

Appellant's Fourth Point of Error

The trial court violated Max Soffar's constitutional right to present a defense and basic evidentiary rules by precluding evidence showing that the Houston media broadcast details of the crime contained in Soffar's putative confession which the prosecutor claimed only the perpetrator could have known.

The credibility of Soffar's purported confession was the most important question in this case. The prosecution argued to the jury that the confession was credible because Soffar knew details only the perpetrator could have known. (35 RR 11, 21-25). But the jury never learned that in July and August of 1980 the Houston media widely broadcast these details. (43 RR Defense Exhibits 58-60). Over defense objections citing Appellant's constitutional right to present a defense (30 RR 100-06; 31 RR 114-16; 33 RR 4-5), the trial court excluded this vital evidence, depriving the jury of the information it needed to determine the truth. The court's ruling deprived Appellant of "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citation omitted). *See also* Appellant's First, Second, and Third Points of Error, incorporated herein. Reversal is required.

Factual Background: Between July 14, 1980, and August 1, 1980, the Houston television and print media widely publicized details of the robbery murders, including the following: 1) four people had been shot execution style; 2) one man had survived; 3) one of the victims was a female, who was shot in the cheek; 4) money was taken from a cash register; 5) the shootings took place at the Fairlanes Windfern bowling center;

6) a .357 magnum was used;¹ 7) reward money was available; and 8) the bowling alley was burglarized the night before. *See* (43 RR Defense Exhibit 58-60 (chart summarizing media sources and information provided); 43 RR Defense Exhibit 66).² The images broadcast by the media included the following: 1) the exterior of the bowling alley, including the Fairlanes Windfern sign and how the building was situated on the parking lot; 2) the interior of the building; 3) a closeup of Greg Garner's gunshot wound, showing its location; and 4) the bodies of the victims inside the bowling alley; (43 RR Defense Exhibits 58, 60). *See also* (45 RR 3; 43 RR Defense Exhibits 63-71 (articles accompanied by business record affidavits)).

Soffar's statements include all the foregoing details. *See, e.g.*, (29 RR 186-87; 30 RR 21-23; 150-52; 160-64; 43 RR State's Exhibit 1A (p. 26-27)). They do not, however, include information not publicly broadcast. They reflect only information that anyone could have known from the extensive media coverage of this case.

Soffar repeatedly told Det. Schultz that he had heard about the Fairlanes robbery murders in the "paper" and on the "news." (43 RR State's Exhibit 1A at 9, 25, 28, 36-37; 30 RR 95-96). Appellant's sister, Jackie Soffar Butler, testified that Appellant's family typically watched Channel 13 eyewitness news on television and that the family

¹ Notably, although knowledge of the type of gun used was disseminated to the public in 1980, the prosecution specifically argued that Soffar could not have known a .357 magnum was used if he were not guilty. (35 RR 22-23).

² The defense proffered this evidence to explain how Soffar knew various details of the crime. The burglary the night before the robbery murders and the reward money were relevant for different reasons. The reward money was relevant to the defense theory that Soffar began talking about the robbery murders and falsely accusing Bloomfield in order to get the reward money. (29 RR 186). The coverage about the burglary was relevant to show that Soffar falsely confessed to crimes he heard about in the media, like both the Fairlanes robbery murders and the Fairlanes burglary the night before.

subscribed to the HOUSTON POST. (32 RR 238-40).

The defense theory of the case was that Max Soffar had falsely confessed and that he had obtained the details of his confession from the media. Thus, the defense sought to cross examine the interrogating police officers regarding the details of the crime broadcast to the public (30 RR 100-09), and was prepared to introduce evidence that various media sources broadcast these details through the testimony of a witness who could summarize the voluminous information contained in the various media reports. (33 RR 4-5, 7).³ The defense argued that the evidence was admissible to support the defense position that the information Max Soffar provided to the police reflected nothing more than information broadcast to the general public. *Id. See also* (31 RR 4-8). Initially, the prosecution had agreed to this witness, but it later changed its position. (31 RR 4). The trial court precluded the evidence over defense objections that the court was violating Appellant's right to present a defense. (33 RR 5). Although the trial judge did not state the basis for her ruling, *see id.*, she had earlier suggested that the evidence would be irrelevant without evidence that Max Soffar had specifically seen the media coverage. (31 RR 6). When the court precluded the evidence (33 RR 4-5; 43 RR Defense Exhibits 58-60, 63-71), the defense sought the alternative remedy of admitting only evidence of stories from the HOUSTON POST and Channel 13 Eyewitness News. (33 RR 5). Defense testimony had established that Max Soffar and his family regularly watched that newscast and read that newspaper. (32 RR 238-40). The prosecution did not object to this

³ Videotapes of the television stories and photocopies of the newspaper stories had been authenticated in the state habeas evidentiary hearing in 1994. (33 RR 4).

alternative, (33 RR 4-5), and had even suggested in an earlier proceeding that the applicable test was whether Soffar had seen the media stories he sought to introduce. (31 RR 4-5). The court, however, rejected this alternative remedy. (31 RR 8). In its summation, the prosecution argued that Appellant's confession was reliable because it contained details only the perpetrator could have known. (35 RR 11; 22-23).

Argument: The trial court precluded evidence that was essential to the defense theory that Appellant's confession was unreliable. The court's rulings violated basic state evidentiary law and the constitutional right to present a defense.⁴ Without this evidence, the defense could not point to the contents of media reports as the source of the information in Soffar's custodial statements. And due to the trial court's erroneous rulings, the prosecution was able to argue to the jury that Soffar's statement contained details known only to the perpetrator. (35 RR 11, 22-23). The court's rulings were fundamentally unfair and require reversal.

The TEXAS RULES OF EVIDENCE rules mandate the admission of all logically relevant evidence.⁵ Newspaper articles not offered for the truth of the matters asserted are relevant and admissible to show public knowledge of those matters, and constitute

⁴**Standard of Review:** *De novo* review is required because "the resolution of [this] question of law [did] not turn on an evaluation of the credibility and demeanor of a witness." *Moff*, 154 S.W.3d at 601. In addition, the trial court's preclusion of this evidence implicated Appellant's constitutional right to present a defense, also requiring *de novo* review. See *Lilly*, 527 U.S. at 137; *Guzman*, 955 S.W.2d at 87.

⁵ See *Crank v. State*, 761 S.W.2d 328, 342 n.5 (Tex. Crim. App. 1988), *overruled on other grounds*, *Alford v. State*, 866 S.W.2d 619, 624 n.8 (Tex. Crim. App. 1993). See also *Montgomery v. State*, 810 S.W.2d 372, 375 (Tex. Crim. App. 1990) (citing *Crank*).

admissible non-hearsay evidence.⁶

This basic evidentiary principle has been applied to precisely the same factual circumstances at issue here. *See Woods v. State*, 696 P.2d 464, 470 (Nev. 1985). In *Woods*, the defendant appealed the trial court’s “refusal to admit a set of newspaper articles . . . to show that all the details provided [his confession] could have been gleaned from news accounts of the murder.” *Id.* As here, the state argued in its summation that the “confession . . . contained information which only the murderer could have known.” *Id.* The Nevada Supreme Court reversed. It explained that newspaper articles are admissible if they are offered for the “fact of their publication.” *Id.* It also rejected the trial court’s rationale “that there was no evidence that [the defendant], who did not testify, had read any of the news accounts.” *Id.* The court held that the articles were relevant and admissible because they showed that the details of the crime were public knowledge, refuting the prosecution’s argument to the jury that defendant’s confession contained details known only by the true perpetrator. *Id.*

Woods is by no means an anomaly. *See, e.g., Bethany v. State*, 152 S.W.3d 660, 669 (Tex. App. – Texarkana 2004), *pet. ref’d*) (“In his admissions to Miller and Bunn, days after the murder, he gave details not released on television news reports.”).

Evidence of the publication of details of a crime, or lack thereof, is often introduced

⁶ *See Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 759 (Tex. 1998) (“[W]hen the occurrence of criminal activity is widely publicized, a landlord can be expected to have knowledge of such crimes.”) (emphasis added). *See also In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1170-71 (5th Cir. 1979) (holding “that the plaintiffs knew or should have known in 1968 and 1969 of the allegations of the Bray complaint [because it had been] publicized in numerous issues of numerous trade publications”); *Forsythe v. State*, 664 S.W.2d 109, 115 (Tex. App. – Beaumont 1983, *pet. ref’d*) (“An exception to the hearsay rule is applicable when the proffered evidence tends to show knowledge, intent, or belief of the party, when such evidence is material to the case”).

under the theory that reliable accounts contain details not known to the public.⁷ None of these precedents, nor any discovered by counsel, requires direct evidence of exposure to a particular publication before a jury may draw the reasonable inference that a person was on notice of a widely-published fact. Indeed, under facts identical to the trial below, the Nevada Supreme Court in *Woods* completely rejected such a requirement. 696 P.2d at 470. Whether the evidence showed that Soffar had seen a particular story in the media bears on the weight the jury should accord the media evidence, not its admissibility.

In any event, there *was* evidence showing Appellant's exposure to the media reports he sought to introduce at trial. The prosecution itself provided direct evidence that Max Soffar had heard about the Fairlanes robbery murders in the "paper" and on the "news" before his putative confessions. (43 RR State's Exhibit 1A at 9, 25, 28, 36-37; 30 RR 95-96). This evidence provided a more than adequate basis for the jury to infer that Soffar had heard about widely-published media reports of the crime. Therefore, the trial court erred by not allowing evidence of the media reports Soffar sought to introduce.

Furthermore, even if this Court rejects the argument that *all* of the relevant published media reports preceding Soffar's confession were admissible, this Court should hold that the trial court erred in precluding introduction of those media stories which the evidence shows that Soffar saw, i.e., the HOUSTON POST and Channel 13 Eyewitness

⁷ *Lord v. Wood*, 184 F.3d 1083, 1088 (9th Cir. 1999) ("Trial counsel . . . suggested that [the accused] had come up with the details of the alleged confessions by reading newspaper stories about [the] murder"); *People v. Dominick*, 182 Cal. App. 3d 1174, 1199 n.17 (1986) (affirming where witness's "testimony was corroborated by the wealth of details he provided concerning the murders, details that could not have been provided by media accounts"); *State v. McCormick*, 778 S.W.2d 48, 52 (Tenn. 1989) (finding defendant's confession reliable because several "accurate details were not released to the media, particularly the number of shell casings found, the precise location of the wounds, the caliber of the weapon, and the check found on the victim").

news stories. (33 RR 4-5). It is beyond dispute that the testimony establishing the Soffar household's exposure to these media outlets supports a reasonable inference that Max Soffar knew about the information.

The trial court's preclusion of relevant evidence diminishing the reliability of Soffar's confession was constitutional error on two bases. *First*, the ruling violated Appellant's constitutional right to present a defense. *See* U.S. Const. amends. VI; XIV.⁸ Showing that the details of Soffar's putative confession were disseminated by the media was crucial to his defense that his confession was not reliable and "defendant's claim of innocence." *Crane*, 476 U.S. at 690.⁹ The trial court's ruling precluding this evidence lacked "any rational justification," *id.*, because it precluded valuable defense evidence without serving any legitimate end. *Holmes*, 126 S. Ct. at 1731. The impact of the ruling was particularly harsh given that he was prohibited from presenting evidence of third-party guilt. *See Appellant's First through Third Points of Error*. *See Ray*, 178 S.W.3d at 836 n.1 (noting danger in "precluding altogether the presentation of the defensive theory"). Soffar could neither argue that someone else was responsible for the crime nor that his confession merely repeated details he had heard from the media.

⁸ The numerous precedents reversing convictions due to a violation of the constitutional right to present a defense are reviewed in *Appellant's First Point of Error*; they are incorporated here but, for efficiency and economy, will not be repeated.

⁹ In *Crane*, the United States Supreme Court reversed a conviction because the jury was not allowed to consider proffered evidence that the defendant was a "young, uneducated boy" whose confession was obtained through coercive circumstances. *Id.* As here, "[s]uch evidence was especially relevant . . . [because] [p]etitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed." *Id.* The "especially relevant" evidence precluded in *Crane* would have provided that jury a basis to determine that the defendant's confession was unreliable; similarly, the wide-spread publication of the details contained in Soffar's confession *before* Soffar ever gave his confession certainly would have provided the jury a basis to find Soffar's confession unreliable.

Second, when the prosecution at a criminal trial asks the trier to infer facts on which its case depends, the defendant cannot constitutionally be foreclosed from responding with evidence and argument that factually throws the inference into doubt. *Kelly v. South Carolina*, 534 U.S. 246, 248, 252 (2002); *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001); *Rock v. Arkansas*, 483 U.S. 44, 51-55 (1987); *Crane*, 476 U.S. at 689-91; *Skipper*, 476 U.S. at 5 n.1. The trial court's ruling foreclosed Appellant from casting doubt on the prosecution's assertion that his putative confession was reliable because it contained details known only to the true perpetrator. (35 RR 11, 22-23). This ruling was a violation of Appellant's rights to due process, compulsory process, and to present a defense. The result was a prosecution case untested by the "crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

Erroneously precluding this crucial defense evidence was not harmless by any standard.

The error was not harmless under either the standard for constitutional error or the standard for non-constitutional error.¹⁰ The defense's theory that Soffar had falsely confessed had support in the recorded statements he made to the police that he had heard about the crime on the news. (43 RR State's Exhibit 1A at 9, 25, 28, 36-37; 30 RR 95-96). It was also supported by: (1) Soffar's false claim (which police witnesses conceded was false) to have committed the burglary at the Fairlanes the night before the

¹⁰ The inherent weaknesses in the prosecution's case are detailed at length in the harmless error section of Appellant's First Point of Error; those weaknesses are incorporated here, and, for reasons of efficiency and economy, will not be repeated. As the Fifth Circuit emphasized in reviewing the all but identical facts from Soffar's first trial, the prosecution's case was built upon Soffar's confession. *Soffar*, 368 F.3d at 479.

murders, (30 RR 25, 189); (2) Sgt. Clawson's testimony that Soffar, a former paid police informant, (29 RR 105-06), was "just not trustworthy," (29 RR 129); and (3) evidence that Soffar lacked specific information about the crime. (29 RR 147-48; 164-66; 31 RR 60-66; 128-29). Showing the jury that the content of the news stories was the same as the content of Soffar's statements would have transformed a plausible defense theory into one overwhelmingly supported by compelling evidence.

Moreover, absent the court's error, the prosecution would not have been able to mislead the jury by arguing that Soffar's confession was reliable because he was able to give details about the inside of the bowling alley that could only be known by the perpetrator. (35 RR 11, 22-23).

Given the prosecution's argument in summation, the thin case on which it prosecuted Appellant, and the importance of this evidence to the defense case, the prosecution cannot demonstrate with any certainty that the court's preclusion of this crucial defense evidence did not have an impact on the jury's finding. *Anderson*, 182 S.W.3d at 918-19. And the prosecution certainly cannot prove that this constitutional error was harmless beyond a reasonable doubt. This Court must reverse.