

reasons set forth above, as well as Applicant's arguments regarding the factual insufficiency of the evidence to support his conviction, Applicant's inability to confront Llamas and cross-examine her on her statements, impeach her credibility and habits, and given, the State's emphasis upon the validity of her testimony and her credibility as a witness in closing arguments before the jury, ("they can't touch her,") one cannot conclude that the trial court's violation of Applicant's constitutional rights to confrontation did not contribute beyond a reasonable doubt to the jury's decision to find him guilty. *Van Arsdall*, 106 S.Ct. at 1435-1436.

This Court must reverse Applicant's judgment of conviction because the error can not be characterized as harmless beyond a reasonable doubt. TEX. R. APP. P. ANN.. 44.2(a) (Vernon Pamph. 2000); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, Applicant prays that the judgment and sentence be reversed. TEX. CODE CRIM. PROC. ANN. art. 44.29(a).

CLAIM FOR RELIEF NUMBER FORTY

THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR BY NOT ALLOWING APPLICANT'S COUNSEL TO PRESENT EVIDENCE THAT SHORTLY BEFORE HER DEATH, COMPLAINANT HAD INSTRUCTED DEE DEE HUGHES, A WITNESS, NOT TO TELL ANYONE THAT COMPLAINANT AND APPELLANT WERE OBSERVED "TOGETHER," IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS TO PRESENT A DEFENSE.

Darlene Hughes, a.k.a. "Dee Dee," testified that she had known Applicant for approximately 22-23 years. Specifically, Hughes recounted her meeting with Applicant and the complainant in a convenience store prior to complainant's death, that is, after January 1, 1987 and before February 14, 1987. (RR, 24, 221). Hughes conversed with both Applicant and complainant at the convenience store; "[Applicant] was making fun of my weight." (RR, 24, 222).

Upon the State's hearsay objection, and despite counsel's response that this evidence was not hearsay and was "not offered for the truth of the matter," the trial court precluded Hughes from telling the jury that the complainant had instructed her "not to tell anyone that she had seen them [complainant and Applicant] together." (RR, 24, 222).

Applicant's counsel presented a Bill of Exception to the court regarding complainant's instructions to Hughes to keep her secret, not to tell anyone that she had seen complainant and Applicant "together." (RR, 28, 9).

In its closing arguments to the jury at the close of the guilt/innocence phase of trial, the State attacked Applicant's defense of a consensual sexual relationship with the complainant, as follows:

"... It is all about consensual sex. That's what they insinuated all week long, because they ain't got the courage [sic] to be man enough to stand in here and say it to you face-to-face is a different thing. But that's what they have been trying to say all week.

And you know what? If you forget everything else that I say today

besides intent being this quick ... don't forget this point. All of their questions in the whole wide world don't make it evidence.

And all of their questions and all of their hopes and all of his wishes that he could make it evidence that they had a consensual relationship, that he and Michelle [complainant] were more than just friends, all of those questions and insinuations and sort of arguments don't make it evidence because there ain't one shred of evidence in this trial and not one word of testimony from the stand that ever told you she ever so much as gave this man a kiss. Nothing.

Don't you think that if there had been a relationship, a true sexual relationship between this defendant and Michelle Shadbolt, his brothers and sisters would have known about it? Did they bring them in to tell you there was such a thing? Hell, no. Because it didn't exist." (RR, 25, 70,71)

Applicant notes that it is ironic that the State stressed the fact that Applicant's family members did not testify about this "secret" relationship with complainant. First, Applicant was precluded from "explaining" this fact via Hughes' testimony that complainant wanted this relationship kept secret. Second, it is noteworthy that in his testimony, Michael Masters, complainant's brother, stated that he was unaware that complainant and Jack Shadbolt were estranged at the time of her death! (RR 19, 81). Third, the State elicited testimony from Kathy Masters that while complainant had been separated from Jack Shadbolt, Masters believed that complainant had no interest in "dating other men." Lastly, Wedgeworth testified on direct examination that he had interviewed complainant's family regarding her relationship with Applicant. Hughes' testimony could have refuted and explained the State's evidence as well as presented Applicant's defense to the trial court's publication of Applicant's own statement, SX 2, denying a "relationship" with the complainant.