion to hold separate hearings on cumulation where they deem it beneficial, we decline to do so and overrule his twenty-fourth issue.[16]

Victim Impact Testimony

Appellant's twenty-fifth issue claims the trial court erred in the cumulation hearing by overruling his objection to the victim impact testimony of the mother of the complainant for whose death appellant was convicted of capital murder in a prior case. The sentence from that case was the one with which the State sought to cumulate appellant's sentence in this case. According to appellant, the witness testified about her son's good character as well as the impact of her son's death on her family. Relying on *Cantu*, appellant contends that this testimony was inadmissible because it pertained to a victim not named in the indictment. *See Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997).

We agree that the complained of testimony would not have been admissible on the issue of appellant's punishment for the murder alleged in this case. *See id*. at 636-37. Importantly, however, the issue before the trial court at the cumulation hearing was whether appellant's sentences for two murders should be served concurrently or consecutively. Although neither side has cited, nor have we found, any authority addressing this issue, simple logic would dictate that, to the extent punishment evidence pertaining to either offense is relevant to the cumulation decision, punishment evidence pertaining to the other offense is equally relevant. Because appellant has not challenged the general admissibility of the victim impact testimony as such, but only the fact that it pertains to a different complainant, we believe that it was as relevant to and admissible for the decision on cumulation in this case as it would have been if the two offenses had been tried in reverse

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[16] Moreover, as illustrated by the following issue, circumstances may arise in which evidence that is not admissible on the issue of punishment for the immediate offense could be admissible on the issue of cumulation.

order and the cumulation issue had instead been raised at the conclusion of the other trial. Accordingly, appellant's twenty-fifth point of error is overruled.

Appellant's twenty-sixth issue challenges the overruling of his hearsay objection to the State's "disparaging affirmative assertions on the issue of sentencing." Although appellant's brief cites two pages of the record at which these purported assertions can be found, it does not specify which statements within those pages appellant regards as hearsay or provide any explanation as to why any of the statements constitutes hearsay. It is not the role of the court to perform this task for appellant. Because his twenty-sixth point of error thus provides no basis upon which it can be sustained, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed June 15, 2000.
Panel consists of Justices Hudson, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).