

Juvenile Law Case Summaries

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Defendant in criminal trial cannot cross-examine witness about being on juvenile probation without proof he is on probation [Ordaz v. State] (02-3-12).

On June 20, 2002, the El Paso Court of Appeals held that a criminal defendant was properly precluded from cross-examining a State's witness about being on juvenile probation to show bias in favor of the State without proof that the witness was in fact on juvenile probation.

02-3-12. Ordaz v. State, UNPUBLISHED, No. 08-00-00255-CR, 2002 WL 1341120, 2002 Tex.App.Lexis ____ (Tex.App.-El Paso 6/20/02) [Texas Juvenile Law (5th Edition 2000)].

Facts: This is an appeal from a conviction for the offense of intentionally committing bodily injury to a child. The court assessed punishment at two (2) years' community supervision and a \$1,000 fine.

At trial, the evidence revealed that the twelve-year-old complainant, Daniel Ordaz, Jr. fell off a couch onto the floor as he was wrestling with his younger brother. This angered Appellant, the child's mother, and she kicked him on his side causing pain. This incident was reported to the police.

Prior to trial, the State filed a motion in limine requesting that Appellant approach the bench and notify the State and the court before any evidence or testimony of any juvenile court proceedings against any witness for the State including the alleged victim in the case was broached at trial. The State maintained that such evidence was improper for impeaching the general credibility of the witness.

During a pretrial hearing, Appellant's counsel requested that the State turn over all of the complainant's juvenile records. Counsel asserted that the complainant was on juvenile probation for sexually assaulting a child. Both the court and the prosecutor stated that it was not certain if any juvenile adjudications existed. The State then argued that if they did exist, they were not admissible. Appellant's counsel then stated:

Well, Your Honor, under the indicia of reliability which the Court has to consider under the totality of the circumstances, under the existing law, one of the issues that the Court need to, to address is whether the child has a motive to fabricate, whether the child has any type of credibility and knows right from wrong. This, under previous offense, it was a sexual assault, Your Honor, sexually assaulted a child. And, I believe under Day versus Maryland we are entitled to that, to attempt to impeach him and his credibility is, the credibility is going to be an issue as to whether or not this child had any credibility at all

...

The court then stated:

All right. You know pretty much where we were, and where you brought the feelings up, and my feeling said I did look at Ruth versus Maryland and some other cases, some other real issues regarding this, and I am inclined to go with the State upon this one. I am not going to permit any inquiry into the complaining witness' background at this time, so that motion is denied.

Appellant then objected to the ruling pursuant to the confrontation clause and the due process and due course of law provisions of the United States and Texas Constitutions. No attempt was made to question the child complainant at trial regarding any juvenile criminal record. Appellant filed a motion for new trial. In that motion she again asserted that the court erred in disallowing any inquiry into the complainant's "juvenile conviction of sexually assaulting a female juvenile." The court denied the motion for new trial. In so doing, the court noted that the stated purpose for defense counsel's proposed cross-examination of the complainant was to attack his credibility rather than to expose a possible bias or motive for the witness's testimony, and that the evidence of the juvenile probation was not

proper for such stated purpose.

Held: Affirmed.

Opinion Text: In her sole issue, Appellant asserts that the court erred by disallowing her attempted cross-examination of the complainant with evidence of his juvenile probation to show that he had a motive to fabricate and to test his credibility and reliability. Generally, a witness may be impeached by proof of felony convictions or misdemeanor convictions involving moral turpitude which are final and not too remote in time. Tex.R. Evid. 609(a). However, juvenile adjudications do not fall under this general category of convictions used for impeachment. First, juvenile adjudications are not convictions. Tex. Fam.Code Ann. § 51.13(a) (Vernon Supp.2002). Second, evidence of a juvenile adjudication, outside the realm of a juvenile proceeding, is not admissible for impeachment unless required by the Constitution of the United States or Texas. TEX. R. EVID. 609(d).

However, the Court of Criminal Appeals has held that a pending juvenile charge may be admissible on cross-examination to show the motive or bias of the witness to testify favorably for the State. *Carmona v. State*, 698 S.W.2d 100, 102 (Tex.Crim.App.1985); *Harris v. State*, 642 S.W.2d 471, 476 (Tex.Crim.App.1982); see also *Carroll v. State*, 916 S.W.2d 494, 499-500 (Tex.Crim.App.1996). The U.S. Supreme Court has held that a defendant is permitted to cross-examine a crucial witness regarding his juvenile record for the limited purpose of showing bias where the witness was on probation for the juvenile crime while assisting the police and testifying in court. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974). But, it is clear that defendants are not permitted to cross-examine a witness regarding prior juvenile adjudications for general character impeachment purposes. *Warren v. State*, 514 S.W.2d 458, 465 (Tex.Crim.App.1974), overruled on other grounds, *Reed v. State*, 744 S.W.2d 112 (Tex.Crim.App.1988); *Gilmore v. State*, 871 S.W.2d 848, 851 (Tex.App.-Houston [14th Dist.] 1994, no pet.).

As a threshold matter, we must address the State's contention that Appellant did not preserve her complaint on appeal. A point of error on appeal must present the same legal theory as was presented to the trial court through a timely, specific objection. *Davila v. State*, 930 S.W.2d 641, 650 (Tex.App.- El Paso 1996, pet. ref'd). The State maintains that Appellant never indicated to the trial court that she desired to utilize the complainant's juvenile record to expose an improper bias, motive, or interest. This is the contention on appeal. Rather, the State alleges that Appellant only indicated that she intended to use such information to challenge the complainant's general credibility. As such, there is an absence of parity in legal theories for admissibility and nothing is preserved for review. See *id.* However, at the pretrial hearing, counsel for Appellant stated during argument that he wanted to question the complainant's motive to fabricate as well as his general credibility. We find that this was sufficient to preserve error.

Next, the State argues that Appellant failed to present this Court with a record sufficient to demonstrate the alleged error. Tex.R. Evid. 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which questions were asked. An offer of proof may be in question-and-answer form, or it may be in the form of a concise statement by counsel. *Love v. State*, 861 S.W.2d 899, 901 (Tex.Crim.App.1993); *Perkins v. State*, 902 S.W.2d 88, 97-98 (Tex.App.-El Paso 1995), supplemented, 905 S.W.2d 452 (Tex.App.-El Paso 1995, pet. ref'd); Tex.R. Evid. 103(b). An offer of proof to be accomplished by a concise statement must include a reasonably specific summary of the evidence offered and must state the relevance of the evidence unless the relevance is apparent, so that the court can determine whether the evidence is relevant and admissible. *Love*, 861 S.W.2d at 901. The burden is upon the proponent of the impeachment evidence to establish that the evidence is relevant to expose any possible motive for the witness's testimony. *Carpenter v. State*, 979 S.W.2d 633, 634-35 (Tex.Crim.App.1998).

In the present case, Appellant has failed to bring forth a record sufficient for us to address his contention on appeal. The State indicated that it was not certain if the complainant had any juvenile record. Nowhere in the record did Appellant make any sort of offer of proof or informal bill. The relevance of the proposed impeachment can be dependent upon whether or not Appellant was on probation at the time of trial. See *Warren*, 514 S.W.2d at 465; *Foster v. State*, 25 S.W.3d 792, 795-96 (Tex.App.-Waco 2000, pet. ref'd). As the factual foundation for Appellant's contention is not before us on this record, we overrule Appellant's issue on appeal.

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