

**COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS AT
EASTLAND**

Dwayne Uterral Hardeman v. State

Hardeman v. State · No. 11-16-00244-CR · Decided June 27, 2017

SUMMARY

This document is the appellant's brief in a Texas criminal appeal arising from Dwayne Uterral Hardeman's conviction for family-violence assault by impeding breath or circulation. The brief raises issues concerning juror racial bias, admission of extraneous-offense and hearsay evidence, impeachment, and denial of a lesser-included-offense instruction. The appeal was filed in the Eleventh Court of Appeals of Texas in cause number 11-16-00244-CR.

CASE DETAILS

COURT	Court of Appeals for the Eleventh District of Texas at Eastland
JURISDICTION	Texas
DECIDED	June 27, 2017
DOCKET	11-16-00244-CR
PROCEDURAL POSTURE	Appellant's opening brief in a criminal appeal from a Brown County felony family-violence conviction.
STANDARD OF REVIEW	The brief states that mistrial rulings and evidentiary rulings are reviewed for abuse of discretion; jury-charge error is reviewed first for error and then for harm; and preservation-based harm is analyzed under the applicable Texas criminal-procedure standards.
PRECEDENTIAL VALUE	none
PARTIES	Dwayne Uterral Hardeman v. The State of Texas

TOPICS

appellate procedure criminal procedure jury selection evidence hearsay

PRACTICE AREAS

criminal procedure evidence appellate procedure constitutional law

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying a mistrial after finding that a juror made a racially biased statement before the venire and by refusing further inquiry into possible jury contamination.
2. Whether the trial court abused its discretion under Texas Rules of Evidence 404(b) and 403 by admitting evidence of alleged prior choking and assaultive conduct against Melissa.
3. Whether the State improperly used Melissa as a strawman to place otherwise inadmissible extraneous-offense evidence before the jury under the guise of impeachment.
4. Whether the trial court erred by admitting law-enforcement recordings as recorded recollections under Texas Rule of Evidence 803(5), and by admitting hearsay and extraneous-offense material contained in those recordings.
5. Whether the trial court erred by refusing to submit family-violence assault causing bodily injury as a lesser-included offense.

KEY QUOTATIONS

"Where a juror withholds material information in the voir dire process, the parties are denied the opportunity to exercise their challenges, thus hampering their selection of a disinterested and impartial jury." (at 20-21)

"Extraneous offense evidence is generally inadmissible 'to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.'" (at 24)

"However, the State may not call a 'strawman' whom it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment evidence." (at 37)

"The evidence must establish the lesser-included offense as 'a valid, rational alternative to the charged offense.'" (at 55)

FACTUAL BACKGROUND

According to the appellant's brief, Hardeman was accused of grabbing and choking his stepdaughter, Lakisha Anthony, during a dispute after she had taken pills and attempted to leave. Lakisha, her mother Melissa, and another daughter gave trial testimony minimizing or denying the alleged choking, while prior recorded interviews and other evidence described choking and prior family violence. The State also introduced evidence of prior alleged assaults against Melissa and recordings containing statements about those incidents.

PROCEDURAL HISTORY

Hardeman was indicted in the 35th Judicial District Court of Brown County for family-violence assault by impeding the normal breathing or circulation of Lakisha Anthony. A jury found him guilty, found two enhancement paragraphs true, and assessed life imprisonment; the trial court entered judgment on August 25, 2016. The brief challenges evidentiary rulings, denial of a mistrial based on alleged juror racial bias, and refusal to submit a lesser-included-offense instruction.

CASES CITED

- *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)
- *Barley v. State*, 906 S.W.2d 27 (Tex. Crim. App. 1995)
- *Franklin v. State*, 986 S.W.2d 349 (Tex. App.—Texarkana 1999), rev'd, 12 S.W.3d 473 (Tex. Crim. App. 2000)
- *Franklin v. State*, 12 S.W.3d 473 (Tex. Crim. App. 2000)
- *Franklin v. State*, 138 S.W.3d 351 (Tex. Crim. App. 2004)
- *Gamboa v. State*, 296 S.W.3d 574 (Tex. Crim. App. 2009)
- *Gigliobianco v. State*, 210 S.W.3d 637 (Tex. Crim. App. 2006)
- *Gonzales v. State*, 304 S.W.3d 838 (Tex. Crim. App. 2010)
- *Gonzales v. State*, 3 S.W.3d 915 (Tex. Crim. App. 1999)
- *Guzman v. State*, 188 S.W.3d 185 (Tex. Crim. App. 2006)
- *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007)
- *Hughes v. State*, 4 S.W.3d 1 (Tex. Crim. App. 1999)
- *Johnson v. State*, 967 S.W.2d 410 (Tex. Crim. App. 1998)
- *Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998)
- *Lane v. State*, 933 S.W.2d 504 (Tex. Crim. App. 1996)
- *Lopez v. State*, 990 S.W.2d 770 (Tex. App.—Austin 1999, no pet.)
- *Martinez v. State*, 327 S.W.3d 727 (Tex. Crim. App. 2010)
- *McCleskey v. Kemp*, 481 U.S. 279 (1987)
- *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990) (op. on reh'g)
- *Mozon v. State*, 991 S.W.2d 841 (Tex. Crim. App. 1999)
- *Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005)
- *Newton v. State*, 301 S.W.3d 315 (Tex. App.—Waco 2009, pet. ref'd)
- *O'Brien v. State*, 89 S.W.3d 753 (Tex. App.—Houston [1st Dist.] 2002, no pet.)
- *Pena-Rodriguez v. Colorado*, 15-606 (U.S. Mar. 6, 2017)
- *Prior v. State*, 647 S.W.2d 956 (Tex. Crim. App. 1963)
- *Pruitt v. State*, 770 S.W.2d 909 (Tex. App.—Fort Worth 1989, pet. ref'd)
- *Rice v. State*, 333 S.W.3d 140 (Tex. Crim. App. 2011)
- *Robbins v. State*, 88 S.W.3d 256 (Tex. Crim. App. 2002)
- *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005)
- *Salazar v. State*, 562 S.W.2d 480 (Tex. Crim. App. 1978) (panel op.)
- *Saunders v. State*, 913 S.W.2d 564 (Tex. Crim. App. 1995)
- *Scott v. State*, 419 S.W.3d 698 (Tex. App.—Texarkana 2013, no pet.)
- *Uranga v. State*, 330 S.W.3d 301 (Tex. Crim. App. 2010)
- *Webb v. State*, 232 S.W.3d 109 (Tex. Crim. App. 2007)
- *Yates v. State*, 941 S.W.2d 357 (Tex. App.—Waco 1997, pet. ref'd)

- *Hughley v. State*, No. 06-15-00174-CR (Tex. App.—Texarkana July 8, 2016) (mem. op., not designated for publication)

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