

COURT OF APPEALS OF TEXAS, HOUSTON (14TH DISTRICT)

Marcus Stephen Fleck v. The State of Texas

201 S.W.3d 268 (Tex. App.—Houston [14th Dist.] 2006) · No. No. 14-04-00798-CR · Decided August 15, 2006

SUMMARY

The Texas Fourteenth Court of Appeals held that the trial court erred by refusing to require the State to elect which of multiple alleged sexual-assault acts it would rely upon for conviction. Because the failure to require an election was constitutional error and the court could not conclude beyond a reasonable doubt that it did not contribute to the conviction, the court reversed the judgment and remanded for a new trial.

CASE DETAILS

COURT	Court of Appeals of Texas, Houston (14th District)
WRITING FOR THE COURT	Charles W. Seymore; Hudson; Fowler; Seymore
JURISDICTION	Texas
DECIDED	August 15, 2006
DOCKET	No. 14-04-00798-CR
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Defendant appealed his conviction for aggravated sexual assault of a child, challenging, among other things, the trial court's refusal to require the State to elect which alleged act it would rely upon for conviction.
STANDARD OF REVIEW	For constitutional error, the court applied Texas Rule of Appellate Procedure 44.2(a), requiring reversal unless the court could determine beyond a reasonable doubt that the error did not contribute to the conviction or had only a slight effect.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Marcus Stephen Fleck v. The State of Texas

TOPICS

[criminal procedure](#)[appellate procedure](#)[harmless error](#)[preservation of error](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the trial court erred by refusing, after the close of the evidence and upon timely request, to require the State to elect which act of sexual assault it would rely upon for conviction.
2. Whether the failure to require an election was harmless beyond a reasonable doubt.
3. Whether the court could review the legal sufficiency of the evidence when the State had not elected the incident supporting the conviction.

HOLDINGS

1. When one act of sexual assault is alleged in the indictment but the evidence shows more than one act, the trial court must require the State to elect the act on which it will rely for conviction after the State rests its case-in-chief, when the defendant makes a timely request.
2. The failure to require an election was constitutional error that was not harmless beyond a reasonable doubt because the evidence concerning the five incidents was conflicting and the record did not establish which incident the State intended to support the conviction.
3. Because the State did not elect which incident it relied upon for conviction, the appellate court could not conduct a meaningful review of the evidence for legal sufficiency.

KEY QUOTATIONS

“If one act of sexual assault is alleged in the indictment, but more than one act is shown by the evidence at trial, “the State must elect the act upon which it would rely for conviction.”” (270)

“The election is required to (1) protect the accused from the introduction of extraneous evidence, (2) minimize the risk that the jury might convict, not because one crime was proved beyond a reasonable doubt, but because the crimes together convinced the jury of the defendant's guilt, (3) ensure unanimous jury verdicts, and (4) give the defendant notice of the particular offense the State intends to rely upon for prosecution.” (271)

FACTUAL BACKGROUND

The complainant, Fleck's daughter, testified about five alleged sexual-assault incidents occurring when she was eleven. The incidents differed in time, location, circumstances, and the details of the alleged sexual contact; one described incident did not involve oral-genital contact. The complainant's accounts conflicted with statements attributed to her mother and pediatrician concerning the number, timing, and circumstances of the incidents.

PROCEDURAL HISTORY

Fleck was indicted for a single act of aggravated sexual assault of a child, but the evidence described multiple alleged acts. After the close of all evidence, Fleck timely requested that the State elect the act supporting conviction; the trial court denied the request. A jury convicted him and assessed twenty-five years'

imprisonment. The court of appeals sustained the election issue, reversed the trial court's judgment, and remanded for a new trial.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remanded for a new trial.

CASES CITED

- O'Neal v. State, 746 S.W.2d 769 (Tex. Crim. App. 1988)
- Phillips v. State, 130 S.W.3d 343 (Tex. App.—Houston [14th Dist.] 2004)
- Phillips v. State, 193 S.W.3d 904 (Tex. Crim. App. 2006)
- Martinez v. State, 190 S.W.3d 254 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd)
- Farr v. State, 140 S.W.3d 895 (Tex. App.—Houston [14th Dist.] 2004), aff'd sub nom. Phillips v. State, 193 S.W.3d 904 (Tex. Crim. App. 2006)