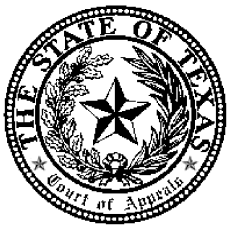
Affirmed and Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01145-CR

MICHAEL JOSEPH BITGOOD EASTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 478,155

O P I N I O N

This is an appeal from an order revoking appellant Michael Joseph Bitgood Easton's probation on a conviction of third degree theft. Primarily at issue in this case is the validity of appellant's waiver of counsel and the sufficiency of the trial court's admonishments regarding self-representation. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant's conviction is based on events that occurred in March 1986, at Gordon's Jewelry Store located in the Westwood Mall in Houston, Texas. After browsing through the store, appellant showed interest in a man's three-carat diamond ring with a retail value of

$4,500. After trying the ring on his finger, appellant proceeded to fill out a credit application. While waiting for his credit to be approved, appellant left the store with the ring and never returned. Sometime thereafter, appellant brought the ring to another jeweler for an appraisal. That jeweler recognized the ring as the one missing from Gordon's Jewelers.

Following an investigation, appellant was indicted of third degree theft in June 1987, and convicted by a jury in February 1990. Appellant requested community supervision, but the court advised him that he would be unable to receive that sentence from the jury due to a deferred adjudication for a prior felony. Appellant waived his right to have his sentence determined by the jury, and the trial court assessed punishment at ten years' confinement, probated for ten years, and assessed a fine of $1,000. After sentencing, appellant filed a motion for new trial based upon the State's alleged suppression of exculpatory evidence. The trial court denied the motion.

Appellant filed a notice of appeal with the Eastland Court of Appeals contending that the State had suppressed exculpatory evidence and the trial court erred 1) by overruling his motion for new trial and 2) in ruling that appellant was not eligible to receive community supervision from the jury. In an unpublished opinion, the Eastland Court of Appeals affirmed in part, reversed in part, and remanded the case as to punishment. *See Easton v. State,* No. 11-90-062-CR (Tex. App.–Eastland [11th Dist.] 1991, pet. ref'd.) (unpublished). On remand, appellant did not elect to have a jury assess his punishment. Instead, the trial court sentenced appellant to ten years' community supervision, the same sentence assessed in the earlier 1990 proceeding. In February 1996, appellant appealed and in a published opinion, the First Court of Appeals affirmed appellant's conviction. *See Easton v. State,* 920 S.W. 2d 747 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd).

In March 1999, the State filed a motion to revoke appellant's probation based upon an alleged violation of federal laws. In May 1999, appellant was convicted in federal court for bankruptcy fraud and sentenced to twenty-seven months in the federal penitentiary. Before the hearing on the State's motion to revoke appellant's probation for the state court

theft conviction, appellant, who is not a lawyer, expressed his desire to proceed without an attorney. The court allowed him to do so. While representing himself, appellant filed and presented a motion to recuse Judge Brian Rains, the presiding judge. The trial court overruled the motion to recuse. Very shortly thereafter, appellant rescinded his request for the self-representation and the trial court appointed counsel to represent appellant. The court made this appointment prior to the revocation hearing.

On July 22, 1999, appellant, represented by counsel, entered a plea of "true" to the allegations in the State's motion to revoke probation. The trial court, after a hearing on the motion, sentenced the appellant to three years' confinement, to run concurrently with his federal sentence. The court also imposed a fine of $1,000.

II. ISSUES PRESENTED ON APPEAL

Appellant relies on the following arguments in seeking a reversal of his conviction: (1) his waiver of counsel was not reduced to writing as required by Article 1.051(f) and (g) of the Texas Code of Criminal Procedure; (2) the trial court failed to admonish him of the dangers and disadvantages of self-representation; and (3) the trial court erred in denying his motion to recuse the trial judge.

III. DISQUALIFICATION AND RECUSAL OF TRIAL JUDGE

In points of error three through five, appellant, alleging several grounds of disqualification, contends the trial court erred in denying his motion to recuse. Specifically, appellant alleges that the trial judge was disqualified from acting because (1) he was a prosecutor at the time appellant was indicted (2) the judge had predetermined appellant's punishment in the event of a revocation and (3) the judge was biased and prejudiced.

The standard of review for the denial of a motion to recuse is whether the trial court abused its discretion. *See Aguilar v. Anderson*, 855 S.W.2d 799, 801 (Tex. App.–El Paso 1993, writ denied). The test for an abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Id.* The fact that the trial court decided the issue

differently than the reviewing court would have does not indicate an abuse of discretion. *Id.* Nor does a mere error in judgment rise to such level. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985).

A. Prior Participation as Counsel

First, appellant contends that because the trial judge was a prosecutor at the time appellant was indicted, the judge is disqualified. The record reflects that when appellant was indicted in 1987, his case was assigned to the 177th District Court. At that time, Judge Rains was a prosecutor for the Harris County District Attorney and was assigned to the 176th District Court. Later, appellant's case was randomly transferred into the 176th District Court, after Judge Rains took the bench.

Article V, Section 11 of the Texas Constitution states in pertinent part, "No judge shall sit in any case . . . when he shall have been counsel in the case . . . " Article 30.01 of the Texas Code of Criminal Procedure provides in pertinent part, "No judge or justice of the peace shall sit in any case . . . where he has been of counsel for the State or the accused . . . ." Both of these provisions have been held to be mandatory. *See Hathorne v. Sate*, 459 S.W.2d 826 (Tex. Crim. App. 1970). A judge is clearly disqualified if he has acted as counsel in the trial of the defendant for the identical offense, or if, as prosecuting attorney, he actively participated in the preparation of the case against the defendant. *See Gamez v. State*, 737 S.W.2d 315, 319 (Tex. Crim. App. 1987). However, the mere fact that a judge was a district attorney at the time the accused was indicted does not work a disqualification if, while a district attorney, the judge had nothing to do with the prosecution. *Id.* (citing Tex. Jur. 3d, Vol.21, Crim. Law, § 1858, pp. 766). The judge must have actually participated in the very case that is before him. *Gamez v. State*, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987). The Texas Court of Criminal Appeals held in *Muro v. State,* that the trial judge was not disqualified although he was the district attorney at the time of indictment because the case did not come within his assignments and he had no recollection of the case. 387 S.W.2d 674 (Tex. Crim. App. 1965); *see also Prince v. State*, 252 S.W.2d 945 (Tex. Crim. App.

1952). To be considered "counsel in the case" the judge must actually have participated, investigated, or rendered advice. *Hathorne,* 459 S.W.2d at 826; *see also Lee v. State*, 555 S.W.2d 121 (Tex. Crim. App. 1977) (stating that judge must actively participate as counsel to later be disqualified from sitting on that same case).

The record clearly shows that Judge Rains did not participate in any way in appellant's case at the time he worked for the Harris County District Attorney prosecuting unrelated cases in the 176th District Court. Thus, we overrule appellant's third point of error.

B. Predetermination of Punishment

Next, appellant contends that the trial judge was disqualified from acting because he already had predetermined appellant's punishment in the event of a revocation of probation. It is a denial of due process for a trial court to arbitrarily refuse to consider the entire range of punishment for an offense or to refuse to consider mitigating evidence and impose a predetermined punishment. *McClenan v. State,* 661 S.W.2d 108, 110 (Tex. Crim. App. 1983); *see also Burke v. State*, 930 S.W.2d 230, 234 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). Appellant alleged in his motion to recuse, that at the conclusion of the punishment phase of the trial, the trial judge made the following statement:

> Let me assure you, Mr. Easton, that if you violate any of the terms and conditions of this probation and if you think that you don't have to take this serious because you don't think that you are guilty, I will tell you that I take it serious. If you violate any conditions of your probation, you are looking at ten years.

Appellant argues these remarks show that the trial judge had predetermined his punishment in the event of a revocation of his probation. Other than appellant's motion for recusal, there is nothing in the record tending to suggest that Judge Rains predetermined appellant's sentence. There was no evidence presented to the judge who heard appellant's motion to support the allegation that Judge Rains arbitrarily refused to consider the entire range of punishment. Moreover, there is nothing in the record that indicates appellant was denied due process. In fact, appellant alleges that Judge Rains had predetermined his

punishment by stating that he would get the full ten years in the event of a revocation of probation, and he actually received only a fraction of that sentence.

Appellant relies on *Jefferson v. State* and *Howard v. State* to support his argument. 803 S.W.2d 470, 471 (Tex. App.–Dallas 1991, pet. ref'd); 830 S.W.2d 785, 787 (Tex. App.–San Antonio 1992, pet. ref'd). In both *Jefferson* and *Howard*, the trial judge promised the defendant that if he did not comply with the terms of his probation, he would be sentenced to a particular number of years in prison, which he received. *Howard*, 830 S.W.2d at 787; *Jefferson*, 803 S.W.2d at 471-72. In *Jefferson*, the judge promised the defendant a twenty year sentence and to be sure that the defendant received what was promised, the judge had the probation officer note on the defendant's records what had been promised. Later, after defendant's probation was revoked, the only thing the judge did before he assessed punishment was ask the probation officer what was written in the defendant's records. 803 S.W.2d at 472. Similarly, in *Howard*, the judge said the defendant would receive 99 years in the event he violated his probation, which was the precise sentence the court imposed as punishment at the defendant's revocation hearing. Furthermore, the judge refused to consider any mitigating evidence. 830 S.W.2d at 787. In both cases, the defendant's conviction was reversed because the appellant was denied due process.

Unlike the cases on which the appellant relies, appellant did not receive the sentence that was purportedly promised to him at the initial punishment hearing. Appellant was sentenced to only three years when he could have been sentenced to ten years. Under these circumstances, we cannot say that the trial court arbitrarily refused to consider the entire range of punishment before sentencing appellant to three years' confinement. *See, e.g., Sanchez v. State*, 989 S.W.2d 409, 411 (Tex. App.–San Antonio 1999, no pet.) (finding that predetermination of sentence violates due process when a trial court actually assesses the punishment at the time of revocation which is consistent with the punishment it announced it would assess in the event of a revocation). Thus, we overrule appellant's fourth point of error.

C. Bias and Prejudice

In his fifth point of error, appellant contends the trial judge should have been disqualified on grounds that he was partial, biased, and prejudiced against appellant. Appellant contends the judge disliked him for several years and also engaged in *ex parte* communications.

Recusal occurs in situations where "a judge voluntarily steps down on motion of a party for reasons other than those enumerated as disqualifying in the constitution." *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. App.– Houston [14th Dist.] 1996, pet. ref'd). Bias is not listed as a proper ground for disqualification under the Texas Constitution or the Texas Code of Criminal Procedure. The Court of Criminal Appeals, however, has found judicial bias to be a common law basis for disqualification when the bias is of such character that it denies a defendant due process. *See McClenan v. State*, 661 S.W.2d 108, 111 (Tex. Crim. App. 1983). When bias is alleged as grounds for recusal, the movant must come forth with facts sufficient to establish that a "reasonable person, knowing all circumstances involved, would harbor doubts about the impartiality of the trial judge." *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992).

An order denying a motion to recuse is reviewed for an abuse of discretion. *See* TEX. R. CIV. P. 18a(f) (Vernon 1999).[1] Where a party challenges a denial of a recusal motion based on alleged bias or impartiality, the party must show that this bias arose from an extrajudicial source and not from actions during the pendency of the trial court proceedings, unless these actions during proceedings indicate a high degree of favoritism or antagonism that renders fair judgment impossible. *Kemp*, 846 S.W.2d at 305; s*ee also Liteky v. U.S.*, 510 U.S. 540, 555 (1994)). Although a judge may be exceedingly ill-disposed towards a party after gaining knowledge of facts during the proceedings, the judge is not thereby subject to

[1] In *Arnold v. State*, the Texas Court of Criminal Appeals expressly held that TEX. R. CIV. P. 18a applies to criminal cases absent "any explicit or implicit legislative intent indicating otherwise." 853 S.W. 2d at 543. (Tex. Crim. App. 1993) (en banc) (citing *McClenan*, 661 S.W.2d at 110)).

recusal for bias or prejudice because the knowledge was acquired in the course of proceedings. *Id*. Recusal based on bias or prejudice generally involves bias arising from an extrajudicial source; however, an unfavorable disposition towards a party arising from events occurring during judicial proceedings may nonetheless support recusal if "it is so extreme as to display a clear inability to render fair judgment." *Id*. at 552.

Applying the extrajudicial source rule to the facts of this case, appellant has not demonstrated an abuse of discretion. Appellant has failed to show that any bias the trial judge may have had was based on an extrajudicial source rather than based on appellant's participation in the case. In fact, appellant has offered only his motion with supporting affidavits, which is not evidence, to support the allegation that the trial judge was biased. *See, e.g., Lamb v. State,* 680 S.W.2d 11, 13 (Tex. Crim. App. 1984); *see also Bahlo v. State,* 707 S.W.2d 249, 251 (Tex. App.–Houston [1st Dist.] 1986, pet. ref'd).

Over the twelve-year period preceding the recusal hearing, appellant had several interactions with Judge Rains, both in court and out of court. While the record reflects that Judge Rains was, at times, frustrated and even angry with appellant, there is nothing to suggest any bias or prejudice on the judge's part. Judicial remarks during the course of a trial that are critical, or even hostile, ordinarily do not support recusal. *See, e.g. Ludlow v. DeBerry,* 959 S.W. 2d 265, 271 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (citing *Liteky v. U.S.,* 510 U.S. 540 (1994)). Moreover, none of the statements by Judge Rains indicate such a "high degree of favoritism or antagonism as to make fair judgment impossible." *Ludlow*, 959 S.W.2d at 283.

We find no abuse of discretion for denial of the recusal motion based on alleged bias or prejudice of the trial judge. Accordingly, we overrule appellant's fifth point of error.

IV. WAIVER OF COUNSEL

Both the Sixth Amendment of the United States Constitution and Article 1, Section 10 of the Texas Constitution provide a defendant in a criminal case the right to assistance of

counsel. This right, however, may be waived, and a defendant may choose to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 819-20 (1975). Courts will not lightly infer a waiver of the right to counsel and will indulge every reasonable presumption against the validity of such a waiver. *See Geeslin v. State*, 600 S.W.2d 309, 313 (Tex. Crim. App. [Panel Op.] 1980). To be effective, a waiver of counsel must be made competently, knowingly and intelligently, and voluntarily. *Collier v. State*, 959 S.W.2d 621, 625-26 (Tex. Crim. App. 1997) (1998) (citing *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993)). This means the defendant must have (1) a full understanding of the right to counsel and (2) a meaningful awareness of the dangers and disadvantages of self-representation. *Collier*, 959 S.W.2d at 626; *see also Blankenship v. State*, 673 S.W.2d 578, 583 (Tex. Crim. App. 1984). These are two distinct requirements and the trial court must be satisfied as to their existence before allowing a defendant to represent himself.

A. Writing Not Required for Waiver of Right to Counsel

In his first point of error, appellant contends that the trial court erred in allowing him to represent himself without first securing a written waiver of right to counsel under Article 1.051(f) and (g) of the Texas Code of Criminal Procedure. These statutory provisions state:

> (f) A defendant may voluntarily and intelligently waive in writing the right to counsel.
>
> (g) If a defendant wishes to waive his right to counsel, the court shall advise him of the dangers and disadvantages of self-representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:
>
> > 'I have been advised this __ day of ____, 19__, by the (name of court) Court of my right to representation by counsel in the trial of the charge pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an

> attorney being appointed for me. I hereby waive my right to counsel. (signature of the defendant)' "

See TEX. CODE CRIM. PROC. ANN. art. 1.051(f) and (g) (Vernon 1999).

Waiver of the constitutional right to counsel need not be in writing to be effective. *See, e.g., Gallegos v. State*, 425 S.W.2d 648, 650 (Tex. Crim. App. 1968). Although the trial court should secure from the appellant a signed statement in the form prescribed by the statute before allowing the appellant to undertake his own representation, its failure to do so will not provide grounds for reversal where the record is otherwise sufficient to demonstrate effective waiver of counsel. Because the statutory language is discretionary rather than mandatory, when "an accused affirmatively asserts his rights to self-representation under *Faretta*, a written waiver of the right to counsel is not required under the statute." *Burgess v. State*, 816 S.W.2d 424, 429 (Tex. Crim. App. 1991). *Id.* Therefore, the failure to reduce an otherwise valid waiver to writing does not result in error. Accordingly, we overrule appellant's first point of error.[2]

B. Proper Admonishments Required for Waiver of Right to Counsel

Appellant contends the trial court failed to properly admonish him as to the dangers and disadvantages of self-representation. Although there is no specific line of questioning the court must follow, the record must reflect that the trial court gave admonishments regarding the dangers and disadvantages of self-representation. *See Blankenship v. State*, 673 S.W.2d 578, 583 (Tex. Crim. App. 1984). Specifically, the trial court should make the accused aware of the general nature of the offense charged and the responsibilities that go along with self-representation, i.e., one who represents himself must comply with the rules

[2] As an aside, appellant argues that it was additional error for the trial court to deny him standby counsel. This argument is without merit. The Texas Court of Criminal Appeals has held that it is not unfair for a trial court to require a defendant to choose between going to trial with counsel or proceeding *pro se*. *See Burgess*, 816 S.W.2d at 428. Moreover, it is within the trial court's discretion to grant standby counsel after the defendant has elected to represent himself. *See id; see also Hathorn v. State*, 848 S.W.2d 101(Tex. Crim. App. 1993) (holding that while there is no absolute right to hybrid representation, the court in its discretion may allow such a form of representation). Appellant has alleged no action by the trial court that would constitute an abuse of discretion.

of evidence and criminal procedure and will receive no special consideration by virtue of self-representation. *Calcarone v. State*, 675 S.W.2d 785, 786 (Tex. App.–Houston [14th Dist.] 1984, no pet.).

Although the record is not completely silent, there are only sparse references to appellant's decision to proceed without counsel. The trial court asked whether appellant had any formal legal training and whether he had any experience in representation in any criminal cases. Appellant replied that he had neither. The trial court questioned appellant as to whether he felt he had "sufficient knowledge" to proceed and appellant responded affirmatively. With that, the court allowed him to proceed *pro se*.

The trial court could have reasonably concluded that appellant voluntarily waived his right to counsel; however, for the waiver to have been valid, the court also would have needed to make appellant aware of the consequences of his decision by informing him of the dangers and disadvantages of self-representation. To determine whether a defendant is aware of the consequences of the decision to waive counsel in favor of self-representation, the trial court should inquire into the defendant's background, age, education, and experience. *Renfro v. State*, 586 S.W.2d 496, 500 (Tex. Crim. App. 1979). The trial court is not obligated to assess a defendant's technical legal knowledge, but the court's inquiries must be sufficient to ensure that the defendant appreciates the practical disadvantage he will confront in representing himself. *Trevino v. State*, 555 S.W.2d 750 (Tex. Crim. App. 1977). As stated in *Webb v. State* "[t]he trial court should . . . admonish an accused who desires to represent himself regarding the wisdom and the practical consequences of that [desire]." 533 S.W.2d 780, 786 (Tex. Crim. App. 1976). In short, the defendant must be aware that "he will be on his own in a complex area." *Trevino v. State*, 555 S.W.2d at 752. The facts demonstrating the defendant's awareness must affirmatively appear in the record. *Id.*

The court below failed to make a sufficient inquiry into the appellant's age, experience, background, or education. There is nothing in this record to indicate appellant was aware of the general nature of the offense for which he was charged or the possible

penalties that could be imposed. *See, e.g., Goodman v. State,* 591 S.W.2d 498, 500 (Tex. Crim. App. 1980). Nor does the record affirmatively demonstrate that appellant was aware that there are technical rules of evidence and procedure or that he would be obligated to comply with these rules. There is nothing to suggest that appellant understood that the court would grant him no special consideration because of his lack of formal training in the law or is unfamiliarity with technical rules of practice and procedure. The court also failed to warn the appellant of the practical consequences of his decision to waive counsel. *See, e.g., Privett v. State*, 635 S.W.2d 746, 750 (Tex. App.–Houston [1st Dist.] 1982, pet. ref'd.) (citing *Faretta*, 422 U.S. at 833, n. 43). Among these are the following:

> (1) lack of skill may cause him to waive any error existing in the indictment or other instrument charging him with an offense;
>
> (2) his lack of evidentiary knowledge may lead to the waiver of errors in the admission and exclusion of evidence;
>
> (3) he may be convicted upon incompetent, irrelevant or otherwise inadmissible evidence;
>
> (4) he faces the danger of conviction, despite that he is not guilty, because he does not know how to establish his innocence;
>
> (5) in all but an extraordinarily small number of cases, an accused who undertakes self representation, will lose whatever defense he may have;
>
> (6) he specifically foregoes the right to the effective assistance of counsel, and may not be heard later to complain on this ground;
>
> (7) in the sense that assistance of counsel is essential to a fair trial and due process of law, he likewise relinquishes those guarantees; and
>
> (8) he loses other benefits such as selection of an impartial jury, a fair final argument by the State, errorless instructions to the jury including any defensive issues.
>
> *Id.* (citations omitted).

Although there is evidence that appellant had represented himself on civil matters in the past, he had not undertaken any self-representation in a criminal proceeding. *See, e.g., Jordan v. State*, 571 S.W.2d 883 (Tex. Crim. App. 1978) (holding that defendant's prior experience was not sufficient to show capacity for waiver). Nothing in the record

demonstrates that appellant had an appreciation of the risks inherent in his decision to represent himself in a criminal prosecution. Furthermore, at the end of the hearing, appellant requested standby counsel, which the court denied.[3]

The record must reflect sufficient admonishment prior to any act of self-representation. *See Goffney v. State*, 843 S.W.2d 583, 584 (Tex. Crim. App. 1992). Because the record does not reflect that the appellant received sufficient admonishments prior to his self-representation at the recusal hearing, we find the trial court's admonishments were insufficient.

All trial errors, even constitutional errors and those relating to mandatory requirements are subject to a harmless error analysis,[4] unless the errors are those that the United States Supreme Court has characterized as "structural errors." *See High v. State*, 964 S.W.2d 637, 638 (Tex. Crim. App. 1998). Structural errors are defined to include "the total deprivation of the right to counsel at trial, a judge who is not impartial, unlawful exclusion of members of the defendant's race from the grand jury, the right to self-representation, and the right to a public trial." *See Arizona v. Fueminante,* 499 U.S. 279, 307 (1991) (recognizing that most constitutional errors are subject to a harmless error analysis). Thus, although we find the trial

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[3] A request for hybrid representation is not necessarily inconsistent with assertion of the right to self-representation. *Burgess*, 816 S.W.2d 424, 431 n. 2. However, as part of its admonishments, the trial court should make it clear to the defendant that in the event he chooses to proceed *pro se*, he does not have a right to standby counsel and inform him that it is in the court's discretion. "Thereafter, if he continues to insist on conducting his own defense, but only with the selective aid of counsel, it may be said his assertion of the right to self-representation is 'conditional' and thus, equivocal–but not before." *Scarbrough v. State,* 777 S.W.2d 83, 93 (Tex. Crim. App. 1989) (en banc). Here, after the appellant requested appointment of standby counsel, the court merely replied, "That won't happen. You either take the appointed lawyer or hire a lawyer or represent yourself. No hybrid representation." Appellant replied, "I'm requesting standby counsel under *Faretta v. California.*" The trial court did not respond. The trial court should have made it clear to appellant that it was in its discretion to appoint standby counsel and inquire further into whether appellant's request meant that he was not sure of the dangers and disadvantages of proceeding without counsel.

[4] Although the court performed no harm analysis in *Goffney*; that case was decided prior to the adoption of the new appellate rules in 1997. We apply Texas Rule of Appellate Procedure 44.2. *See Abrego v. State,* 977 S.W.2d 835, 839 n.4 (Tex. App.–Fort Worth 1998, pet. ref'd) (citing Court of Criminal Appeals Final Approval of Revisions to the Texas Rules of Appellate Procedure, no.2 (Tex. Crim. App. Sept. 1, 1997). Because we determine that it would not work in an injustice in this case, we apply Rule 44.2.

court's admonishments insufficient, we find this error to be a non-structural constitutional error subject to a harm analysis. *See Fulbright v. State*, 41 S.W.3d 228, 235 (Tex. App.– Fort Worth 2001, pet. ref'd.) (holding that failing to give sufficient admonishments to a defendant proceeding *pro se* is subject to a harm analysis).[5] In cases asserting constitutional error, we apply Rule 44.2(a) and determine whether the trial court's failure to admonish appellant was harmless beyond a reasonable doubt. *See Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997). We must reverse the trial court's judgment unless we determine beyond a reasonable doubt that the error did not contribute to appellant's conviction or punishment. TEX. R. APP. P. 44.2(a); *see also Manley v. State*, 23 S.W.3d 172, 178 (Tex. App.–Waco 2000, pet. ref'd).

Of great significance is the fact that the *only* proceeding at which appellant was without counsel was the recusal hearing. At all other relevant times, appellant was represented by counsel. Therefore, our focus in conducting the harm analysis is the impact, if any, of appellant's self-representation during this very brief period of time encompassing the one hearing on the motion to recuse. Although appellant had never represented himself in criminal cases before assuming his own representation in this case, there are other factors tending to show that the lack of admonishments did not harm him. It is apparent from appellant's comments to the trial court that appellant intended to represent himself, with or without standby counsel.[6] At the recusal hearing, appellant made his own objections, called and examined witnesses who were present, responded to the State's objections and presented his own closing argument. Appellant had represented himself in several civil matters and expressed confidence in his own abilities. Most importantly, however, appellant's lack of counsel at the recusal hearing was not a factor in the outcome of appellant's revocation

[5] Failure to give proper admonishments to a defendant before he enters a voluntary guilty plea, although of constitutional dimension, is subject to a harm analysis. *See Matchett v. State*, 941 S.W.2d 922, 929 (Tex. Crim. App. 1996) (en banc).

[6] It is apparent that appellant has a history of representing himself. Although not a lawyer, appellant worked as a paralegal or legal assistant. The record reflects he has been reprimanded several times for practicing law without a license.

hearing.

Under the facts of this case, the outcome of the revocation of probation hearing would be no different had appellant been more thoroughly admonished and, as a result, decided not to represent himself at the recusal hearing. Because appellant was represented by counsel at the revocation hearing, the trial court's failure to provide sufficient admonishments in connection with appellant's self-representation at the recusal hearing had no impact at all on the outcome of the case. Appellant received a three-year sentence when he could have received the full ten-year sentence. We find beyond a reasonable doubt that the trial court's error did not contribute to the revocation of appellant's probation or punishment. Appellant's second point of error is overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed October 25, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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