Review of Recent Juvenile Cases (2008)

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

Witness with extensive experience and knowledge in the area of body shop estimation was able to testify as an expert.[In the Matter of C.D.S.](08-1-9)

On January 30, 2008, the Waco Court of Appeals held that it was not an abuse of discretion for the trial court to allow witness who had extensive experience and knowledge in the area of body shop estimation to testify as an expert.

¶ 08-1-9. **In the Matter of C.D.S.**, MEMORANDUM, No. 10-07-00226-CV, 2008 Tex.App.Lexis 706, (Tex.App.—Waco, 1/30/08).

Facts: On March 9, 2006, K.W. was a student at the Waxahachie Learning Center where he had a verbal confrontation with a classmate, S.N. K.W. testified that when he left class at 11:35 a.m. that day he saw C.S. along with S.N. and another classmate, D.D., throwing rocks at his truck. He recognized C.S. from seeing him in the halls and in his classroom, although C.S. is not a student in [*2] his class. K.W. testified that the three boys were throwing rocks at the passenger side of the truck and then, as he drove away, they threw rocks at the driver's side. He later came back to school to get the last names of the boys from his teacher, Isaiah Moreland, because he only knew the boys' first names. He described C.S. to Moreland by saying "He's the one that comes in the classroom every now and again from the classroom that's across the hall."

Following this, K.W. went to the police station, filed a report, and later spoke with Sergeant Gray. He stated that he had two estimates done. The first estimate was at Ellis County Auto Repair, and it was for approximately $4,000. However, his insurance would not cover the work by that body shop, so he took it to Collision Specialists where the final amount of the repair was $4,702.76. When K.W. brought the truck to Collision Specialists there was pre-existing damage to the back quarter panel on the passenger's side, a dent in the tailgate and a dent on the driver's door. K.W. testified that although the pre-existing damage was repaired at the same time as the vandalism damage, he separately paid "about $900" for the pre-existing damage out of pocket and it was not on the bill to the insurance company. Devin Devall, the body shop estimator that evaluated K.W.'s truck testified that he knew of the pre-existing damage to the vehicle but only included the vandalism damage in his estimate.

Held: Affirmed

Memorandum Opinion: C.S.'s first and second issues, in part, contend that Devall's testimony is not legally and factually sufficient to prove the cost of repairs because Devall was not qualified to give an expert opinion on repair costs. A lay opinion about repair costs by an individual who is not competent to give an expert opinion, but is merely giving his "off-the-wall" lay opinion, is not sufficient to prove pecuniary loss. *See Elomary v. State, 796 S.W.2d 191, 193 (Tex. Crim. App. 1990)*. Conversely, an expert opinion on a repair estimate given

by a witness, such as an insurance adjuster, who is qualified to testify as to the fair market value of the expected repair cost is sufficient to prove the pecuniary loss. *See id.*

In this case, Devall, the body shop estimator, testified that the actual cost to repair the vehicle without the pre-existing damage was $4,702.76. The State qualified Devall as an expert by establishing that he had been in the body shop estimation business for over ten years and had specific experience in repairing the type of damage that was done to K.W.'s vehicle. Devall testified that at the time of the incident he was working at Collision Specialists and that he had previously worked for other body shops doing repair estimation. He stated that in terms of training, there is no body shop estimation certification and that most experience comes from on-the-job training. He also testified that when doing estimates, he uses a computer program called Pathways, a standard program used exclusively by all of the body shops he has worked at. Devall testified that he examined and evaluated the damage to K.W.'s truck and felt that the damage was consistent with vandalism done by rock throwing. He testified that he submitted his estimate to the insurance company and that when the vehide was repaired they submitted a check to Collision Specialists. We find that Devall's testimony on the cost to repair the automobile is sufficient to prove the fair market value of that cost. [2]

> 2 The State is not required to prove that the cost of repair was reasonable. *See Kinkade v. State, 787 S.W.2d 507, 509 (Tex. App.--Houston [1st Dist.] 1990, no pet.)*; *Dorado v. State, 943 S.W.2d 94, 96 (Tex. App.--Corpus Christi 1997, no pet.)*. However, this issue is not before us.

C.S. also argues that the repair work included all dents and scratches on the car, including the pre-existing damage to the vehicle. However, Devall and K.W. each testified that repair of the pre-existing damage was billed separately. Additionally, the insurance adjuster's claim report was entered into evidence, indicating that the insurance company had reviewed the body shop estimate and found the damages to be consistent with K.W.'s vandalism claim. Moreover, even after deducting the cost to repair the pre-existing damage to the vehicle--which Devall testified would cost a maximum of $ 1,500--the remaining repair costs still exceeded $ 1,500.

Issue Omitted

Expert Testimony

In his third issue, C.S. asserts that the trial court erred in failing to conduct a "gatekeeper hearing" to determine if Devall was qualified to testify as an expert over his objection. C.S. argues that he objected to Devall's expert testimony, and despite that, the trial court did not act upon its responsibility to be a gatekeeper and evaluate whether Devall's testimony was relevant and reliable to aid the jury. The State argues that C.S. failed to make this particular objection at trial and therefore waived this complaint. When the State's expert, Devall, testified, the prosecutor asked several questions regarding the witness's training and experience and then tendered the witness as an expert. C.S. objected as follows:

> I don't know why he's being tendered as an expert for. Is it for the art of estimating or the body damage? That's not clear here. He's - he just indicated he has no certifications, no formal training. What he does know about is what he picked up in the shop, so we would object to presenting him as an expert.

Trial counsel did not ask the court to conduct a "gatekeeper hearing" outside the presence of the jury. After overruling C.S.'s objection the trial court stated:

> Generally, under Texas law, the witness will go forward as an expert, unless formally objected to or challenged. So he does not necessarily need to be tendered to the Court. So we'll go

> forward. If you have an objection to an opinion, or if you wish to have any type of gatekeeper hearing, you can make the request at the appropriate time.

Even after being prompted, C.S. did not ask the court to conduct a "gatekeeper hearing." Further, when a copy of the estimate performed by Devall, containing his opinions as to the cost of the repair of the vehicle, was entered into evidence, C.S. stated that he had no objection and the exhibit was admitted.

To preserve a complaint for appellate review, a party must make a timely objection, stating the specific grounds of the objection. *TEX. R. EVID. 103(a)(1)*; *TEX. R. APP. P. 33.1(a)*; *In re M. P., 220 S.W.3d 99, 101 (Tex. App.--Waco 2007, pet. denied)*; *see also In re E.M.R., 55 S.W.3d 712, 716 (Tex. App.--Corpus Christi 2001, no pet.)* (holding the appellant failed to preserve a complaint regarding admission of statement by failing to object at trial on the same grounds as he was complaining on appeal). Because C.S. did not ask the trial court to conduct a "gatekeeper hearing," he has failed to preserve this complaint. Furthermore, when the written version of Devall's testimony was admitted without objection, any error was rendered harmless. *Beaumont v. Basham, 205 S.W.3d 608, 622 (Tex. App.--Waco 2006, no pet.)*.

Construing C.S.'s argument as a challenge to Devall's qualifications, we refer to our earlier discussion regarding Devall's knowledge and experience. We review the trial court's admission of expert testimony for an abuse of discretion. *Weatherred v. State, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000)*. Because we have determined that the record established that Devall had extensive experience and knowledge in the area of body shop estimation, we hold that it was not an abuse of discretion for the trial court to allow him to testify as an expert. We overrule C.S.'s third issue.

Conclusion: Having overruled C.S.'s three issues, we affirm the trial court's judgment.

Chief Justice Gray concurs with a note*

* (Chief Justice Gray expressly disagrees with the discussion in footnote 1 regarding preservation of factual sufficiency complaints in juvenile proceedings. The discussion in that footnote, in large part, surrounds two potential issues not presented to us for decision: 1) ineffective assistance of trial counsel for the failure to file a motion for new trial asserting factual insufficiency prior to withdrawal; and 2) lack of the assistance of counsel at a critical stage of the proceedings. We should be more careful to not let those two issues muddy the water on deciding whether in a juvenile proceeding preservation of a factual insufficiency issue must be preserved by a complaint raised in a motion for new trial. For a discussion of the proper method for consideration of that issue, *see In re C.O.S., 988 S.W.2d 760 (Tex. 1999)*. *See also In re B.L.D., 113 S.W.3d 340 (Tex. 2003)*. Of course, as the footnote states, the prior holding of this Court is that "juvenile proceedings are not exempt from this requirement." Further, Chief Justice Gray questions whether the discussion of Devall's expertise in estimating automobile body repair is necessary. Devall is a person with personal knowledge of a relevant fact -- that the actual cost, not an estimate, to repair the vehicle without the pre-existing damage was $ 4,702.76. With these observations, Chief Justice Gray concurs in the judgment of the Court but a separate opinion will not be issued.)