Opinion filed June 16, 2016

In The

Eleventh Court of Appeals

Nos. 11-14-00177-CR, 11-14-00178-CR,
11-14-00179-CR, & 11-14-00180-CR

JOHNNY LEE DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 90th District Court

Stephens County, Texas

Trial Court Cause Nos. F33385, F34015, F34016, & F34017

M E M O R A N D U M O P I N I O N

The jury convicted Johnny Lee Davis[1] of one count of sexual assault of a child and of three counts of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.011 (West 2011), § 22.021 (West Supp. 2015). As to the conviction

[1]We note that the indictment in trial court cause no. F33385 shows Appellant's name to be Johnny Lee Davis, Jr. but that the indictments in the other three causes and the judgments in all four causes show Appellant's name to be Johnny Lee Davis.

for sexual assault of a child, the jury assessed Appellant's punishment at confinement for a term of twenty years and a fine in the amount of $10,000. As to each of the three convictions for aggravated sexual assault of a child, the jury assessed Appellant's punishment at confinement for life. The trial court ordered Appellant's sentence for sexual assault of a child to run concurrently with two of his life sentences for aggravated sexual assault. The trial court further ordered Appellant's other life sentence for aggravated sexual assault to run consecutively to the twenty-year sentence for sexual assault. We affirm.

Appellant presents three issues in each appeal. In his first issue, Appellant contends that the trial court erred when it prohibited his defense counsel from cross-examining the complainant regarding the complainant's pending indictment for burglary of a habitation. Appellant argues in his second issue that the trial court erred when it admitted the outcry statement because the statement did not conform to Article 38.072 of the Texas Code of Criminal Procedure. In his third issue, Appellant asserts that the trial court erred when it allowed a witness to bolster the unimpeached testimony of the complainant.

The complainant in this case is Appellant's son. While serving a sentence in a juvenile detention center for his own perpetration of sexual abuse of other children, the complainant reported that Appellant had sexually abused him on multiple occasions. In Appellant's second issue, he contends that the trial court erred when it allowed Robert Hallas, an investigator with the Texas Department of Family and Protective Services, to testify as an outcry witness because the complainant was over the age of fourteen when the complainant made the outcry to Hallas and because the complainant reported that the abuse occurred when he was fourteen or fifteen years old. Article 38.072 provides that an outcry witness may be permitted to testify about an outcry statement made by the complainant if the abuse occurred when the complainant was younger than fourteen years of age and if the complainant reported

the abuse while he was still a child. TEX. CODE CRIM. PROC. ANN. art. 38.072, §§1(1), 2(a) (West Supp. 2015); *see also Harvey v. State*, 123 S.W.3d 623, 629 (Tex. App.—Texarkana 2003, pet. ref'd) (holding that, for the outcry witness's testimony to be admissible, the complainant must have been under the age of eighteen when he made the outcry statement).

At the Article 38.072 hearing, the parties stipulated that the complainant was born in 1994. Hallas testified that he interviewed the complainant on August 17, 2010, at the juvenile detention center in which the complainant was being held. The complainant was fifteen at the time of the interview. During the interview, the complainant told Hallas that his father started sexually abusing him when he was around the age of fourteen or fifteen. The complainant's mother testified that she believed that the complainant had said the abuse started when he was thirteen or fourteen. At the end of the Article 38.072 hearing, the trial court explained that the complainant's statement indicated that the abuse occurred at several different places and that the last time it occurred was prior to the complainant's incarceration in April 2010. Although the trial court agreed that the testimony showed that the last time the abuse occurred was when the complainant was fifteen, the trial court stated that it could "derive" that some of the abuse occurred before the child turned fourteen.

The outcry statement itself was that the abuse occurred when the complainant was fourteen or fifteen years old. In addition, in the notice of intent to use the outcry statement, the State provided that the abuse occurred when the complainant "was around the age of 14 or 15 years old." However, the notice also provided that the complainant told Hallas that "this incident was similar to what had happened before." The evidence at the time of the trial court's decision—during the Article 38.072 hearing—did not provide a clear answer as to when the abuse began. However, at trial, the complainant testified that the abuse began when he was thirteen years old. He described specific details of the abuse that occurred that summer, and

he also described the locations where the abuse occurred. The jury convicted Appellant of three counts of aggravated sexual assault of a child. The offense of aggravated sexual assault of a child requires proof that the complainant was under the age of fourteen at the time the abuse occurred. *See* PENAL § 22.021(a)(1)(B), (a)(2)(B). Based on the jury's guilty verdicts, the jury believed that the abuse occurred when the complainant was younger than fourteen years old. We recognize that this information was not before the trial court at the time that it decided to allow Hallas to testify as the outcry witness; however, we cannot say that the trial court's decision was reversible error when the complainant's own testimony shows that the abuse began when the complainant was thirteen years old and when the complainant testified to the abuse with more specificity than the outcry witness. *See* TEX. R. APP. P. 44.2(b) (an error that does not affect the defendant's substantial rights must be disregarded); *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) (the improper admission of evidence is harmless when the same facts are proven by other properly admitted evidence). Appellant's second issue is overruled in each appeal.

Appellant asserts in his third issue that the trial court erred when it allowed Hallas to bolster the complainant's unimpeached testimony. The Court of Criminal Appeals has held that impeachment of a complainant is not necessary "before substantive evidence which has the effect of bolstering may be admitted" and that expert testimony that is relevant as substantive evidence does not have to serve "some rehabilitative function" to be admissible. *Yount v. State*, 872 S.W.2d 706, 709 (Tex. Crim. App. 1993) (op. on reh'g). However, a witness's direct opinion on the truthfulness of another witness is inadmissible. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); *Yount*, 872 S.W.2d at 711–12; *Arzaga v. State*, 86 S.W.3d 767, 776 (Tex. App.—El Paso 2002, no pet.). We do not believe that Hallas's testimony at issue in this case was a direct comment on the truthfulness of the complainant's outcry statement. Here, the prosecutor asked Hallas whether he

had "taken a lot of statements, or outcry statements, of this nature before." Hallas responded, "Yes, ma'am," and the prosecutor further asked, "Are all of them as detailed as this?" After Hallas answered, "Some," the prosecutor asked, "What does it indicate to you when a child provides that much detail?" Defense counsel objected, and after the trial court overruled the objection, Hallas stated, "When someone gives details, it generally means they're telling the truth." The prosecutor did not ask about the complainant specifically but, instead, asked about "a child" in general. In addition, Hallas's response was not about the complainant but was, instead, about "someone . . . generally." Although the jury could have applied Hallas's testimony to the complainant's outcry statement in its determination of whether to believe the complainant, Hallas did not directly testify that, in his opinion, the complainant was truthful. Therefore, we overrule Appellant's third issue in each appeal.

In Appellant's first issue, he contends that the trial court erred when it prohibited his defense counsel from cross-examining the complainant regarding the complainant's pending indictment for burglary of a habitation. "A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias or interest for the witness to testify." *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996) (citing *Lewis v. State*, 815 S.W.2d 560, 565 (Tex. Crim. App. 1991)). "Such avenues necessarily include[] inquiry concerning criminal charges pending against the [witness] and over which those in need of his testimony might be empowered to exercise control." *Lewis*, 815 S.W.2d at 565; *see also Alford v. United States*, 282 U.S. 687, 692–94 (1931) (permissible purposes of cross-examination include showing that the witness's testimony is untrue or biased because it is given under promise or expectation of immunity or under the coercive effect of the witness's current detention by the State, which is also conducting the present prosecution). However, the defendant must establish a causal connection or

logical relationship between the pending charges and the witness's alleged "vulnerable relationship" with the State in order to show that evidence of the pending indictment is relevant and, thus, admissible. *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998); *see also Johnson v. State*, No. PD-1496-14, 2016 WL 3017842, at *13–14 (Tex. Crim. App. May 25, 2016) (distinguishing law that requires defendant to establish causal connection between pending criminal status and alleged biased relationship with the State with law that allows cross-examination of a witness regarding the underlying facts of a pending or juvenile charge when such facts show a witness's motive to accuse the defendant). The trial court does not abuse its discretion when it limits the defendant's cross-examination where the defendant fails to establish a causal connection or logical relationship. *Johnson v. State*, 433 S.W.3d 546, 552 (Tex. Crim. App. 2014).

Here, defense counsel argued that he should be allowed to cross-examine the complainant on the pending charges because the charges were pending in the same court in which the complainant was testifying against Appellant. Defense counsel also argued that the complainant opened the door to the testimony by testifying that he was currently "doing good." The State responded that it had made no offers or deals related to the burglary case and that it "ha[d]n't even dealt with that case." The trial court explained that it did not see the relevance of the pending indictment to the complainant's credibility because the grand jury did not indict the complainant for the offense of burglary of a habitation until 2013, and the complainant had already made his outcry in 2010. We agree that Appellant did not establish a causal connection between the complainant's pending charges and the complainant's relationship with the State in testifying against his father. Therefore, we cannot say that the trial court abused its discretion when it denied Appellant's request to cross-examine the complainant regarding his pending charges for burglary of a habitation. We note that the trial court did allow defense counsel to question the complainant

about whether he had a motive to make his outcry statement when he was being held in the juvenile detention center. Defense counsel suggested, through questioning, that the complainant made the outcry in an effort to be released from the detention center. Thus, defense counsel was not precluded from exposing a possible motive for the complainant's accusations. Appellant's first issue is overruled in each appeal.

We affirm the judgments of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

June 16, 2016

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.