

Review of Recent Juvenile Cases (2007)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Statements made by complainant to witness were not hearsay where respondent's counsel suggested complainant's testimony was fabricated or the subject of improper influence. [In the Matter of F.E.C.](07-2-17)

On September 13, 2007, the San Antonio Court of Appeals held that the prior consistent statement by complainant was not hearsay because it was consistent with her testimony and was offered to rebut an express or implied charge against her of recent fabrication or improper influence or motive.

¶ 07-2-17. **In the Matter of F.E.C.**, ___ S.W.3d. ___, No. 04-05-00830-CV, 2006 Tex.App.Lexis 11244 (Tex.App.—San Antonio, 9/13/06) rel. for pub. 4/5/07.

Facts: This is an appeal from a juvenile adjudication and order of disposition. A jury found F.E.C., a juvenile, engaged in delinquent conduct by committing the offense of aggravated sexual assault. The trial court assessed punishment of commitment to the Texas Youth Commission ("TYC") for thirty-five years.

F.E.C. contends the trial court abused its discretion when it admitted hearsay evidence in violation of *article 38.072 of the Texas Code of Criminal Procedure* and *rule 801(e)(1)(B) of the Texas Rules of Evidence*. F.E.C. claims that the testimony of complainant's friend, Brandi Fernandez, concerning a statement made to her by complainant about the alleged sexual assault, was inadmissible hearsay and improperly bolstered the State's case.

Held: Affirmed

Opinion: A prior consistent statement is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *TEX. R. EVID. 801(e)(1)(B)*.

During cross-examination, F.E.C.'s counsel questioned complainant about whether complainant's mother and complainant's aunt, who is F.E.C.'s mother, had spoken in three years, whether they get along, and whether there was a property dispute between the two sisters. He asked complainant's sister, Veronica Zuniga, about complainant's mother's motive and whether complainant's mother would "put [complainant] up to say something against [F.E.C.] so that she could get the house." F.E.C.'s counsel continued, "[Y]ou still think that there's no way that [complainant] could have made this up." He asked complainant, "You're not making this up to get back at [F.E.C.]?", and complainant answered, "No." Also, F.E.C.'s counsel asked complainant whether she was changing her story, to which she responded, "No." After a review of the evidence, we believe F.E.C.'s counsel suggested complainant's testimony was fabricated or the subject of improper influence. Accordingly,

Brandi's testimony concerning the alleged sexual assault was admissible to rebut F.E.C.'s charges of recent fabrication and improper motive.

Further, Brandi's testimony did not constitute improper bolstering. Improper bolstering occurs "when one item of evidence is improperly used by a party to add credence or weight to some earlier *unimpeached* piece of evidence offered by the same party." *Guerra v. State*, 771 S.W.2d 453, 474 (Tex. Crim. App. 1988). Here, because F.E.C. attempted to impeach complainant's testimony during his cross-examination, the State did not impermissibly use Brandi's testimony to bolster the complainant's testimony. *See Bolden v. State*, 967 S.W.2d 895, 898-99 (Tex. App.--Fort Worth 1998, pet. ref'd) (noting that admission of prior consistent statement was not bolstering because it was offered to rebut appellant's charge of improper motive); *see also Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Crim. App. 1993) (holding that "evidence that corroborates another witness' story..., in the sense that it has an incrementally *further* tendency to establish a fact of consequence, should not be considered bolstering").

Conclusion: We affirm the trial court's judgment.