

Review of Recent Juvenile Cases (2010)

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

Hearsay by (unnoticed) outcry witness was admissible to rebut an express or implied charge of fabrication or improper influence.[In the Matter of A.C.T.](10-1-7B)

On February 3, 2010, the San Antonio Court of Appeals held that hearsay testimony from an outcry witness, which the state failed to properly notify juvenile's counsel of, was admissible as a hearsay exception where the testimony was offered to rebut an express or implied charge of recent fabrication or improper influence or motive.

¶ 10-1-7B. **In the Matter of A.C.T.**, MEMORANDUM, No. 04-09-00068-CV, 2010 WL 374392 (Tex.App.-San Antonio, 2/3/10).

Facts: On July 10, 2008, the State filed an original petition alleging that A.C.T., a fourteen year-old boy, had engaged in delinquent conduct by committing two counts of aggravated sexual assault on J.K., a female child younger than fourteen years old, and seeking a determinate sentence. Count I of the petition alleged that, on or about July 17, 2007, A.C.T. intentionally and knowingly caused the sexual organ of J.K., a child younger than fourteen, to contact the sexual organ of A.C.T. Count II alleged that, on or about July 17, 2007, A.C.T. intentionally and knowingly caused the sexual organ of J.K., a child younger than fourteen, to contact the mouth of A.C.T. The State filed a pretrial "Notice of Intent to Present Outcry Statement" naming J.K.'s mother, Jeanette, as the outcry witness. After the jury was sworn and opening statements were made, a hearing was held outside the jury's presence to determine whether Jeanette or another witness subpoenaed by the defense, Sonya Vallejo, was the first adult to whom J.K. made an outcry. The trial court ruled that Sonya was the proper outcry witness. Defense counsel objected that the State had not given the fourteen-day notice required by the outcry statute as to Sonya, arguing that the "proper predicate had not been laid" for admission of Sonya's testimony as the outcry witness. [FN1] A discussion was held on the record during which the defense conceded it was not claiming unfair surprise or asking for a continuance. The trial court ultimately ruled that Sonya would not be permitted to testify as the outcry witness. The court later admitted Sonya's testimony about what J.K. told her as a prior consistent statement to rebut a charge of fabrication or improper influence. At the conclusion of the trial, the jury found that A.C.T. had engaged in delinquent conduct as alleged in both counts, and found that disposition was required. The court adjudicated A.C.T. as having engaged in delinquent conduct as alleged in both counts, and entered a disposition order committing A.C.T. to TYC with a possible transfer to TDCJ for eleven (11) years. A.C.T. now appeals.

[FN1]. During trial, both the State and the defense referred to the adult outcry statute, [article 38.072 of the Code of Criminal Procedure](#), instead of the juvenile outcry statute, [section 54.031 of the Family Code](#). See [Tex.Code Crim. Proc. Ann. art. 38.072](#) (Vernon Supp.2009); [Tex. Fam.Code Ann. § 54.031](#) (Vernon Supp.2009). The two outcry statutes are interpreted the same. [In re Z.L.B., 102 S.W.3d 120, 123 \(Tex.2003\)](#) (per curiam).

Held: Affirmed

Memorandum Opinion: Finally, A.C.T. argues the trial court erred in admitting Sonya Vallejo's hearsay testimony as a prior consistent statement "when no express or implied challenge was made to the complainant's testimony on the grounds of recent fabrication or improper influence or motive." As noted, *supra*, it was determined that Sonya Vallejo was the proper outcry witness; however, her testimony about what J.K. told her was not admitted under the outcry statute, but, rather, was admitted as a "prior consistent statement" under [Rule 801\(e\)\(1\)\(B\), Tex. R. Evid.](#) 801(e)(1)(B) (providing that a statement is not hearsay if the declarant testifies at trial subject to cross-examination, and the statement 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"). It is clear from the record that the declarant, J.K., testified at trial and was cross-examined; further, it is not disputed that her prior statement to Sonya was consistent with her trial testimony. The only question before us is whether a charge of recent fabrication or improper influence or motive was raised which would warrant admission of J.K.'s prior consistent statement under [Rule 801\(e\)\(1\)\(B\)](#). We review the trial court's ruling that a prior consistent statement is admissible under [Rule 801\(e\)\(1\)\(B\)](#) for an abuse of discretion. [Hammons v. State, 239 S.W.3d 798, 806 \(Tex. Crim. App. 2007\)](#).

A.C.T. argues on appeal that he made no express or implied charge of recent fabrication or improper influence, stressing that his attorney's cross-examination of J.K. contained no reference to recent fabrication or improper influence that would warrant admission of J.K.'s out-of-court statement. However, the Court of Criminal Appeals clarified in *Hammons* that a charge of fabrication or improper influence "may be subtly *implied* through tone, tenor, and demeanor," and need not be restricted to the specific wording used by counsel. *Id.* at 799. Because there is no "bright line" between a challenge to the witness's memory or credibility and a suggestion of conscious fabrication, the trial court has substantial discretion in determining whether the tenor of the questioning reasonably implies a conscious intent to fabricate. *Id.* at 804-05. In determining whether the record shows an implied charge of recent fabrication or improper influence was raised, an appellate court focuses on the "purpose of the impeaching party, the surrounding circumstances, and the interpretation put on them by the [trial] court." *Id.* at 808. In addition to the totality of the questioning, we may also consider clues from the voir dire, opening statements, and closing arguments of counsel. *Id.* The ultimate question is whether, giving deference to the trial judge's assessment of tone, tenor, and demeanor, a reasonable trial judge could have concluded that a charge of recent fabrication or improper influence was raised. *Id.* at 808-09.

Here, during opening statements, A.C.T.'s counsel raised the defensive theory of a family feud over housing arrangements on the property owned by Rose, A.C.T.'s mother, as the background leading up to J.K.'s allegations. Specifically, counsel stated,

Because in order to understand these people, in order to understand this situation, you don't just go back to January 24th of this year [2008] when the statements were made ... You've got to go back decades, and you need to understand the Rincon family ... Mr. Rincon was a good man ... when Jeanette and her husband Justin--when they [sic] getting ready to get out of the military and Air Force--didn't have a place to live, Mr. Rincon went and ... built a house in the back of his house ... he made sure that when she got out of the Air Force, she had a place to live. And everything between the family was good ... But that didn't last forever.

Unfortunately, in December of 2007, Mr. Rincon passed away. And things began to unravel. About a year before he passed away, he sold his house to Rose, to [A.C.T.'s] mother,--sold the house that he lived in, in back of which Jeanette [s] ... family ... lived. And while Mr. Rincon was alive, Jeanette never had to worry about paying rent. She didn't have to pay utilities, didn't have to pay taxes, didn't have to pay insurance. But after Mr. Rincon passed away, Rose had a conversation with Jeanette. And she let her know that things were going to be different;

that she was going to have to pay all those things that she never had to pay before. And at the same time, Sandra, who's Jeanette's mother, ... began to lean on Rose, began to put pressure on her to let ... Jeanette ... and [her] family move into the bigger house. And there were a couple problems with that. First of all, there was already a relative who had been living there ... Secondly, she simply didn't trust that Jeanette ... would take care of the house. They hadn't shown the ability to do that with the little house. And after ... 30 or 45 days, the bills began to roll in. And Rose would get notices that nothing was being paid and she got frustrated. And she began to sit down with Jeanette and explain to her that ... she was going to pay her end or they were going to talk about Jeanette moving to another place.

Now, January 24th of this year, 2008, all of this comes to a head. Stories go around that [A.C.T.] has been sexually abusing [J.K.]. And, of course, after letting the police know, Jeanette goes and talks to Rose and tells her this has been going on. Well, Rose continues this--this idea ... Jeanette's not paying anything. So she's going to go and have her evicted. And the situation gets worse and worse and unravels and unravels. And here we are today.

Counsel also told the jury they would hear evidence from the defense about "the family dynamic" and "exactly what this family situation was like" to help them understand J.K.'s allegations.

In addition, before admission of J.K.'s out-of-court statement to Sonya, defense counsel cross-examined J.K.'s mother, Jeanette, concerning any arguments or bad feelings between her and Rose about payments for the small house and whether Jeanette and her family would be moving into the big house. Specifically, counsel asked Jeanette whether she ever paid rent, taxes, or insurance on the small house while Mr. Rincon was alive, and whether Rose had told her she needed to take over payment of the bills after he passed away. Counsel also inquired whether Jeanette had conversations with her mother, Sandra, about moving into the big house after Mr. Rincon's death. Jeanette agreed that Rose had talked to her about paying the bills for the small house, but denied wanting to move into the big house and denied any hard feelings or arguments about these issues. In addition, defense counsel questioned Jeanette about whether J.K. was "a very obedient child" who "does pretty much everything you ask her to do" and "what she thinks she needs to do to make you and your husband happy." Counsel pointed out that she and her husband had told J.K. not to use A.C.T.'s real name anymore, and so J.K. stopped using it. On redirect, the State responded by asking Jeanette whether she had "ever told [J.K.] to lie" or "to create a story" about A.C.T. Jeanette answered, "No," and stated that she had only told J.K. to answer honestly and "tell what happened to her," and "tell the truth."

In ruling that Sonya Vallejo would be permitted to testify to J.K.'s out-of-court statement about the sexual abuse by A.C.T., the court noted that J.K. had already testified and been subjected to cross-examination. The court stated the prior consistent statement was being admitted "to rebut the defense that this is somehow a fabrication or a coaching situation to rebut some family feud regarding the ownership of these houses." During cross-examination of Sonya, defense counsel inquired whether she knew of any arguments between Rose and Jeanette over the housing situation. Sonya testified that Rose had argued with Jeanette about the houses, there had been a break-in, the water was turned off, and eviction was mentioned. Defense counsel continued to raise the family discord theme during his questioning of Rose during the defense case. Rose testified that before J.K.'s allegations she informed Jeanette to start paying the bills and utilities for the small house, but Jeanette did not pay them. Rose also stated that Jeanette and her mother asked Rose whether Jeanette's family could move into the big house, but Rose refused; there was one argument about this. When counsel asked Rose whether J.K. "has reasons to lie," Rose replied she did not know why J.K. would have lied. Finally, during closing arguments, counsel for A.C.T. again brought up the family discord and suggested that someone had influenced parts of J.K.'s story. Further, we note that in his brief A.C.T. concedes that his "defensive theory

was, from the beginning of the trial, that the child had been coached prior (emphasis omitted) to the outcry to Sonya Vallejo ... in retaliation for Rose []'s attempts to collect bills owed her by Jeanette...."

The record shows that during questioning, as well as opening statements and closing arguments, A.C.T.'s counsel made an implied charge that J.K.'s allegations were the product of improper influence by Jeanette and her family in retaliation against A.C.T.'s mother, Rose, for the housing dispute. In admitting the evidence under [Rule 801\(e\)\(1\)\(B\)](#), the trial court specifically noted the basis was to rebut charges of coaching or fabrication due to a family feud over housing. We conclude the trial court did not abuse its discretion in admitting Sonya's testimony about J.K.'s out-of-court statement under [Rule 801\(e\)\(1\)\(B\)](#). [FN2]

[FN2](#). A.C.T. also argues on appeal that the prior consistent statement was not made prior to the time the motive to fabricate arose, as required by *Hammons*. See *Hammons*, 239 S.W.3d at 804. However, A.C.T.'s generalized objection to the prior consistent statement in the trial court did not inform the court of the argument he now raises on appeal; therefore, this complaint was not preserved. [Tex.R.App. P. 33.1\(a\)](#); see *Medina v. State*, 7 S.W.3d 633, 639 ([Tex.Crim.App.1999](#)) (complaint on appeal must comport with trial objection or nothing is preserved for appeal); see also *Bolden v. State*, 967 S.W.2d 895, 899 ([Tex.App.-Fort Worth 1998, pet. ref'd](#)) (to complain on appeal that prior consistent statement is inadmissible because it does not predate motive to fabricate, appellant must have objected on that basis in trial court); *Meyers v. State*, 865 S.W.2d 523, 524-25 ([Tex.App.-Houston \[14th Dist.\] 1993, pet. ref'd](#)) (general hearsay objection under [Rule 801](#) did not preserve complaint on appeal that prior consistent statements contained in state's exhibit were made after motive to fabricate arose and thus exhibit was not admissible as prior consistent statement).

Conclusion: Based on the foregoing reasons, we overrule A.C.T.'s issues on appeal and affirm the trial court's judgment.