
YEAR 2005 CASE SUMMARIES

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On the day of trial, the State provided the defense with notice it intended to introduce a prior juvenile adjudication during the punishment phase of the criminal trial, which the Court of Appeals held was sufficient notice (Robinson v. State) [05-1-17].

On January 31, 2005, the Dallas Court of Appeals held that notice by the State on the day trial began of the State's intent to introduce evidence of a prior felony adjudication by the criminal defendant was sufficient.

¶ 05-1-17. Robinson v. State, UNPUBLISHED, No. 05-03-01510, 2005 WL 225245, 2005 Tex.App.Lexis ____ (Tex.App.—Dallas 1/31/05) *Texas Juvenile Law* (6th Ed. 2004).

Facts: Jason O'Neal Robinson appeals his conviction by jury of two offenses of aggravated robbery. The jury set punishment at 40 years' imprisonment for each offense. Appellant raises the following four issues on appeal: (1) the State did not give reasonable notice of its intent to introduce a prior juvenile adjudication; (2) the evidence was legally insufficient to sustain his convictions for aggravated robbery; (3) the evidence was factually insufficient to sustain his convictions; and (4) appellant's motion for new trial should have been granted based on unauthorized communications between the bailiff and the jury.

SUFFICIENCY OF THE EVIDENCE [omitted]

NOTICE OF PRIOR ADJUDICATION

In his first point of error, appellant contends that the State did not provide reasonable notice of its intent to introduce a prior juvenile adjudication under Texas Code of Criminal Procedure 37.07, section 3(g). On the morning the trial commenced, the State informed the trial court and appellant that it discovered a prior juvenile offense, but did not have its case number or disposition. Appellant objected to its introduction because it was not included in the State's previous notice of extraneous offenses. The trial court reserved ruling until the punishment phase two days later. At that time, the trial court asked appellant to articulate the harm he suffered by receiving notice of the offense at the start of trial. Appellant's counsel replied that he had not had time "to contact that officer out here to see if his character was good or bad or how he may have discharged it." The trial court overruled appellant's objection, allowing the State to introduce evidence of the prior juvenile adjudication.

In determining whether a trial court erred in admitting evidence, the standard of review is abuse of discretion. *Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex.Crim.App.1999). Article 37.07, section 3(g) of the Texas Code of Criminal Procedure provides as follows:

On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Criminal Evidence.... The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

Tex.Code Crim. Proc. Ann. art. 37.07, § 3(g) (Vernon Supp.2004-05). The obligation of the State to give the notice required by Section 3(g) is not triggered unless and until the defense requests such notice. *Mitchell v. State*, 982 S.W.2d 425, 427 (Tex.Crim.App.1998); *Ford v. State*, 106 S.W.3d 765, 766 (Tex.App.—Texarkana 2003, no pet.). When a document seeks trial court action, it cannot also serve as a request for notice triggering the State's duty under Article 37.07, § 3(g). *Mitchell*, 982 S.W.2d at 427; *Ford*, 106 S.W.3d at 766. The Court of Criminal Appeals has implied and other appellate courts have found that a defendant may comply with the notice requirements of section

3(g) by filing a discovery motion requesting the court to order notice under 37.07 and by securing a ruling on the discovery motion. See *Mitchell*, 982 S.W.2d at 427; *Ford*, 106 S.W.3d at 766; *Henderson v. State*, 29 S.W.3d 616, 625 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd).

Appellant filed a pretrial motion requesting pretrial notice of "any evidence of bad acts or unadjudicated offenses allegedly committed by the Defendant, or for which he may be held criminally responsible, which the State intends to admit before the jury in the sentencing stage under 37.07 T.C.C.P." The trial court subsequently entered a discovery order requiring the State to provide a copy of appellant's criminal history report. Although appellant admits that his motion did not trigger the State's duty under Article 37.07, he contends that the trial court's discovery order did.

Although appellant filed a discovery motion asking the court to order notice under Article 37.07, we do not find that the trial court ruled on his motion and ordered the State to give notice. The trial court simply ordered the State to provide a copy of appellant's criminal history report, but did not clearly require notice of intent to introduce evidence under Article 37.07. Therefore, the State was not obligated to give such notice, and the trial court did not abuse its discretion in allowing evidence of the prior juvenile adjudication.

Even if appellant did trigger the State's duty to comply with the notice requirement in Article 37.07, the State's notice of the prior juvenile adjudication on the first morning of trial does not require reversal. Assuming without deciding that the State's notice was unreasonable, we must still consider whether the district court's admission of the evidence was harmful. See *Roethel v. State*, 80 S.W.3d 276 (Tex.App.-Austin 2002, no pet.); see Tex.R.App. P. 44.2. The erroneous admission of evidence of an extraneous offense in violation of the evidentiary rules does not violate the state or federal constitutions. *Id.* We must disregard any nonconstitutional error that does not affect substantial rights. *Id.*

The purpose of the notice requirement in article 37.07 is to prevent unfair surprise and to enable the defendant to prepare to answer the extraneous offense evidence. See *Nance v. State*, 946 S.W.2d 490, 493 (Tex.App.—Fort Worth 1997, pet. ref'd). To determine harm in light of that purpose, we analyze whether and how the notice deficiency affected appellant's ability to prepare for the evidence. *Apolinar v. State*, 106 S.W.3d 407, 414-15 (Tex.App.- Houston [1st Dist.] 2003, no pet.). Our sister courts have used a test in which they analyze whether the deficient notice resulted from prosecutorial bad faith or prevented the defendant from preparing for trial, including an inquiry of whether the defendant was surprised by the substance of the evidence and whether the lack of notice affected his ability to prepare cross-examination or mitigating evidence. *Id.*; *Roethel*, 80 S.W.3d at 282.

Appellant does not accuse the State of bad faith because of the failure to provide reasonable notice. On the first day of trial, the State informed the trial court that it discovered the additional juvenile adjudication that morning and that it knew nothing about the offense except that appellant was sent to the Texas Youth Village for a year for it. Nothing indicates that the prosecution was acting in bad faith or attempting to prevent appellant from preparing a defense.

The appellant did not argue that he did not recall the juvenile adjudication that resulted in his being sent to the Texas Youth Village. Additionally, he did not argue that late notice of the juvenile adjudication affected his ability to prepare mitigating evidence. Although Appellant argued that he was unable to contact an officer concerning the adjudication, he did not explain why he was unable to talk to the officer during the two days between the beginning of trial and the punishment phase or how being unable to speak with the officer harmed him. Given these considerations, we cannot say that the admission of the complained-of extraneous offense, if error, had a substantial and injurious effect or influence on the verdict. See *Apolinar*, 106 S.W.3d at 415.

We overrule appellant's first issue.