Juvenile Law Case Summaries

By
Robert O. Dawson
Bryant Smith Chair in Law
University of Texas School of Law

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Juvenile court abused its discretion in finding unavailability of child witness but admission of taped testimony was harmless [In re C.Y.] (02-3-35).

On August 15, 2002, the El Paso Court of Appeals held that the juvenile court did not make the constitutionally-required finding of unavailability to authorize admission of tape of interview. However, in view of the respondent's admission into evidence of a similar, later tape, the error was harmless.

02-3-35. In the Matter of C.Y., UNPUBLISHED, No. 08-01-00338-CV, 2002 WL 1874855, 2002 Tex.App.Lexis ___ (Tex.App.-El Paso 8/15/02) [Texas Juvenile Law (5th Edition 2000).

Facts: In a trial by jury, C.Y., a juvenile, was adjudicated delinquent for committing indecency with a child younger than seventeen years of age by sexual contact. The trial court placed him on probation for one year.

L.J., the complainant, was born on December 5, 1995. On February 15, 1999, her mother, Lillie Johnson, left the child at the home of her babysitter, Pat Livingston, while Johnson was at work. Livingston and her husband were Appellant's guardians and he lived in the house with them. Appellant referred to Livingston as "Grandma." Johnson testified that when she picked up L.J. from the Livingston home after work, Appellant, L.J., and Mr. Livingston were there. After Johnson left the home, she and L.J. had a conversation in the car. Based upon that conversation, Johnson took L.J. to a doctor and then called the police. On February 17, 1999 and again on April 20, 2000, L.J. provided videotaped statements which were recorded at the Children's Advocacy Center in Midland. [FN1]

FN1. The relevant portions of the February 1999 tape included the following testimony by L.J.:

Interviewer: Ummm, [L.J.], are there parts of the body people aren't supposed to touch?
L.J.: uuu [C.Y.]
Interviewer: uuu [C.Y.]? uuuh [L.J.], who's [C.Y.]?
L.J.: [C.Y.] (inaudible)
Hammon: [C.Y.] did what?
L.J.: [C.Y.] wiggled my tee-tee.
Interviewer: [C.Y.] wiggled your tee-tee?
L.J.: mm mmm
Interviewer: mm mm is [C.Y.] a boy or a grown up?
Interviewer: Oh, well [L.J.], where were you when [C.Y.] wiggled your tee- tee?
L.J.: Grandma's Pat.
Interviewer: At Grandma Pat's? And um when [C.Y.] wiggled your tee-tee, what room were you in?
L.J.: In Misty's room watching cartoons.
Interviewer: In Misty's room watching cartoons?
L.J.: On the bed.
Interviewer: On the bed?
L.J.: uh uh

On May 30, 2000, the State filed in the juvenile court a petition for delinquency accusing Appellant, then fifteen years of age, of delinquent conduct by engaging in sexual contact with a child younger than seventeen years of age. [FN2] Thereafter, the State filed a motion to introduce the videotaped statements and requested that the court make findings under Article 38.071 of the Texas Code of Criminal Procedure. Appellant filed a motion to challenge the competency of the child pursuant to Texas Rule of Evidence 601(a)(2).

FN2. The petition alleged the following:

On or about the 15th day of February, 1999, in the County of Midland, State of Texas ... [C.Y.] did then and there unlawfully, intentionally and knowingly engage in sexual contact with [L.J.], a child younger than seventeen (17) years of age, by touching the genitals of [L.J.], with the intent to arouse or gratify the sexual desire of said [C.Y.], contrary to Section 21.11, Texas Penal Code.

At a pretrial hearing on its motion, the State sought to introduce the two videos. The court reviewed both tapes and determined that pursuant to Section 8 of Article 38.071, L.J. was unavailable with regard to the first video because of the time lapse between the date of the incident in February 1999 and the date of trial in June 2001. The court explained its ruling:

The difference between the two tapes with regard to the obvious age and maturity of the child is striking, and the Court is of the opinion that, because of that lapse of considerable time and now the lapse to the possible trial date of June of 2001 from the alleged date of occurrence, which was February the 15th of 1999--the Court is of the opinion that the child meets, in the Court's mind, a requirement that the Court determine the child to be unavailable because of that time lapse.
....
I do tend to think with regard to Tape One the child is unavailable. I think that the passage of time from an interview of February the 17th of 1999 is just too extensive for me to come to any other finding.

The court did not find the child unavailable as to the second tape. Defense counsel then objected to the court's ruling and argued that the court must make findings in order to determine the unavailability of a child witness:

First of all, I believe the Court must find that it is trying to protect--I may actually have that cite. Marilyn versus Craig is 497 U.S. 844-846, or 110 Supreme Court at 3163, 'the use of the procedures necessary to protect the welfare of the particular child witness who seeks to testify, the Court must find that the child witness would be traumatized by the presence of the Defendant and that the trauma would be more than just de minimis; that is, more than just mere nervousness or excitement or reluctance to testify.'

Your Honor, it is not like this is a brother and sister type situation. My client's grandmother was babysitting this child back in 1998, and this is alleged to have been a one-time occurrence. It is my understanding that when Ms. Johnson found out about the abuse that she took the child out of the--out of the home and away from the babysitter, so I don't believe this child and this young man have had any contact since that time, and so I don't see where there is any trauma to the child, other than, of course, the normal nervousness of having to testify.

The court responded to defense counsel's argument, in relevant part:

I am not convinced that I would be able to make a finding at this point in time with regard to some of the suggestions that you are pointing out that, well, these children have been removed since that point in time. It is not like a family member where she would be afraid to maybe come and testify because of maybe the emotional issue of having to identify some loved one as being the perpetrator, or something of that sort. As I say, I have not even seen the child physically, to my knowledge, and have only seen her on these two taped representations.

But I did definitely feel that the time lapse certainly bothered me and caused me to feel that, under that circumstances, I was going to rule that the child was unavailable under Section 8, so as to permit the State's introduction of Tape 01 of February the 17th of 1999.

The judge then turned to the issue of the admissibility of the tapes under Section 5 of Article 38.071, addressing each of the twelve requirements. With regard to Subsection (a)(10), the court commented:

Number ten, this--this is--in the Court's estimation in the tape that I saw first that related to February the 17th of 1999, the Court found that an age- appropriate indication during the examination with regard to 'We only talk about things that happened or things that are truthful'--I forgot exactly how the examiner put it. I thought that was appropriate to the child's age, and it was an admonishment that we are here for purposes of only telling the truth and not make-believe and not make-up type of items. I found that number ten was satisfied from the recording. The entire recording of February the 17th of 1999 the Court found to be a rather innocent approach to the subject, and I felt that that admonishment was contained in the questions of the interviewer and placed in the interview, although I don't think that they initially--that they led off the tape. I don't think that they came at the very beginning of the tape.

Following the ruling on admissibility, defense counsel urged his challenge to L.J.'s competency. The judge questioned the child in chambers [FN3] and ruled that she was not competent to testify at trial:

[T]his child does not appear to the Court to possess sufficient intellect to relate transactions with respect to which they are interrogated. The child does not give me the confidence that she would understand the difference between telling the truth and telling a lie in a courtroom setting, and her immaturity does not give me any confidence that she can be interrogated in an adversarial,

although very delicate, manner.... So the court rules that she is not competent to testify at this point in time.

FN3. There is no reporter's record of the discussion between the judge and L.J.

The trial was conducted on June 11, 2001. Appellant pled "not true" to the allegations in the petition. The State offered the February videotape into evidence during the testimony of Christina Hammon, a forensic interviewer at the Children's Advocacy Center in Midland who had conducted the interview with L.J. [FN4]

State: I have placed in front of you what I've marked as State's Exhibit 2. Are you able to identify that?
Hammon: Yes, this is the videotape that I made of an interview with [L.J.].
State: Your Honor, at this time I would like to show the video to the jury.
Defense: I object. They have not laid a proper predicate as to it being an accurate recording, having--that the machinery was working, identification of the parties on the tape. That's the basis of my objection, Your Honor.
State: Your Honor, I would be happy to--
Court: At least ask her if she has had an opportunity to view it since the time it has left her possession. State: Have you had the opportunity to review this video?
Hammon: Yes.
State: And who are the actors that are shown on this video?
Hammon: Myself and [L.J.].
State: How are the videotapes actually made at the Child Advocacy Center?
Hammon: The interview room that [L.J.] and I are in has the camera on the wall, and then in another office we have a monitoring room set up. And that monitoring room is, of course, hooked up to the camera via closed-circuit television, so the interview can be monitored as it happens there. And also the VCRs are in that room, in that monitoring room.
State: And is the camera and VCR and all the other equipment capable of making an accurate recording of the occurrences in that room? Hammon: Yes. State: And were you operating all of this machinery?
Hammon: Yes.
State: And are you capable and trained in operating that machinery?
Hammon: Yes.
State: Okay. And you had the opportunity to observe it?
Hammon: Yes.
State: Have any alterations been made?
Hammon: No.
State: Is it an accurate representation of the interview that you did on that day?
Hammon: Yes.
State: Your Honor, at this time I offer State's Exhibit 2. (State's Exhibit No. 2 was offered)
Court: Further objection?
Defense: No, sir.
Court: Tape No. 2 is admitted--as Exhibit No. 2, excuse me.

FN4. Hammon also videotaped the April 2000 interview with L.J. which was later offered into evidence by the defense. L.J. also stated in this videotape that "[C.Y.] wiggled my tee-tee." Defense counsel acknowledged during her closing argument that the child made this statement in both tapes. However, she argued to the jury that there were a number of inconsistencies in the child's testimony, including whether her clothes were on or off and whether there was another person in the room when the incident occurred.

At the end of Hammon's testimony, defense counsel offered the April videotape into evidence and it was played for the jury. The jury ultimately found that Appellant engaged in delinquent conduct by committing indecency with a child by sexual contact.

Appellant brings three issues for review. In Point of Error No. One, he argues the trial court erred in admitting the complainant's videotaped testimony. In Point of Error No. Two, he claims the trial court erred in finding that the complainant was unavailable. Finally, he brings a legal sufficiency challenge in his third point of error. We address his second point first.

Held: Affirmed.

Opinion Text: UNAVAILABILITY OF CHILD WITNESS

Appellant contends the trial judge erred in finding that the complainant was unavailable to testify. See Tex.Code Crim.Proc.Ann. art. 38.071, 1 (Vernon Pamph.2002). [FN5] A trial court's ruling on a finding of unavailability is reviewed for an abuse of discretion. See Marx v. State, 953 S.W.2d 321 (Tex.App .-Austin 1997), citing Act of July 20, 1987, 70th Leg., 2d C.S., ch. 55, 2, 1987 Tex.Gen.Laws 180, 185 (Tex.Code Crim.Proc.Ann. art. 38.071)(stating preference for affording "sufficient discretion" to trial courts applying statute), aff'd, 987 S.W.2d 577 (Tex.Crim.App.1999), cert. denied, 528 U.S. 1034, 120 S.Ct. 574, 145 L.Ed.2d 436 (1999). [FN6]

FN5. Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

(5) Section 21.11 (Indecency with a Child).

FN6. There is no case directly holding that a finding of unavailability under Article 38.071 is reviewed for abuse of discretion. In Marx v. State, the appellate court addressed the issue of whether the State failed to prove the child witness was "unavailable" as required by Section 1 of Article 38.071 before permitting the child to give testimony by closed-circuit television. Marx, 953 S.W.2d at 327. The court observed that in Gonzales v. State, the Texas Court of Criminal Appeals noted that a statute was not the only basis for permitting closed- circuit testimony of a child victim in Texas. Id. To justify the use of closed-circuit testimony, the trial court must determine that the procedure is necessary by hearing evidence and finding: (1) the procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) the emotional distress suffered by the child witness in the presence of the defendant is not de minimis, that is, more than mere nervousness or reluctance to testify. Id. The court concluded that this finding of necessity supplants the requirement of unavailability described in Section 8 of Article 38.071. Id. As long as the record supports a finding of necessity, the trial court did not err by allowing testimony by closed-circuit television merely because the children involved did not meet the other requirements of Article 38.071. Id. The court then reviewed the trial court's ruling on necessity for an abuse of discretion. Id.; see also Bousquet v. State, 47 S.W.3d 131, 136 (Tex.App.-Houston (1st Dist.) 2001, pet. ref'd)(stating that a finding of necessity equally satisfies the test to determine unavailability). Thus, if a finding of necessity equally satisfies a finding of unavailability, an abuse of discretion standard should apply to both upon appellate review. Moreover, a trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. Willover v. State, 70 S.W.3d 841, 845 (Tex .Crim.App.2002).

Section 8 of Article 38.071 requires that in making a determination of unavailability, the court shall consider relevant factors, including:

the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:
(1) of emotional or physical causes, including the confrontation with the defendant; or
(2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.

Tex.Code Crim.Proc.Ann. art. 38.071, 8(a). The trial court conducted a pretrial hearing and ruled that L.J. was unavailable only with regard to the first videotape. This finding was based on his belief that the amount of time between the alleged offense in February 1999 and the anticipated trial date of June 2001 was too extensive. The court did not hear testimony on any of the relevant factors set out in Section 8. No evidence was presented on the relationship between the defendant and the child, the maturity and stability of the child, or whether the child would be unavailable to testify because of potential psychological or physical harm. L.J. was not questioned prior to the determination. When defense counsel insisted that the trial court was required to inquire into these factors, the court replied that he was not sure whether, at that point in time, he could make such a determination. However, there was no further discussion either at the pretrial hearing or during the trial itself as to whether unavailability was properly determined.

The trial court was aware of L.J.'s age and had some idea of the nature and duration of the alleged offense, but those factors taken together with the court's determination that there was a long period of time between the alleged offense and the trial date did not provide a sufficient basis upon which to find that L.J. was unavailable under Article 38.071. There was no testimony that the child would suffer harm if she were forced to testify. [FN7] We thus conclude that the trial court abused its discretion in finding the child unavailable.

FN7. In Bousquet v. State, the defendant challenged the trial court's finding of unavailability of a child witness. Bousquet v. State, 47 S.W.3d 131 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd). The State presented testimony from the child's uncle relating to the child's psychological state of mind. The uncle testified that if the child were to return to Texas from Colorado to testify it would have a highly detrimental impact on his emotional progress and that the child did not want to return because he feared appellant. Id. at 135. A caseworker also testified that the child feared appellant. Id. Based on this evidence, the trial court considered two factors: (1) the relationship between the child and the defendant; and (2) the emotional stability of the child. Id. at 135- 36. The court found that the child was unavailable. Id. On appeal, the court held that the trial court abused its discretion when the evidence showed that the child was twelve years old at the time of trial, the alleged sexual assault consisted of a single touching occurring over three years before the trial, and the absence of testimony from a child-care expert regarding the child's psychological state of mind at or near the time of the trial. Id. at 136. The court also expressed doubts about the child's fear of appellant based on evidence that the child was at the assistant district attorney's office in Houston during the proceedings and that this provided the judge with an opportunity to question the child directly about his reluctance to testify, but did failed to do so. Id. Here, there was even less evidence presented to support a finding of unavailability.

We turn now to a harm analysis. See Tex.R.App.P. 44.2(a). The denial of a defendant's right to confront the complainant in violation of the Confrontation Clause is constitutional error. Shelby v. State, 819 S.W.2d 544, 547 (Tex.Crim.App.1991). Where the Confrontation Clause is implicated, the harm analysis is conducted pursuant to Texas Rule of Appellate Procedure 44.2(a). We must reverse the judgment unless we find beyond a reasonable doubt that the error did not contribute to the adjudication. Tex.R.App.P. 44.2(a). While the trial court's finding of unavailability led to the improper admission of the first videotape, the record reflects that the defense offered the second videotape into evidence. L.J. made similar accusations against Appellant in both videos; indeed, the defense acknowledged these accusations but then utilized inconsistencies in her statements to attack her credibility. Improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. Broderick v. State, 35 S.W.3d 67, 74 (Tex.App.-Texarkana 2000, pet. ref'd), citing Mayes v. State, 816 S.W.2d 79, 88 (Tex.Crim.App.1991). Appellant does not complain on appeal that the trial court's error in admitting the first videotape forced him to introduce the second videotape in order to demonstrate the child's lack of credibility. Consequently, we find beyond a reasonable doubt that the erroneous admission of the February videotape did not contribute to the jury's verdict. Point of Error No. Two is overruled.

ADMISSION OF THE VIDEOTAPE

In Point of Error No. One, Appellant claims that the February videotape did not satisfy Sections 5(a)(10) and 5(a)(11) of Article 38.071 because there was insufficient evidence to show that L.J. knew the difference between a truth and a lie. We find that these claims are without merit. As to his complaints regarding Section 5(a)(10), Appellant has failed to preserve error. Section 5(a)(10) Appellant permits the admission of a recording of an oral statement of a child made before a complaint has been filed or an indictment returned if "before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully." Tex.Code Crim.Proc.Ann. art. 38.071, § 5(a)(10). Appellant failed to object to the admissibility of the videotape on the basis of Section 5(a)(10) either at the pretrial hearing or at trial. An objection stating one legal basis may not be used to support an appeal on a different legal basis. Fultz v. State, 940 S.W.2d 758, 760 (Tex .App.- Texarkana 1997, pet. ref'd), citing Rezac v. State, 782 S.W .2d 869, 870 (Tex.Crim.App.1990). The objection must draw the court's attention to the particular complaint raised on appeal. Id., citing Little v. State, 758 S.W.2d 551, 564 (Tex.Crim.App.1988), cert. denied, 488 U.S. 934, 109 S.Ct. 328, 102 L.Ed.2d 346 (1988). When the court ruled at the pretrial hearing that the videotape comported with the requirements of Subsection 5(a)(10), Appellant did not object. When the tape was offered into evidence at trial, the defense did not object that the video lacked an oath or an admonishment to the child to testify truthfully. Instead, his objection went to the lack of a proper predicate as to the accuracy of the recording and whether the parties were properly identified. Defense counsel further stated, "That's the basis of my objection." When the court asked, "Further objection?," defense counsel replied, "No, sir."

Appellant next complains that the videotape did not comply with Section 5(a)(11), which provides that a recording is admissible if "the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time that the recording was made." Tex.Code Crim.Proc.Ann. art. 38.071, 5(a)(11). The court stated on the record that he believed the child was competent to testify at the time the recording was made. Point of Error No. One is overruled.

LEGAL SUFFICIENCY

In Point of Error No. Three, Appellant challenges the legal sufficiency of the evidence supporting the finding of delinquency. Specifically, he contends that the evidence is legally insufficient because L.J. did not make an in-person identification either at or before trial as required by Section 9 of Article 38.071. [FN8] He also seems to argue that neither the child nor any other person at trial identified him as the perpetrator of the offense. We disagree.

FN8. Section 9 of Article 38.071 states:

If the court finds the testimony taken under Section 2 or 5 of this article is admissible into evidence or if the court orders the testimony to be taken under Section 3 or 4 of this article and if the identity of the perpetrator is a contested issue, the child additionally must make an in- person identification of the defendant either at or before the hearing or proceeding.

Tex.Code Crim.Proc.Ann. art. 38.071, § 9.

In determining the legal sufficiency of the evidence used to support a criminal conviction, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560, 573 (1979); Dewberry v. State, 4 S.W.3d 735, 740 (Tex.Crim.App.1999); Lyon v. State, 885 S.W.2d 506, 516 (Tex.App.-El Paso 1994, pet. ref'd). We must consider all the evidence the jury was permitted to consider, whether proper or improper, in determining the sufficiency of the evidence to support a conviction. See Johnson v. State, 871 S.W.2d 183, 186 (Tex.Crim.App.1993). We do not resolve conflicts of fact or assign credibility to witnesses, as it is the function of the trier of fact to accept or reject any, part, or all of any witness's testimony. See Adelman v. State, 828 S.W.2d 418, 421 (Tex.Crim.App.1992); Lucero v. State, 915 S.W.2d 612, 614 (Tex.App.-El

Paso 1996, pet. ref'd).

The identity of a perpetrator may be proven by either direct or circumstantial evidence. See Couchman v. State, 3 S.W.3d 155, 162 (Tex.App.-Fort Worth 1999, pet. ref'd), citing Earls v. State, 707 S.W.2d 82, 85 (Tex.Crim.App.1986). The absence of an in-court identification does not render the evidence insufficient on the issue of identity. See id.; Meeks v. State, 897 S.W.2d 950, 954-55 (Tex.App.-Fort Worth 1995, no pet.). The fact that L.J. did not make an in-person identification does not preclude us from reviewing the entirety of the record to determine whether the evidence of identity was legally sufficient. We may review any evidence submitted to the jury, whether properly or improperly admitted.

In Couchman, a defendant charged with indecency with a child challenged the out-of-court statements made by the child victim as legally insufficient on the issue of identity. Couchman, 3 S.W.3d at 162. He claimed that he was not the same "Tony" identified in the out-of-court statements made by the child and that the child never identified him as the perpetrator in court. Id. The court found the evidence sufficient based on (1) the child's testimony that "Tony" had touched her in an area where it "was not okay to touch"; (2) a relative's testimony that "Tony" was the only person the child knew with that name; and (3) an in-court identification of "Tony" by that relative. Id. at 162-63.

Here, both of the videotapes revealed that L.J. referred to Appellant by his first name. In both tapes, she said that "[C.Y.] wiggled my tee-tee." L.J.'s mother, testified that Appellant was at the house when she picked up the child on the date of the offense. She also identified Appellant in court and testified that L.J. did not know any other person with Appellant's first name. This evidence was sufficient for a rational juror to conclude that Appellant was the perpetrator of this offense. Point of Error No. Three is overruled.

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