



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00229-CR

JAMES ALAN HORTON

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1404769D

OPINION

In three points, Appellant James Alan Horton appeals his conviction for indecency with a child by contact. See Tex. Penal Code Ann. § 21.11(a)(1) (West 2011). We affirm.

Background

Appellant is the father of Andrea,¹ who was twelve years old at the time of the incident that gives rise to the allegations here. After Appellant and Andrea's mother, Jane, divorced in 2009, Andrea and her siblings spent every other weekend at the paternal grandparents' home, where Appellant also lived. When they stayed there, Andrea would often sleep in a bed with Appellant. According to Andrea, her brothers would sleep in other rooms.

Andrea testified that in January 2015, when she was 12 years old, she awakened to her father's hand rubbing her sexual organ over her clothes. Too scared to do anything, Andrea waited until Appellant stopped—approximately five minutes later, by Andrea's estimation—and then got out of bed and went to the living room, where she fell back to sleep. Andrea estimated that she went to the living room at “around 6:30 or 7:00” that morning.

According to Andrea, after she awoke that morning and before she told anyone else what had happened, Appellant approached her, apologized, and said he “didn't mean to do it.” Later that day Andrea told her grandmother, Kay, what had happened and, according to Andrea, Kay cried and instructed Andrea to “keep [her] distance.”

¹To protect Andrea's anonymity, we refer to children and family members by aliases. Tex. R. App. P. 9.8(b) & cmt., 9.10(a)(3); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

Kay also testified that Andrea approached her that day, crying, and told her that Appellant had touched her and that it had made Andrea feel “very uncomfortable.” According to Kay, she tried to assure Andrea that she should not worry, that she had done the right thing, and that it would be okay. When Kay confronted Appellant about Andrea’s accusation, he told her that he had accidentally touched Andrea in his sleep.

According to Jane, Appellant called her that evening and told her that “he had touched [Andrea] accidentally.” Jane immediately met Andrea’s grandfather and took possession of Andrea and her siblings. According to Jane, Andrea was crying “hysterically” at the time she picked her up. Kay testified to the contrary, that when Andrea left the house, she did not want to leave and pleaded with Appellant to let her stay. But her grandfather testified that Andrea wanted to go home to her mother.

Jane called the police that night.

Appellant took the stand in his own defense and testified that he believed that Andrea had told the truth when she said that he had touched her, but he denied that he had done so intentionally. Appellant claimed that when he went to bed the night before, both Andrea and her brother were in his bed watching a movie. He testified that he fell asleep before the movie ended, and when he woke up around 7:00 that morning, both children were still in his bed. Andrea was lying next to him, and according to Appellant, he reached over and touched her leg and then fell back asleep. A few minutes later, he woke up again when

he felt his hand fall off of Andrea's leg. According to Appellant, at that point Andrea "was getting up, and it was pretty quick," and as she was going to the door, she turned around and looked at him, and "[he] knew something was wrong. [He] could tell." Appellant testified that he noticed that Andrea appeared to be "uncomfortable" with him that morning, and at some point, Kay relayed to him what Andrea had told her about the incident.

According to Appellant, after his conversation with Kay, he approached Andrea and said, "[Andrea], I just want you to know I'm sorry. It was an accident. I was asleep." Andrea was crying at the time, but she said, "Dad, it's okay." Appellant also admitted that he called Jane that evening and told her what had happened.

Tarrant County Sheriff's Office Detective Jerome Adams interviewed Jane and Andrea. Afterwards, he arranged for a forensic interview of Andrea. Natalie Davis, investigator for Child Protective Services, conducted the interview while Detective Adams watched it on a closed-circuit T.V. Detective Adams characterized Andrea's demeanor during the interview as "nervous." He observed that "she had her legs folded up" as she sat in the chair but that "once she started talking about the incident, she kind of broke down and started crying." Based on what he heard, Detective Adams thought Andrea "sounded like she was embarrassed."

Appellant was charged with indecency with a child. See Tex. Penal Code Ann. § 21.11(a)(1). The jury found Appellant guilty and sentenced him to two years' confinement.

Discussion

In his first point, Appellant argues that the trial court abused its discretion in responding to the jury's request for a rereading of testimony. In his second and third points, Appellant argues that certain court costs imposed in accordance with the code of criminal procedure and the local government code are unconstitutional.

I. Response to jury note

During its deliberations, the jury sent several notes to the trial court. The jury's tenth handwritten note stated, "Could we get testimony from [Andrea] and [Appellant] regarding the description of the apology[?] ~~Did either witness~~ The jurors are disputing what [Appellant] apologized for[.]" The court reporter prepared an excerpt of the testimony from these two witnesses that appeared to respond to the jury's inquiry. Appellant takes issue with the trial court's decision to redact certain portions of his testimony before providing the excerpt to the jury. The testimony provided to the jury appears below, except that the lines appearing in strike-through font represent the portions that were excluded by the trial court:

Q. At that time, we're talking about -- let's say 2 o'clock in the afternoon. Had you said anything to [Jane] at that point about what had happened before?

A. No, sir.

Q. After you had a conversation with your mom --

A. And I did that intentionally even though I felt uncomfortable.

Q. Wait for a question, okay?

A. Yes, sir.

Q. After you had a conversation with your mom, did you have a conversation with [Andrea]?

A. Yes, sir.

Q. What did you say to [Andrea]?

A. I said, "[Andrea], I just want you to know, I'm sorry. It was an accident. I was asleep."

~~And she was crying. She said, "Dad, it's okay." And I said --~~

~~Q. Don't go into what she said[.]~~

~~A. Okay. Okay.~~

Q. Just I asked you what you said. So you said you were sorry?

A. Yes, sir.

Q. And you said it was an accident?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Appellant first objected to the court's delivery to the jury of any part of his testimony quoted above. He then separately objected to the exclusion of the

stricken portion on the basis that its exclusion was an improper comment on the evidence. The trial court overruled both objections.

On appeal, Appellant contends that the trial court erred in excluding the above excerpt of his testimony because, in doing so, the trial court failed to provide the full context of his interaction with Andrea to the jury. Appellant specifically argues that this exclusion unfairly and unnecessarily bolstered the State's case and Andrea's apparent acceptance of Appellant's apology places the incident in an otherwise different context.

Article 36.28 of the code of criminal procedure states, "In the trial of a criminal case[,] . . . if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, *and no other*" Tex. Code Crim. Proc. Ann. art. 36.28 (West 2006) (emphasis added). As the court of criminal appeals has recently explained,

When the jury asks the trial court to read back certain disputed testimony, the trial court judge must first determine if the jury's inquiry is proper under Article 36.28. If it is proper, the trial court must then interpret the communication and decide what sections of the testimony will best answer the inquiry. The trial court has discretion to decide "what sections of the testimony will best answer the query, and limit the testimony accordingly." However, if a trial court reads too much or too little testimony to the jury, such a response may serve to bolster the State's case unnecessarily. An appellate court should not disturb a trial court judge's decision under Article 36.28 unless a clear abuse of discretion and harm are shown.

Thomas v. State, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016) (citations omitted). As the court of criminal appeals has also explained, this rule attempts

to strike a balance between the need to assist the jury in resolving disputes about the evidence itself, on the one hand, and the concern that trial courts not comment on the weight of the evidence, on the other. *Balderas v. State*, No. AP-77,036, 2016 WL 6496715, at *30 (Tex. Crim. App. Nov. 2, 2016).

“The test for an abuse of discretion . . . is a question of whether the court acted without reference to any guiding rules or principles. The mere fact that a trial judge may decide a matter within its discretionary authority differently than an appellate judge does not demonstrate such an abuse.” *Megason v. State*, 19 S.W.3d 883, 889 (Tex. App.—Texarkana 2000, pet. ref’d). When the jury requests a specific and limited portion of testimony, the trial court does not abuse its discretion by excluding a portion of the testimony that is not responsive to the jury’s specific inquiry. *Ford v. State*, 444 S.W.3d 171, 185 (Tex. App.—San Antonio 2014), *aff’d*, 477 S.W.3d 321 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 2380 (2016); *Arnold v. State*, 234 S.W.3d 664, 677 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Robison v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994)); see also *Render v. State*, 316 S.W.3d 846, 854–55 (Tex. App.—Dallas 2010, pet. ref’d) (holding that when the jury sent a note asking about how certain abuse had occurred, the trial court did not abuse its discretion by excluding testimony about when the abuse occurred in its response).

Appellant points to *Jones* and *Brown* to support his contention that the trial court abused its discretion. *Brown v. State*, 870 S.W.2d 53, 56 (Tex. Crim. App. 1994); *Jones v. State*, 706 S.W.2d 664, 668 (Tex. Crim. App. 1986). Appellant’s

reliance on these cases for that proposition is misplaced, however, as these cases actually support the trial court's ruling here.

Jones stands for the proposition that a trial court should not exclude testimony that is directly related to the issue in dispute. *Jones*, 706 S.W.2d at 668. In *Jones*, the court held that the trial court abused its discretion by limiting its response in such a manner as to exclude testimony that “*clearly bore on the disputed issue.*” *Id.* at 668 (emphasis added).

Brown provides a corollary to *Jones*. In *Brown*, the court found no abuse of discretion where the trial court refused to narrow the testimony because, in that case, the entirety of the testimony selected by the court was necessary to address the dispute identified by the jury in its question. *Brown*, 870 S.W.2d at 56.

Here, the jury's note requested testimony from Andrea and Appellant concerning the “description of the apology” and specifically noted a dispute among the jurors over “what [Appellant] apologized for.” The note therefore focused on what Appellant said to Andrea the morning after the incident, not on how Andrea reacted or what she said in response. Because the trial court in this case strictly complied with article 36.28 by conveying to the jury the “particular point in dispute, and no other” and did not omit testimony that clearly bore on the disputed issue as identified by the jury, we cannot conclude that the trial court abused its discretion by excluding the portion of testimony relating Andrea's

reaction to Appellant's apology. Tex. Code Crim. Proc. Ann. art. 36.28; see *a/so Jones*, 706 S.W.2d at 668. We therefore overrule Appellant's first point.

II. Consolidated court costs

In his second and third points Appellant argues that the "child abuse prevention fee" assessed in accordance with article 102.0186 of the code of criminal procedure and the "consolidated court cost" assessed in accordance with section 133.102(a)(1) of the local government code are unconstitutional. Tex. Code Crim. Proc. Ann. art. 102.0186 (West Supp. 2016) (providing for assessment of \$100 fee upon conviction of certain sex-related crimes); Tex. Local Gov't Code Ann. § 133.102(a)(1) (West Supp. 2016) (providing for assessment of \$133 fee for felony convictions). Appellant asks that we so hold and that we modify the trial court's judgment to delete each of the assessed costs.

Article 102.0186 provides that a person convicted of certain sex-related crimes, including indecency with a child, shall pay \$100 on conviction of the offense to be deposited in a "child abuse prevention fund" administered by the commissioners court of the county in which the trial court is located. Tex. Code Crim. Proc. Ann. art 102.0186.

Section 133.102 states that the comptroller must allocate the court costs received under that section to fourteen accounts and assigns percentages to each account. Tex. Local Gov't Code Ann. § 133.102(e). Appellant specifically complains of the percentage allocations of funds to "abused children's

counseling,” *id.* § 133.102(e)(1), “law enforcement officers standards and education,” *id.* § 133.102(e)(5), and “comprehensive rehabilitation,” *id.* § 133.102(e)(6).

Appellant contends that article 102.0186 and the selected provisions of section 133.102 are unconstitutional because they violate the separation of powers clause of the Texas Constitution and allow money to be gathered and spent for purposes that are too remote from criminal justice. See Tex. Const. art. II, § 1; *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015) (“[I]f the statute under which court costs are assessed . . . provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not . . . violat[e] . . . the separation of powers clause.” (footnote omitted)), *cert. denied*, 136 S. Ct. 1188 (2016).²

A. Sections 133.102(e)(1) and (6)

In its recent decision in *Salinas v. State*, No. PD-0170-16, 2017 WL 915525, at *4, *5 (Tex. Crim. App. Mar. 8, 2017), the court of criminal appeals partially upheld the same argument Appellant now advances. In *Salinas*, the court declared section 133.102 facially unconstitutional in violation of the separation of powers clause of the Texas Constitution to the extent it allocates

²The State contends that Appellant has waived his second and third points by failing to raise them first in the trial court, but we have held that these complaints may be raised for the first time on appeal. See *Ingram v. State*, 503 S.W.3d 745, 748 (Tex. App.—Fort Worth 2016, pet. ref’d).

funds from the consolidated fees to the “comprehensive rehabilitation” account and the “abused children’s counseling” account because these subsections do not serve a “legitimate criminal justice purpose.” *Id.* (invalidating Tex. Loc. Gov’t Code Ann. § 133.102(e)(1), (6)). We therefore sustain Appellant’s point to the extent that it complains of the allocation of funds under those two subsections. However, we do not agree that Appellant is entitled to the relief he seeks.

In a letter brief to this court, Appellant argues that he is entitled to a reduction of \$13.07 in the amount of court costs assessed against him. However, as will be explained below, the court of criminal appeals, in addressing the retroactive effect of its holding in *Salinas*, expressly excluded from retroactive application those cases in the appellate posture that this case occupies. *Id.* at *6.

First the court of criminal appeals determined that the *Stovall* test applied to determine retroactivity because the unconstitutional provisions of section 133.102 violated a right of the courts, not any personal right of the defendant. *Id.*; see *Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970 (1967) (noting that retroactivity of new constitutional rule of criminal procedure depends on (1) the new rule’s purpose, (2) how much law enforcement relied on the old rule, and (3) the effect retroactivity would have on the administration of justice). The court of criminal appeals held that all three *Stovall* factors weighed against retroactivity, observing that (a) the purpose of requiring a defendant to pay a fee has “nothing to do with the truth-finding function of a criminal trial,” (b) the State’s

reliance interest in the statutorily-provided revenue stream is significant, and (c) imposing the holding retroactively could “create large administrative burdens on court clerks throughout the state.” *Salinas*, 2017 WL 915525 at *6.

Yet, recognizing “the need to reward parties who persuade a court to overturn an unconstitutional statute,” the court concluded that its holding applied retroactively *only* to the parties before it and “to any defendant who ha[d] raised the appropriate claim in a petition for discretionary review before the date of [the *Salinas*] opinion,” if the petition was pending on the date of the opinion. *Id.* The court of criminal appeals further emphasized in a footnote that only those cases pending in its court as of the date of the opinion were appropriate for relief. *Id.* at *6, n.54.

Thus, although we recognize that the court of criminal appeals has held that the provisions of section 133.102 allocating funds to the “comprehensive rehabilitation account” and the “abused children’s counseling account” are unconstitutional, Tex. Local Gov’t Code Ann. § 133.102(e)(1), (6); *Salinas*, 2017 WL 915525, at *4, *5, we nevertheless must follow the directive of the court of criminal appeals which precludes us from retroactively modifying Appellant’s court costs to delete those fees.³ *Id.* See also *Hawkins v. State*, No. 02-16-

³To the extent that the dissent suggests that the Supreme Court’s holding in *Griffith v. Kentucky* precluded the application of *Stovall*’s retroactivity analysis in *Salinas*, we point out that the concern expressed in *Griffith* related to the conducting of trials using different standards and rules. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987) (holding that “a new rule *for the conduct of criminal prosecutions* is to be applied retroactively to all cases, state

00104-CR, 2017 WL 1352097, at *2 (Tex. App.—Fort Worth Apr. 13, 2017, no pet. h.) (recognizing that the *Salinas* decision precludes us from modifying the trial court’s judgment to delete court costs held unconstitutional in that decision).

B. Section 133.102(e)(5) and article 102.0186

Appellant additionally argues that section 133.102(e)(5) of the local government code, which allocates funds to “law enforcement officers standards and education,” and article 102.0186 of the code of criminal procedure, which allocates funds to “child abuse prevention,” are unconstitutional for the same reasons he argues with respect to sections 133.102(e)(1) and (6).

We have previously rejected the precise challenges brought by Appellant to both section 133.102(e)(5) and article 102.0186 and held that both are facially constitutional. *Ingram*, 503 S.W.3d at 748–49. Since the issuance of *Salinas*, we have also rejected the exact challenges brought by Appellant to section 133.102(e)(5). *Hawkins*, 2017 WL 1352097, at *2. In so doing, we noted that *Salinas* did not change the applicable test we use to determine whether a statute requiring the collection of fees in a criminal case violates the separation of powers clause. *Id.* (citing *Salinas*, 2017 WL 915525, at *2). Accordingly, we decline Appellant’s invitation to revisit these issues, and therefore again hold that

or federal, pending on direct review or not yet final”) (emphasis added). As the court of criminal appeals has held that the unconstitutional provisions of section 133.102 violated a right of the courts, not any personal right of any defendant, it does not appear to us that the holding in *Salinas* is at odds with the holding in *Griffith*. *Salinas*, 2017 WL 915525, at *6.

section 133.102(e)(5) and article 102.0186 are facially constitutional. We therefore overrule the remainder of Appellant's second and third points.

Conclusion

Having sustained Appellant's third point to the extent that sections 133.102(e)(1) and (6) are unconstitutional but also recognizing the limitation placed on our ability to reform Appellant's judgment to delete the costs related to those sections, and having overruled the remainder of Appellant's points, we affirm the judgment of the trial court.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

EN BANC

LIVINGSTON, C.J., filed a dissenting opinion in which MEIER, J., joins.

PUBLISH

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