



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MIGUEL REYES,	§	No. 08-13-00296-CR
	§	
Appellant,	§	Appeal from
	§	
v.	§	346th District Court
	§	
THE STATE OF TEXAS,	§	of El Paso County, Texas
	§	
Appellee.	§	(TC # 20090D05388)
	§	

OPINION

Miguel Reyes appeals his conviction of aggravated sexual assault of a child. A jury found Appellant guilty and assessed his punishment at imprisonment for a term of ten years and a fine of \$10,000. We affirm.

FACTUAL SUMMARY

In November of 2008, Veronica Martinez was having financial difficulties, so she and her thirteen-year-old daughter, L.E., moved into Appellant's home to share expenses. Appellant is Martinez's uncle by marriage, and his sixteen-year-old daughter, S.R., also lived with him. According to Martinez, L.E. did not want to move because she did not want to change schools. Martinez and L.E. began moving into Appellant's home on Saturday, November 8, 2008. L.E. did not want to help with the move, so Martinez gave Appellant \$30 to take L.E. to the movies and get something to eat while she continued moving their belongings. Martinez had borrowed a

truck to use during the move, but it did not have working headlights. It was dark by the time Martinez got the last load in the truck, so she had to stay at the old residence overnight. Appellant's daughter, S.R., was staying with her mother that weekend, so Appellant and L.E. were alone at his house that night.

L.E. explained that she slept in the same bed with Appellant because boxes were in all of the other rooms, but she acknowledged that she could have slept in S.R.'s room. After L.E. got into bed, Appellant began caressing her face and hair. He kissed her face and then began kissing her on the lips. Appellant moved his hands over her body on the outside of her clothing, and he put his hands under her shirt. Appellant touched her breasts and put his hand inside of her pants and underwear. He tried to put his fingers inside of her vagina, but L.E. squeezed her legs together in an effort to stop him. Appellant persisted and tried to separate her legs, but he finally stopped when he felt her shaking. Appellant said he was sorry and went into the bathroom. L.E. stayed in the bed and fell asleep. She explained that she did not leave Appellant's bedroom because she was in shock.

L.E. woke up at around 9:00 the following morning and saw that Appellant was not in the bedroom. Appellant came into the house after L.E. got up and he told her that he was sorry. He asked her not to tell her mother and promised it would not happen again. L.E. went into another room and locked the door. She called one of her friends later that day and told her that Appellant had touched her. L.E. did not immediately tell her mother because she was worried her mother would not believe her since Appellant was her favorite uncle. When she told her mother two weeks later, they immediately left Appellant's house. Martinez confronted Appellant the

following day, but he denied doing anything to L.E.

The following day, Martinez took L.E. to the hospital and a certified sexual assault nurse examined her. The nurse did not find any injuries or evidence of vaginal penetration. The nurse explained that the absence of evidence was expected given the amount of time between the incident and examination.

Appellant testified at trial and denied sleeping in the same bed with L.E. or touching her. He explained that after they returned to his house, he went into his bedroom and made a phone call while L.E. watched television. L.E. came to his bedroom later and asked him where she was going to sleep. He gave her a blanket and a pillow, and told her she could sleep in her bedroom, the TV room, or the living room. He did not know where she slept, but she did not sleep in his room. Appellant got up early to go to a church retreat, and when he returned home at 9:00 p.m., L.E. and S.R. were both at the house.

S.R. testified that when she returned home to her house at 7:00 or 8:00 p.m., Appellant and L.E. were in the kitchen talking and laughing. L.E. appeared to be happy. S.R. testified that she had been present during two conversations when L.E. said she was unhappy about moving from the east side of El Paso to Appellant's home in the northeast.

Appellant attempted to elicit lay opinion testimony from L.E.'s great aunt, Norma Contreras, that L.E. was not a truthful person. The trial court sustained the State's objections that the evidence was inadmissible under Rule 608 because Contreras did not have sufficient knowledge of L.E.'s reputation for truthfulness to form an opinion since she had not had any

contact with L.E. since 2008¹, and the evidence was unfairly prejudicial under TEX.R.EVID. 403. The jury impliedly rejected Appellant's defense that L.E. had fabricated the allegation and it found Appellant guilty as charged in the indictment.

EXCLUSION OF EVIDENCE

In his sole issue, Appellant argues that the trial court abused its discretion by excluding Norma Contreras's lay opinion testimony that L.E. is untruthful. The State responds that the trial court did not abuse its discretion by implicitly ruling that Contreras's opinion of L.E.'s character for truthfulness was too remote in time to be relevant and probative.

Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App. 2010). An abuse of discretion occurs if the court's decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008). An evidentiary ruling must be upheld if it is reasonably supported by the record and correct on any theory of law applicable to the case. *Ramos v. State*, 245 S.W.3d 410, 418 (Tex.Crim.App. 2008).

Opinion Evidence Regarding Untruthfulness

Rule 404(a)(1) of the Texas Rule of Evidence generally prohibits the admission of evidence of a person's character or character trait for purposes of proving character conformity, but Rule 404(a)(4) establishes an exception for evidence of a witness's character offered pursuant to Rules 607, 608, and 609. TEX.R.EVID. 404(a)(4). Rule 608, titled "A Witness's

¹ The case was tried before a jury in 2013.

Character for Truthfulness or Untruthfulness,” provides as follows:

(a) Reputation or Opinion Evidence. A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness’s conduct in order to attack or support the witness’s character for truthfulness.

TEX.R.EVID. 608.

Rule 608(a) permits two types of general credibility impeachment of a witness: (1) testimony that the witness has a poor reputation in the community for telling the truth; and (2) testimony from a specific character witness that, in his opinion, the witness is not worthy of belief because they generally do not tell the truth. TEX.R.EVID. 608(a); *Dixon v. State*, 2 S.W.3d 263, 272 (Tex.Crim.App. 1998)(op. on reh’g); see *Scott v. State*, 222 S.W.3d 820, 824-26 (Tex.App.--Houston [14th Dist.] 2007, no pet.).

For impeachment purposes, the prior character of a defendant for being peaceful and law abiding, or for being truthful, is some evidence of present character. See *Nethery v. State*, 692 S.W.2d 686, 706 (Tex.Crim.App. 1985). Thus, testimony regarding prior character is admissible if it is not so remote as to have no probative value in indicating present character. *Id.* The question of remoteness, consistent with impeachment practices, rests in the sound discretion of the trial court. *Id.*

If permitted, Contreras would have testified that in her opinion L.E. was not a truthful person. Contreras testified that she had known L.E. since she was young, and Martinez and L.E.

had lived with her for about six months when L.E. was about eight or nine years of age. Contreras admitted that she had not had any contact with L.E. since these allegations were made in 2008. Thus, her opinion pertains exclusively to L.E.'s character for truthfulness in 2008 when L.E. was thirteen years of age. Contrary to the arguments Appellant made in the trial court, the jury was not evaluating L.E.'s character for truthfulness solely at the time she made the allegation against Appellant in 2008. It was evaluating her credibility as a trial witness in 2013. Because Contreras had not had any contact with L.E. since 2008, the State challenged the basis of her opinion and effectively argued that the testimony was too remote to be probative of L.E.'s present character for truthfulness in 2013. The general rule is that a remoteness objection goes to the weight to be given to the opinion testimony, not its admissibility. *See Nethery*, 692 S.W.2d at 706-07; *Sanne v. State*, 609 S.W.2d 762, 772 (Tex.Crim.App. 1980). Both *Nethery* and *Sanne* cite to *Brown v. Perez*, 34 S.W. 725 (Tex. 1896) in support of this rule. In *Brown*, the Texas Supreme Court held that evidence of a person's character at a remote time is generally admissible because the law does not presume that "a person of mature age" has so reformed as to have acquired a different reputation. *Brown*, 34 S.W. at 727. The same cannot be said for a juvenile's character because it has been recognized that the personality traits of juveniles are less fixed than those of adults and there is a possibility that a minor's character deficiencies will be reformed. *See Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 1195-96, 161 L.Ed.2d 1 (2005). While we decline to hold that the general rule does not apply to opinion testimony regarding a juvenile's character for truthfulness, the trial court certainly could have taken into account the mutable nature of a juvenile's personality when evaluating the remoteness of this

evidence. We conclude that the trial court did not abuse its discretion by finding that Contreras's opinion of thirteen-year-old L.E. for truthfulness in 2008 was so remote that it was not probative of her present character for truthfulness in 2013. We overrule the sole issue presented and affirm the judgment of the trial court.

September 21, 2016

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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