YEAR 2005 CASE SUMMARIES

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

A witness's assertion of his or her *Fifth Amendment* rights and refusal to testify is not evidence and the jury is not allowed to draw any inferences from such actions. [McKaine v. State](05-4-6B)

On August 31, 2005, the Corpus Christi Court of Appeals held that evidence, could be properly excluded, if it was offered to allow the jury to consider a witnesses' assertions of their *Fifth Amendment* rights, even if trial court did not state that as the reason for exclusion.

05-4-6B. **McKaine v. State,** ___S.W.3d ___, No. 13-03-430-CR, 2005 Tex.App.Lexis 7147 (Tex.App. — Corpus Christi, 8/31/05).

Background: Defendant was originally charged as a juvenile, but was successfully transfer to district court to be prosecuted as an adult. Defendant pleaded guilty to burglary of a habitation and committing aggravated assault therein. The District Court sentenced him to 75 years' imprisonment.

The Appellate Court originally reversed and remanded the case to the trial court for a new punishment hearing. The state filed a motion for rehearing, which was granted.

Held: Previous opinion withdrawn, judgment of the trial court affirmed.

Facts: On November 12, 2002, McKaine and three other people used force to unlawfully enter the residence of Charles and Amy in Cuero, Texas. n2 McKaine entered the home carrying a twenty-gauge shotgun. His cohorts were armed with handguns. With their weapons drawn, the group forced Charles down onto the kitchen floor, threatening to kill him if he resisted. McKaine then pointed his shotgun at Charles's wife, Amy, and told her to take off her shirt. With her husband and three small children watching, Amy removed her shirt for McKaine, exposing her breasts. McKaine's companions then took Charles into the couple's bedroom, and McKaine took Amy and two of her children into a second bedroom. Once inside, he began to touch Amy, fondling her breasts and repeatedly telling her that he wanted to have sex and that he was going to have sex with her on her child's bed in front of her children. He threatened to kill her, her husband, and her children if she told anyone. McKaine then took Amy into the living room and in front of all three of her children, ordered her to pull down her pants. She refused. McKaine repeated his demand, and again, she refused, saying that she was "on her period." McKaine put his shotgun against the head of Amy's three year old son and said, "Pull down your pants and spread your legs, or I'm going to kill your son." She complied, but McKaine did not have sex with her. He and his companions left, taking a knife, cigarettes, and money belonging to the family. Before leaving, McKaine repeated his threat that he would kill all of them if they told anyone what happened.

n2 We withhold the couple's last name because of the nature of the crimes committed

against them.

At the time of the incident, McKaine was sixteen years old. He was originally charged as a juvenile, but the State petitioned the juvenile court to transfer the case to district court so that he could be prosecuted as an adult. After a hearing, the juvenile court certified McKaine as an adult and transferred the case. Before the district court, McKaine pleaded guilty to burglary of a habitation and committing aggravated assault therein, a first-degree felony. n3 He requested that a jury determine his punishment. The jury sentenced him to seventy-five years' imprisonment.

n3 *See id.*

McKaine raises two issues on appeal. First, he challenges the juvenile court's decision to transfer his case to district court for trial as an adult. Second, he argues that the trial court abused its discretion during the punishment phase of the trial by not allowing his attorney to question Amy and Charles regarding their involvement in drug activities.

Other Issues Omitted.

Opinion: In his second issue, McKaine claims that the trial court erred by not allowing his trial counsel to question Amy and Charles on their involvement in drug-related activities prior to the burglary. McKaine's attorney sought to ask Amy and Charles whether they were drug dealers and whether McKaine and his three companions had stolen cocaine and marihuana from them along with the knife, cigarettes, and money. Before trial, the State filed a motion in limine regarding this testimony, which the court granted. At trial, the testimony was ultimately excluded as irrelevant. *See TEX. R. EVID. 401*.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Green v. State, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996)*; *Ford v. State, 26 S.W.3d 669, 672 (Tex. App.--Corpus Christi 2000, no pet.)*. Even if the trial court gave the wrong reason for its decision, *Salas v. State, 629 S.W.2d 796, 799 (Tex. Crim. App. 1981)*, the decision will be upheld as long as it is correct on some theory of law applicable to the case. *Osbourn v. State, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002)*. Even if there is no legal basis to support the ruling, the reviewing court must still disregard the error unless it affected the defendant's substantial rights. *See TEX. R. APP. P. 44.2(b)*.

On appeal, McKaine focuses almost exclusively on whether the trial court erred by ruling that the excluded evidence was irrelevant. Regardless of whether the trial court's determination of relevance was correct, its ruling will not be disturbed if it can be upheld on some other legal basis. *See Osbourn, 92 S.W.3d at 538*; *Salas, 629 S.W.2d at 799*. Although we recognize the significance of the relevance issue, especially because it was the stated reason for the trial court's ruling, we must also recognize that, on appeal, the State has raised other bases on which the trial court's ruling can be upheld. In addition to defending the court's ruling on relevance, the State argues that the evidence was properly excluded under *rule 513*, as it amounted to no more than denials of criminal activity and assertions of the victim's *Fifth Amendment* rights. *See TEX. R. EVID. 513*. Appellant has not responded to this argument. Nor has appellant addressed the possibility that the evidence in question could have been properly excluded under *rule 403* because its probative value was substantially outweighed by the danger of unfair prejudice it created. *See TEX. R. EVID. 403*.

We agree with the State's contention that the evidence, whether relevant or not, could have been properly excluded because it was offered to allow the jury to consider the witnesses' assertions of their *Fifth Amendment* rights. *See TEX. R. EVID. 513*. The reporter's record includes the following exchange that took place as defense counsel examined one of the witnesses outside the jury's presence:

Defense Counsel: Did you or did you not know of contraband, namely, marijuana, and cocaine that was taken from your house on this particular night we're talking about?

Witness: I plead the Fifth.

The Court: Okay. Is that all then?

Defense Counsel: That's all I have for her outside the presence of the jury, but I'd like to ask her that same question in front of the jury, and I think it goes towards the offense that they've alleged against my client, and I --

The Court: Alright. The objection of the State will be sustained.

Defense counsel was later allowed to examine the second witness outside the jury's presence and the following exchange occurred:

Defense Counsel: During the commission of this offense were any personal items of yours taken?

Witness: I had a knife, some money, and I had a pistol, and that's it.

Defense Counsel: There were no narcotics?

Witness: No.

Defense Counsel: You realize you're under oath?

Witness: I realize I'm under oath.

Defense Counsel: And you will be charged with perjury, if you're lying?

Witness: I will plead the Fifth, if you keep asking me a question like that?

Defense Counsel: Your Honor, again, I just put it to the Court that I believe that that particular witness has evidence that the jury would find relevant, as far as McKaine's punishment goes, and I will make the same argument about the facts of . . . [the first witness's] testimony also and reurge the Court to allow that to come in.

The Court: Well, this last witness that testified, what part of the evidence -- what part of the testimony do you want to have the jury hear?

Defense Counsel: Well, your Honor, he pled -- he said he would take the *Fifth Amendment*, which is not incriminating himself. He is not on trial, he is just simply a witness, and he should be urged to testify to the truth of those questions.

The Court: And that's the part that you want to be submitted to the jury?

Defense Counsel: That's correct.

The Court: All right. I'll -- I'll deny your tender.

Based on these excerpts from the reporter's record, we cannot dismiss the possibility that the trial court excluded the testimony because defense counsel sought to have the witnesses assert their *Fifth Amendment* rights in the jury's presence. A witness's assertion of his or her *Fifth Amendment* rights and

refusal to testify is not evidence and the jury is not allowed to draw any inferences from such actions. *See TEX. R. EVID. 513(d)*; *Torres v. State, 137 S.W.3d 191, 198 n.3 (Tex. App.--Houston [1st Dist.] 2004, no pet.)*. Accordingly, we conclude that the trial court's ruling can be upheld on a basis other than relevance. We therefore overrule McKaine's second issue.

Conclusion: The judgment of the trial court is affirmed.