Juvenile Law Case Summaries

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Juvenile court erred in admitting sexual assault tape without making a finding of no unfair prejudice, but the error was harmless [In re J.D.R.](01-2-04).

On March 8, 2001, the El Paso Court of Appeals held that the defense attorney in a sexual assault on a child trial opened the door to admission of a sexual assault interview videotape but that the juvenile court erred in admitting the tape over defense objection that it had not found no unfair prejudice under Rule 403 of the Rules of Evidence. However, the error, in light of the other evidence and the arguments in the case, was harmless.

¶ 01-2-04. In the Matter of J.D.R., UNPUBLISHED, No. 08-00-00178-CV, 2001 WL 225935, 2001 Tex.App.Lexis ____ (Tex.App.—El Paso 3/8/01)[Texas Juvenile Law (5th Edition 2000)].

Facts: J.D.R., a juvenile, appeals the trial court's judgment concluding that he engaged in delinquent conduct, namely aggravated sexual assault of a child and indecency with a child. The trial court placed J.D.R. on probation for one year and committed him to the Kerr County Treatment Facility for a period of at least six months as a condition of his probation.

On June 14, 1998, J.D.R., a fourteen-year-old juvenile, babysat a six-year-old female, K.T., and a three-year-old female, S.T., while the girls were visiting their aunt. The next morning, K.T. told her neighbor and her aunt that J.D.R. had taken her into a bedroom, drew pictures of her, had her take her clothes off, kissed her on her vagina, and peed on her face. The next day, K.T.'s aunt took K.T. to the hospital, followed by a trip to Harmony Home so that Eve Flores could interview K.T. and make a videotaped statement of what had happened.

At trial, K.T. testified that J.D.R. touched her genitals with his hand and fingers under her pajamas. She also testified that he touched her there with his tongue. During the State's redirect examination of K.T., the following colloquy ensued:

> Q: ... When you were in the room with [J.D.R.], it was just you and [J.D.R.]; is that right?
> A: Yes.
> Q: Did anybody else go into the room with just [J.D.R.]?
> A: No.

At the completion of K.T.'s testimony, the State attempted to have the entire videotape entered into evidence under Rule 107 because defense counsel had shown the videotape cassette to K.T., he had held it up in the air, and he had referenced it indirectly. Defense counsel responded, stating that he had not offered any part of the video, but that he intended to do so later in the trial. He also objected under Rules 403 and 404(b). The trial court ruled that the door had not been opened such that the jury should see the entire videotape.

The trial continued, and after the State rested, J.D.R. played certain portions of the videotape to impeach K.T.'s inconsistent testimony. The portions that the defense showed the jury were as follows:

> DEFENSE COUNSEL: Go to 352.50.
> EVE FLORES: 'Okay. So he touched you right there? And what do you call that? So [J.D.R.] touched you right there? And you said he touched you with his hand? Did he touch you right here with any other part?'
> (FAST FORWARDING OF TAPE)

EVE FLORES: 'Can you point out where his tongue is?'
K.T.: (indicating)
EVE FLORES: 'Right there? Okay. And who is the first person that you told?'
K.T.: 'The next door neighbor.'
EVE FLORES: 'You told the next door neighbor? Who was the next door neighbor that you told?'
K.T.: 'I don't know her name.'
EVE FLORES: 'Okay. Do you know if [J.D.R.] has done this to anybody'--
(FAST FORWARDING OF TAPE)
EVE FLORES: 'When you went and told the next door neighbor, where was [J.D.R.]?'
K.T.: 'He was still there.'
EVE FLORES: 'He was still there when you went and told the next door neighbor?'
K.T.: 'Uh-huh.'
(FAST FORWARDING OF TAPE)
EVE FLORES: 'What?'
K.T.: 'He hide his papers, what he drawed, and he hide it in the cabinet, and he had a key and he won't show anyone.'
EVE FLORES: 'What was he drawing on those papers?'
K.T.: 'Us.'
EVE FLORES: 'He was drawing y'all? Yeah? Did he leave those papers there when he left?'
K.T.: 'No, he took them all home.'
EVE FLORES: 'And were they good pictures or bad pictures that he drew of you?'
K.T.: 'Bad.'
EVE FLORES: 'What made those pictures bad? You said they were bad pictures of y'all. What was it that was bad about those pictures? What were y'all doing in those pictures?'
K.T.: 'We were laying down and standing up.'
EVE FLORES: 'Did he draw those pictures or did he take those pictures with a camera?'
K.T.: 'Take.'
EVE FLORES: 'Huh?'
K.T.: 'Take.'
EVE FLORES: 'He take those pictures, or he took those pictures? What did he take those pictures with?'
K.T.: 'In his pocket.'
EVE FLORES: 'So he put them in his pocket? He put these pictures in his pocket? Did he draw pictures of ya'll?'
K.T.: 'Yes.'
DEFENSE COUNSEL: 401.15.
EVE FLORES: '[K.T.], you said that you had told a neighbor; is that right?
What did you tell the neighbor happened?'
K.T.: 'What he did to me.'
EVE FLORES: 'Okay. And did you talk to anybody else?'
K.T.: 'No.'
EVE FLORES: 'No? Okay. Did you tell [your aunt] when [she] got back?'
K.T.: 'Yes.'
EVE FLORES: 'What did you tell [your aunt] he had done to you?'
DEFENSE COUNSEL: 402.50.
EVE FLORES:--'[J.D.R.] do to you? Okay? Is there anything that you told your Aunt [ ] that you have not told me yet that [J.D.R.] did to you? You don't know? Okay. Is there anything else you want to tell me before we go'--
(END OF PLAYING THE TAPE).
DEFENSE COUNSEL: That's it. Your Honor, that's all I need to show. Thank you.

Again, the State asked the court to show the jury the videotape in its entirety under the Rule of Optional Completeness. After defense counsel argued that the selected portions of the videotape were shown to the jury for impeachment purposes only, not "for the truth of the matter," he then objected that the tape contained inadmissible extraneous offense evidence and that the prejudicial effect of that evidence would outweigh its probative value. Defense counsel then requested that the court conduct a Montgomery balancing test, but the record does not show that the trial court honored that request.

Instead, the trial court agreed with the State that the defense had "opened the door," it overruled J.D.R.'s 403 and 404(b) objections to the videotape, it admitted the videotape into evidence, and it showed the entire videotape to the jury. When the trial court admitted the videotape into evidence, however, J.D.R. requested that the jury be instructed to consider the tape only for impeachment purposes, and he requested a mistrial. The trial court denied the former

request and overruled the latter.

The extraneous offense evidence of which J.D.R. complained consisted of Flores asking K.T. if J.D.R. had done anything similar to anyone else. K.T. responded that J.D.R. had done the same things to her younger sister, S.T., in K.T.'s presence that same night, including drawing bad pictures of and licking S.T.

Held: Affirmed.

Opinion Text: RULE OF OPTIONAL COMPLETENESS, RULE 403, AND RULE 404(b)

On appeal, J.D.R. avers that the trial court erred in admitting the videotaped statement of the extraneous offense in violation of Texas Rule of Evidence 107 because it was not the same subject as the excerpts offered by defense counsel. Further, the extraneous offense evidence violated Texas Rule of Evidence 404(b) because it was "character conformity" evidence. According to J.D.R., the erroneous admission of this extraneous offense constituted reversible error because it violated his substantial rights.

STANDARD OF REVIEW

The trial court's admission of evidence is reviewed under an abuse of discretion standard. If the trial court's ruling was within the "zone of reasonable disagreement," there is no abuse of discretion and the trial court's ruling will be upheld. It cannot be said that the decision falls outside that zone if it can be supported under any theory of law, regardless of whether the theory was mentioned at trial.

Rule 107

Rule 107 states in pertinent part:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given.

This "rule of optional completeness," has been recognized as addressing or at least encompassing the "opening the door" situation:

'It is well established that the evidence which is used to fully explain a matter opened up by the other party need not ordinarily be admissible.' Thus, the necessity of completeness will justify the introduction, through the 'open door,' of extraneous offense evidence, hearsay, or other matter that would otherwise be incompetent. There are, however, two limitations to the scope of the completeness opening. One, only parts or items germane to the part or item offered ('on the same subject') become admissible. Two, the matter offered on the justification of completeness may be excluded under Rule 403 if its prejudicial effect substantially outweighs its probative value. [FN5]

> FN5. Fuentes v. State, 991 S.W.2d 267, 279, 280 (Tex.Crim.App.1999) (quoting Steven Goode, Olin Guy Wellborn, II, and M. Michael Sharlot, 1 Texas Practice Guide to the Texas Rules of Evidence: Civil and Criminal § 107.1 at 41 (West 1993) (footnotes omitted), and concluding that trial court did not abuse its discretion in excluding rebuttal evidence when State "opened the door" because admission of evidence might reasonably have been viewed as presenting danger of confusing jury, which outweighed questionably probative rebuttal value such evidence may have had); cert. denied, 528 U.S. 1026, 120 S.Ct. 541, 145 L.Ed.2d 420 (1999).

Under this language, J.D.R.'s 404(b) challenge fails if the trial court did not abuse its discretion in admitting the extraneous offense evidence under Rule 107.

Rule 107-Same Subject Matter

The purpose of Rule 107 is to reduce the possibility of the fact finder receiving a false impression from hearing evidence of only a part of the conversation, writing, act, or declaration. The theory behind the rule is that by allowing the jury to hear the rest of the conversation on the same subject, the whole picture will be filled out, removing any misleading effect which may have occurred from introduction of only a portion of the conversation. This purpose is

achieved by admitting the balance of the conversation on the same subject. Admission of portions of testimony wholly unrelated to the matter initially introduced, however, does not
contribute to this goal.

Here, although J.D.R. stated that he was admitting the selected portions of the videotape to show K.T.'s inconsistent statement about the outcry witness, one of the selected portions of the tape that J.D.R. played for the jury did not discuss the identity of the outcry witness; it discussed the matter of J.D.R. drawing bad pictures of "us" while "we" were laying down and standing up. In making its ruling to admit the tape in its entirety, the trial court stated, "I think that [J.D.R.'s] offer has opened to where the State could play [the entire video]. The other matter that you raise may just be part of that that you didn't really wish to invite, but you--it may come in." Arguably, from our cold reading of the record, the trial court determined that J.D.R. had inadvertently "opened the door" to the extraneous offense evidence of doing the same things to S.T. by playing this selected segment of the tape about J.D.R. drawing bad pictures of more than one person. Therefore, under Rule 107, the jury could see the entire video, including the portion that mentioned that J.D.R. had done the same things to S.T., so that the jury could fully understand and determine the identity of "us" and "we" as mentioned by K.T. in the segment that J.D.R. played for the jury. [FN10] Had the portion involving S.T. not been admitted, the jury could have been left with the impression that J.D.R. had drawn pictures of himself and K.T., which was not true. Even J.D.R. in his closing statement confirmed the identity of "us" and "we" when he stated that it was K.T. and S.T. who were the subjects of J.D.R.'s bad-picture drawings. Accordingly, the trial court's decision to admit evidence about "the other matter" that J.D.R. raised by mistake was within the zone of reasonable disagreement; and therefore, the trial court did not abuse its discretion in admitting such evidence under this subpoint.

> FN10. See Credille v. State, 925 S.W.2d 112, 117 (Tex.App.-- Houston [14th Dist.] 1996, pet. ref'd) (finding that trial court did not abuse its discretion in admitting entire videotape (1) because State was entitled to offer any other kind of evidence that was necessary to make conversation fully understood where Credille had inquired into videotaped conversation between complainant and police investigator and (2) because it was necessary to show specific instances in context of entire interview where Credille challenged complainant's credibility during her interview with police investigator).

Rule 107-Rule 403 Hurdle

The second scope of inquiry under Rule 107 is whether the matter offered should have been excluded because its prejudicial effect substantially outweighed its probative value. Tex.R.Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Here, J.D.R. made a Rule 403 objection and expressly requested that the trial court conduct a Montgomery balancing test, which the trial court did not do. Rule 403 imposes a duty on the trial court: the court should inquire of the opponent what his or her view of the prejudice is and should also ask the proponent to articulate his or her need. [FN12] Once Rule 403 is invoked, however, the trial judge has no discretion whether to engage in the balancing process. It will not suffice for the trial court to simply determine that the evidence is relevant to some legitimate, non-character- related purpose such as those enumerated in Rule 404(b); the trial court must determine whether the danger of unfair prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Here, the trial court erred in not conducting the Rule 403 balancing test.

> FN12. See Montgomery, 810 S.W.2d at 389.

Nevertheless, we cannot say that the admission of the videotape in its entirety constituted reversible error. Under Texas Rule of Appellate Procedure 44.2(b), we disregard any error, defect, irregularity, or variance that does not affect substantial rights. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. A conviction should not be overturned for such error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. The United States Supreme Court has construed the nearly identical federal harmless error rule as follows:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was

not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. [FN18]

FN18. See id. (quoting O'Neal v. McAninch, 513 U.S. 432, 437- 38, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (emphasis in original)).

Here, even when considering the evidence that the same things that had happened to K.T. also happened to S.T., we can say with fair assurance that such evidence had but a slight effect, if any, on the jury. Neither Flores during the interview with K.T. nor the State at trial exaggerated what J.D.R. had done to S.T. It was J.D.R.'s counsel, not the State, who, during his closing argument, mentioned the events concerning S.T. as yet another instance where K .T.'s credibility as a witness was questionable. [FN19] The State mentioned the extraneous offense evidence in closing argument, only in rebuttal to the defense's discussion of it. [FN20] Neither party spent much time telling the jury about what J.D.R. had done to S.T. Importantly, the record is replete with K.T.'s trial testimony during direct examination and cross- examination about what J.D.R. had done only to her. Defense counsel played the videotaped segments where K.T. told Flores that J.D.R. touched her vagina with his tongue and drew bad pictures of her. K.T.'s cousin also testified that J.D.R. and K.T. were in the bedroom for a long time together that night.

Considering the record as a whole, the brief mention of what J.D.R. had also done to S.T. had, at the most, a slight effect on the jury. Accordingly, J.D.R.'s substantial rights were not affected by the admission of this extraneous offense evidence, and therefore, no reversible error ensued.

FN19. Defense counsel stated:

She told that story on tape about the pictures. [J.D.R.] drew pictures of her--by herself on the witness stand--of her and her sister on tape. And there were bad pictures on tape. She said she never saw them, and then she says she saw half of it, but she couldn't answer which half she saw.

Later, defense counsel added:

But [K.T.'s young cousin] tells you that she saw [J.D.R.] take [K.T.] down to that bedroom. How does the three-year-old [S.T.,] get down there?.... [K.T.] doesn't tell you that on the witness stand. But it sounds pretty good on tape. Just throw it in, 'Yeah, he did it to my sister, too.'

FN20. In countering the defense's attempts to discredit K.T.'s credibility, the State added in its closing argument that with regard to the evidence involving S.T.:

My recollection of the tape is [K.T.] said that she and [J.D.R.] were in the room, [S.T.] was in the living room watching TV with everyone else. And then I believe she was asked, 'Well, did he do this to anyone else? Did anyone else go in the room with [J.D.R.]?' 'Yes, [S.T.] did.' I believe she's telling about two different things, two different times. Her and [J.D.R.], [S.T.] and [J.D.R.].
