COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DONIVAN VIDAL JAQUEZ,	§	No. 08-15-00274-CR
Appellant,	§	Appeal from
v.	§	County Court at Law No. 1
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20120C09300)

O P I N I O N

Donovan Vidal Jaquez was convicted of assault causing bodily injury to a family member. The trial court sentenced Appellant to confinement in the El Paso County Jail for one year, probated for 18 months, and assessed a $4,000 fine, of which $3,000 was probated. In two issues for review, Appellant complains that the trial court abused its discretion in excluding proffered impeachment evidence. For the reasons that follow, we affirm.

FACTUAL SUMMARY

On September 16, 2010, Appellant was charged by information with the offense of family violence assault by "intentionally, knowingly, or recklessly caus[ing] bodily injury to Rocio Garay by striking Rocio Garay about the face with [Appellant's] fist."

Garay began dating Appellant in 2009 and their relationship lasted approximately three years. Together they have a son, A.J. On September 10, 2010, Garay was working at a

Halloween store near downtown El Paso while her sister, Claudia, watched A.J. Claudia lived on the far east side of town, and it took about forty minutes for Garay to drive from downtown El Paso to Claudia's house. That evening, Garay had been at Claudia's house for thirty minutes when she received a call from Appellant telling her to hurry to his house. Appellant always called to keep track of her and how long it took her to get from work to Claudia's house. According to Garay, Appellant would often get upset over how much time she spent at Claudia's house. Garay left Claudia's house with A.J. and headed to Appellant's house as requested. When she pulled up, she noticed he was walking around outside near the sidewalk area. Appellant opened her car door, got into the passenger seat, and the two began arguing about how she did not arrive quickly enough because he was heading out to a friend's house. Garay did not understand why Appellant was rushing her when he was already planning to leave. When Appellant told Garay he was going to a party with his friends, she broke up with him. Immediately after she said, "it's over," he punched her in the face. Appellant then exited the car and sat on the side of the street. Garay did a U-turn to the other side of the street and called the police on her cell phone. The 911 dispatcher instructed her to drive to the police station, which was located about three minutes away.

Once at the station, Garay informed Officer Miramontes of the incident that occurred. Officer Miramontes created a report, but did not take any photographs. Officers instructed Garay to return a few days later so they could photograph her eye, since she did not yet have any apparent bruising. Garay never returned. She testified at trial that she had a bruise under her eye and red dots both inside her eye and along the bruise. She took photos of her eye with her phone, but later lost the photos. She admitted that she had been arrested for an aggravated assault but she had not been indicted for the offense. Finally, Garay revealed that approximately six months

after the incident, she and Appellant reconciled and continued an on-and-off again relationship for two years.

Prior to cross examination and outside the presence of the jury, Appellant advised the court that he intended to question Garay about an assault she allegedly committed against his girlfriend, three Child Protective Services (CPS) complaints, and two protective orders Garay had filed. He argued that this evidence would be relevant to his theory that Garay fabricated her allegations against him. He then proceeded to question Garay on voir dire outside the presence of the jury. The following facts were developed. In May 2013, Appellant filed a petition to modify child support. The couple broke up a month later. On July 3, 2013, Garay filed for a protective order, but purportedly not because Appellant wanted to reduce his child support. She later dismissed it because Appellant told her to do so. Garay filed a second application on March 25, 2014. She dismissed that one as well, again because Appellant told her to do so. In April 2014, an agreed judgment was entered, reducing Appellant's child support and awarding him visitation. Garay denied filing any complaints with CPS. At the conclusion of the voir dire examination, the trial court ruled that Appellant was not permitted to discuss any of these collateral issues before the jury.

Cross examination then began before the jury. Garay confirmed that she never went back to the police station to check on the status of the incident. She thought Appellant struck the right side of her face, but it happened so fast, she could not really recall. Appellant asked her to drop the charges against him after they got back together, so she did so. She denied threatening Appellant with a false report that he hit her. Regarding A.J., Garay testified that she has had various issues with Appellant concerning custody and support. She hired a family law attorney because she wanted Appellant to have supervised visitation due to his violent nature.

Appellant testified in his own defense. On the day in question, he and Garay argued all day. He broke up with her over the phone before she even arrived at his house later that evening. He was not waiting for Garay to arrive and was in fact on his way to visit a friend. According to Appellant, when Garay saw him dressed up, she became angry and accused him of "see[ing] someone else." Appellant acknowledged that he was going to see a female friend. Once Garay parked next to his house, Appellant approached the passenger side window of her car. She wanted Appellant to get into her car and told him that if he did not get in the car, she would call the police and tell them he hit her. Appellant explained that he continued to walk down the street and never got into her car. After their exchange, she drove off in the opposite direction. After this incident, Appellant and Garay reconciled and continued their relationship for another few years. He was not aware of the charges against him until he was arrested in 2014. He further explained that after the modification agreement was finalized in 2014, he and Garay did not communicate with each other. He concluded his testimony by stating that Garay had threatened him many times in the past, but he did not "think it would get to the point where it actually did. And it wasn't until four years later that [he] got picked up on something she said she would do a long time ago." He admitted he had previously been convicted of an assault family violence in 2015.

Outside the presence of the jury, Appellant testified in support of his bill of exceptions. Garay had filed two applications for protective orders against him. One of the applications alleged that he was stalking her. He was also aware of three CPS complaints filed against him, two of which he believed Garay filed. In 2014, Garay struck his girlfriend with a beer bottle because she was upset that he was with another woman. Appellant believed that the assault, the protective order applications, and the CPS complaints resulted from his efforts to reduce child

support. He also had been required to enforce his visitation rights because at one point, Garay attempted to move to Colorado with their son without his consent. Defense counsel offered: (1) his 2013 petition to decrease child support; (2) a 2013 protective order application filed by Garay, based on stalking and family violence allegations; (3) a 2013 order granting nonsuit of the protective order application; (4) a 2014 protective order application filed by Garay; (6) a 2014 order granting nonsuit of the second protective order application; and (7) an agreed order concerning child support, medical insurance, and notification of a change of address. Ana Zaragosa then testified that Garay had thrown a bottle at her forehead. The left side of her forehead and both of her eyes were bruised. She passed out from the incident and suffered a concussion. Defense counsel then offered two photographs of Zaragosa's injuries.

EVIDENTIARY COMPLAINTS

In two points of error, Appellant maintains that the trial court erred in not admitting his impeachment evidence. The first relates to the child support litigation, the applications for protective orders, and the CPS complaints. The second pertains to the assault on Zaragosa. Because both issues involve the exclusion of evidence, we will address them together.

A trial judge's decision on the admissibility of evidence is reviewed under an abuse of discretion standard and will not be reversed if it is within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex.Crim.App. 2011); *Davis v. State*, 329 S.W.3d 798, 813-14 (Tex.Crim.App. 2010); *Russeau v. State*, 291 S.W.3d 426, 438 (Tex.Crim.App. 2009). If an abuse occurred, we will not reverse the trial court's judgment unless the error affected a substantial right of the appellant, i.e., the error had a substantial and injurious effect or influence in determining the jury's verdict. *Bosquez v. State*, 446 S.W.3d 581, 585 (Tex.App.--Fort Worth 2014, pet. ref'd); *Walters v. State*, 247 S.W.3d 204, 218-19 (Tex.Crim.App. 2007); *Hammons v.*

State, 239 S.W.3d 798, 806 (Tex.Crim.App. 2007); *see also* TEX.R.APP.P. 44.2(b); TEX.R.EVID. 103(a).

Confrontation Clause Complaints

Included within both points of error are complaints that Appellant was denied his constitutional right to confront and cross-examine Garay. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. To preserve error for appellate review, including constitutional error, an appellant must make a timely, specific objection to the trial court and obtain a ruling. TEX.R.APP.P. 33.1; *Linney v. State*, 401 S.W.3d 764, 772-73 (Tex.App.--Houston [14th Dist.] 2013, pet. ref'd). The issue on appeal must comport to the objection made at trial. *Linney*, 401 S.W.3d at 773. In the trial court, Appellant argued that the evidence was admissible under the rules of evidence, but he never lodged a confrontation clause objection. Objections predicated on the evidentiary rules do not preserve constitutional issues. *See Reyna v. State*, 168 S.W.3d 173, 179 (Tex.Crim.App. 2005). Because Appellant failed to preserve error as to violations of the Confrontation Clause, those issues waived. *See Ferree v. State*, 416 S.W.3d 2, 7 (Tex.App.--Houston [14th Dist.] 2013, pet. ref'd).

Exclusion Predicated on the Rules of Evidence

Appellant contends that his impeachment evidence should have been admitted to support his theory of fabrication. A defendant seeking to impeach a witness with evidence of a previous false accusation against a third party must, as a threshold evidentiary matter, produce evidence showing the prior accusation is actually false. *Palmer v. State*, 222 S.W.3d 92, 95 (Tex.App.--Houston [14th] Dist.] 2006, pet. ref'd); *Lopez v. State*, 18 S.W.3d 220, 225-26 (Tex.Crim.App. 2000)(approving trial court's exclusion of complainant's previous accusation of physical abuse against third party when it was "never shown to be false"); *Lape v. State*, 893 S.W.2d 949, 955

(Tex.App.--Houston [14th Dist.] 1994, pet. ref'd)(upholding exclusion of prior accusations of sexual assault against third parties when the appellant produced no evidence of falsity); *Hughes v. State*, 850 S.W.2d 260, 262-63 (Tex.App.--Fort Worth 1993, pet. ref'd)(same). On voir dire examination outside the presence of the jury, Garay denied that the allegations she made in her 2013 protective order application were false. She was never questioned as to whether the allegations in her 2014 application were false, but after an exchange with defense counsel, she testified that she believed her stalking allegations had merit. She also denied making any CPS complaints against Appellant. Appellant failed to question her concerning the assault on Zaragosa, her attempts to control Appellant and keep him away from other women, or her desire to seek revenge because he left her for another woman. Garay never testified that she fabricated any of the documents at issue or that she had any ill-intentions or motives in filing the protective order applications and the assault charges against Appellant. At the close of Garay's voir dire examination, Appellant reiterated that the evidence should be admissible to show Garay had attempted to control Appellant. The trial court issued its ruling, and determined that it would not permit questioning on "these collateral matters." Appellant did not establish, as a threshold evidentiary matter, that the evidence he sought to have admitted was actually false. Therefore, the trial court did not err in excluding the contested custody and child-support litigation evidence[1]; the two protective order applications filed against him; and the three CPS complaints made against him. We overrule Issue One.

[1] When substantially the same or similar evidence is before the jury as that excluded, no reversible error is shown. *Young v. State*, 382 S.W.3d 414, 421 (Tex.App.--Texarkana 2012, pet. ref'd); *McNac v. State*, 215 S.W.3d 420, 425 (Tex.Crim.App. 2007). Garay testified that she had custody and support issues with Appellant and that she hired a family law attorney to help her reduce the amount of time Appellant spent with their child. When Appellant testified before the jury, he stated that he had come to an agreement with Garay on these issues. After hearing this testimony, the jury was excused while Appellant filed his bill of exceptions with the court which included his petition to modify the parent-child relationship to decrease child support filed in 2013. The petition itself would not provide the jury with any useful information as it was already aware of the family law issues between Appellant and Garay, given the testimony elicited from both of them.

In his second issue, Appellant similarly asserts that the trial court erred in not allowing him to cross examine Garay concerning the assault on Zaragosa. This argument is without merit. Texas law requires great latitude when the evidence deals with a witness's specific bias, motive, or interest to testify in a particular fashion. *See, e.g., Richardson v. State*, 744 S.W.2d 65, 79 (Tex.Crim.App. 1987)("the accused is given great latitude in showing any fact which would tend to establish ill feeling, bias, or motive for fabrication on the part of any witness testifying against the accused."), *vacated on other grounds*, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989); *Gonzales v. State*, 929 S.W.2d 546, 549 (Tex.App.--Austin 1996, pet. ref'd)("The rules of evidence grant a party greater latitude to prove a witness's bias than to prove a witness's untruthful character."). But there is an important distinction between an attack on the general credibility of a witness and a more particular attack on credibility that reveals "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17, 94 S.Ct. at 1110. However, as Justice Stewart noted in concurrence, the court neither held nor suggested that the constitution confers a right to impeach the general credibility of a witness through otherwise prohibited modes of cross examination. *Id.* at 321, 95 S.Ct. at 1112-13 (Stewart, J., concurring). Thus, a defendant does not have an absolute constitutional right to impeach the general credibility of a witness in any fashion that he chooses. *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. 2009). But the constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an

extent that he could not present a vital defensive theory. *Potier v. State*, 68 S.W.3d 657, 663-65 (Tex.Crim.App. 2002); *Wiley v. State*, 74 S.W.3d 399, 405 (Tex.Crim.App. 2002).

Under Rule 403(a)(3) of the Texas Rules of Evidence, a defendant may offer evidence of a pertinent character trait such as truthfulness. *Hammer*, 296 S.W.3d at 563. But under Rule 608, the witness's general character for truthfulness may be shown only through reputation or opinion testimony. TEX.R.EVID. 608(a)("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."); *Hammer*, 296 S.W.3d at 563. A witness's general character for truthfulness or credibility may not be attacked by cross examination or by offering extrinsic evidence concerning specific prior instances of untruthfulness. *Hammer*, 296 S.W.3d at 563. For example, the defense may not ask the witness: Didn't you cheat on you income tax last year? Didn't you lie on Tuesday about having an affair with your boss? Didn't you steal five dollars from the church collection plate last week and then lie to the priest about it? *Id.* While all of those questions attack the witness's general character for truthfulness, that mode of impeachment is specifically barred by Rule 608(b). TEX.R.EVID. 608(b)("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."). Our state evidentiary rules frown on unnecessary character assassination.

However, the rules of evidence do permit a witness to be cross examined on specific instances of conduct when they are used to establish his specific bias, self-interest, or motive for

testifying.[2] *Hammer*, 296 S.W.3d at 563. Under Rule 613(b), the opponent must first cross examine the witness with the circumstances surrounding the bias, interest, or motive, and, if the witness denies the circumstances or the motive, the opponent may introduce extrinsic evidence to prove the motive or bias. TEX.R.EVID. 613(b). Rule 404(b) explicitly permits the defense, as well as the prosecution, to offer evidence of other acts of misconduct to establish a person's motive for performing some act, such as making a false allegation against the defendant. *Hammer*, 296 S.W.3d at 563.

Here, Appellant attempted to utilize Garay's alleged assault against Zaragosa as evidence to support his theory that Garay fabricated the 2010 assault offense against him. Importantly, Garay allegedly assaulted Zaragosa in 2014, four years after the 2010 assault at issue. Appellant attempts to fit this 2014 offense into the parameters of Rules 608(b) and 613(b) as a means to illustrate that Garay had ill feeling, bias, or a motive to fabricate the 2010 assault filed against him. But the evidence of the 2014 assault on Zaragosa is not admissible to show that Garay had a motive to fabricate the assault that occurred in 2010. We conclude that the trial court did not abuse its discretion in excluding this evidence. We overrule Issue Two and affirm the judgment of the trial court.

[2] To establish interest, bias, or motive, the Texas Court of Criminal Appeals has held that one must first establish a specific connection between the witness's testimony and the cause to disclose an actual bias or motive. *Thompson v. State*, No. 2-02-026-CR, 2003 WL 857135, at *1 (Tex.App.--Fort Worth Mar. 6, 2003, pet. ref'd)(not designated for publication); *Willingham v. State*, 897 S.W.2d 351, 358 (Tex.Crim.App.), *cert. denied*, 516 U.S. 946, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995). This nexus must be demonstrated by laying a proper foundation. *Id.* To lay this foundation, the witness must first be informed as to the circumstances supporting a claim of bias or interest, and the witness must be given an opportunity to explain or deny such circumstances. *See* TEX.R.EVID. 613(b)(stating that before cross examination may be allowed, the circumstances supporting such claim, including the contents and where, when, and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances); *Willingham*, 897 S.W.2d at 358. Rule 613 further provides that "[e]xtrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it." TEX.R.EVID. 613(b)(4). When a party fails to lay the proper predicate for impeaching a witness, it is not error to refuse to allow the admission of such testimony. *Id.*; *see also Moore v. State*, 652 S.W.2d 411, 413 (Tex.Crim.App. 1983).

March 22, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

(Do Not Publish)