IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1289-17

DEDRIC D'SHAWN JONES, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY

NEWELL, J., filed a concurring opinion in which HERVEY and RICHARDSON, JJ., joined.

There's a danger of losing sight of what the trial judge actually did in this case. The trial court ruled that Appellant could not cross-examine the complainant's mother, Adeline Gonzales, about the existence of a CPS investigation and whether Gonzales stood to get the complainant's and Appellant's baby girl if parental rights were terminated. Later, Appellant made an offer of proof that contained some questions about the

termination proceedings, but it also contained questions about Gonzales's care for the child and Gonzales's desire to protect her. I do not see where the trial judge prevented Appellant from asking about these new subjects. Appellant never sought to obtain a ruling from the trial judge about whether he could cross-examine Gonzales in front of the jury about this extra information elicited during the offer of proof. And the trial judge never prevented Appellant from cross-examining Gonzales about her possible bias or motive stemming from her desire to keep the child safe. The trial judge only held that Appellant could not introduce evidence of the termination proceedings and any potential outcomes of such proceedings. Without any evidence that Gonzales had some direct interest in the outcome of the termination suit, I agree with the trial court. That is why I concur in the judgment.

Preservation of Error and Offers of Proof

I agree with the court of appeals that Appellant preserved error regarding a limitation on his ability to cross-examine Gonzales about the CPS proceedings. But the only ruling the trial court made was about questions regarding that proceeding.

> THE COURT: I'm going to find the CPS investigation and any potential outcomes are not relevant to this trial and in fact

would be more prejudice to the defendant.

Later, after Gonzales had finished testifying, Appellant made an offer of proof that elicited testimony beyond the trial court's ruling.

> Q. Do you know that there's a CPS -- that there's a child custody battle going on to eliminate parental rights of both [the complainant] and [Appellant]?
>
> A. Yes, sir.
>
> . . .
>
> Q. Do you have a preference?
>
> A. Do I have preference of what?
>
> Q. That their parental rights be terminated or not?
>
> A. I don't have any say in that. That damage has been done between the both of them.
>
> Q. My understanding is the child is with an aunt; is that correct?
>
> A. My sister.
>
> Q. Your sister?
>
> A. Yes. And before that, she was with me. I had her. I've always had her.
>
> Q. The reason that you take care of the child is because of the relationship that [Appellant] and [the complainant] have, correct?
>
> A. I'm sorry?

> Q. It's because of the type of relationship that [the complainant] and [Appellant] have and the things that they do destructive towards each other, correct?
>
> A. I'm not sure I want to answer that.
>
> Q. The reason –
>
> A. Yes, that's why I take care of her because I want her to be safe. She's a beautiful little girl. She deserves to be safe. (Witness crying.)

The only information about the termination proceedings elicited in the offer of proof was Gonzales's awareness of a termination proceeding against Appellant and her statement that she didn't have "any say" in the outcome of that proceeding. After Appellant made his offer of proof, he did not seek a ruling from the trial judge regarding whether he could cross-examine Gonzales about her caring for the child and wanting to keep the child safe due to the toxic relationship between Appellant and the complainant.

To preserve error regarding the exclusion of evidence, a party is required to make an offer of proof and obtain a ruling.[1] Here, Appellant obtained a ruling, and later made an offer of proof that went beyond that ruling. While an offer of proof can provide an opportunity for a trial court

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[1] *Reyna v. State*, 168 S.W.3d 173, 176 (Tex. Crim. App. 2005).

to reconsider its original ruling, Appellant never asked the trial court to do that.[2] Nevertheless, the court of appeals in this case seems to have held that the trial court's ruling covers all the information in the offer of proof.[3] I agree with the court of appeals that no second objection was needed to preserve error regarding a limitation on the questioning about the termination proceedings, but it is not at all clear that an offer of proof can unilaterally expand an earlier ruling by the trial court.

This is significant in this case because it is one thing to argue that Gonzales would shade her testimony out of a desire to keep the child safe. It is another to say that she would shade her testimony to potentially influence a collateral proceeding. So much of the rhetorical force of the court of appeals' and this Court's holdings seems to come from a concern that Appellant was not allowed to question Gonzales about her desire to keep the child safe. Appellant could have easily elicited that information without discussing the child-termination proceeding, which carried with it the potential prejudice attendant to asking the jury to speculate about Gonzales's motive to influence the outcome of a collateral proceeding.

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[2] *See Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009).

[3] *Jones v. State*, 540 S.W.3d 16, 25 (Tex. App.—Houston [1st Dist.] August 1, 2017).

Our New "Logical Leap" Test

The scope of appropriate cross-examination is necessarily broad.[4] 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 in a particular manner.[5] The Sixth Amendment right of confrontation is violated when appropriate cross-examination is limited.[6] But the confrontation clause does not prevent a trial judge from imposing some limits on defense counsel's inquiry into the potential bias of a prosecution witness. Trial judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant.[7]

Prior to this case, we have held that cross-examining a witness about a collateral proceeding required a predicate showing of a "causal connection" between the collateral proceeding and the possible bias of the

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[4] *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996).

[5] *Id*.

[6] *Id.*

[7] *Id.*

testifying witness. But these cases all involved cross-examination of witnesses who had a direct interest in the outcome of the collateral proceeding, and that direct interest was supported by some evidence. For example, *Spain v. State* dealt with the cross-examination of a witness about that witness's probated sentence for his role in the same offense that the defendant had been charged with.[8] In *Carpenter v. State*, we considered whether a defendant could cross-examine a witness about pending federal charges.[9] And in *Irby v. State*, we considered whether a defendant had a constitutional right to cross-examine a witness about his status as a juvenile probationer.[10] In all these cases, the existence of a "causal connection" was determined by reviewing the facts about the collateral proceeding, not by searching for an admission of bias or motive from the witness. As we explained in *Irby*, the "causal connection" requirement is a matter of simple relevance, whereby a cross-examiner must show a logical connection between a fact or condition that could give rise to a potential bias or motive.[11] The question has always been

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[8] *Spain v. State*, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979) (panel op.).

[9] *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998).

[10] *Irby v. State*, 327 S.W.3d 138, 140 (Tex. Crim. App. 2010).

[11] *Id.* at 149.

whether the witness's interest in the collateral proceeding gives rise to an inference of bias, not the other way around.

Here, the Court focuses on whether Appellant was required to secure an admission of bias or motive from Gonzales in the offer of proof, rather than on whether there were sufficient facts regarding the termination proceedings to infer bias on the part of Gonzales. According to the Court, "[i]t would take no great leap of logic for a jury to infer that Gonzales was motivated by the hope or expectation that, if Appellant were convicted of this offense, it would diminish his chances of retaining custody of his daughter."[12] But we don't know anything about the termination proceedings except that they exist. There are many different justifications for seeking the termination of parental rights; we don't even know whether the termination proceedings were initiated in response to the offense at issue in this case. Moreover, there is no evidence suggesting Gonzales has any direct interest in the outcome of the termination proceeding. In *Carpenter*, the simple existence of pending federal charges did not establish a causal connection between the collateral proceeding and the witness's motive to testify.[13] Yet in this

[12] Maj. op. at 11.

[13] *Carpenter*, 979 S.W.2d at 635.

case, Gonzales's simple awareness of the collateral proceeding is enough to establish relevance of testimony about the collateral proceeding. Without any evidence that Gonzales was named or even sought to be named as a possible caretaker for the child in the termination proceeding, I don't see how the Court can square this opinion with *Carpenter*.

Indeed, after this case, we are no longer looking for a "causal connection"; we are evaluating the size of the leap from a witness's motive to shade his or her testimony to the collateral proceeding. I fear this new "logical leap" test places the emphasis on how biased the witness appears to the trial court, or the reviewing court, rather than on the existence of facts from which bias may be inferred. And under this test, I don't see any reason why a defendant would be prevented from questioning a witness about any pending criminal charge, the chance for parole, or the witness's status as a probationer, even though we have already upheld limitations upon inquiries in each of these areas.[14] For

[14] *See*, *e.g.*, *Woods v. State*, 152 S.W.3d 105, 111–12 (Tex. Crim. App. 2004) (upholding trial court's refusal to allow defense to question witness about possibility of receiving parole or good time because the witness was not eligible for good time and no indication existed that the witness expected to be rewarded); *Irby*, 327 S.W.3d at 140 (holding that the defendant did not have a constitutional right to question a witness about his status as a juvenile probationer); *Adams v. State*, 577 S.W.2d 717, 720–21 (Tex. Crim. App. 1993), *rev'd on other grounds*, 448 U.S. 38 (1980) (upholding trial court's refusal to allow defense to question a witness about his pending charges); *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993) (holding that when the witness was unaware he was a suspect in two crimes, evidence that he was a "suspect" had "no legitimate tendency to show that [he] was biased in favor of the State").

example, it takes no great logical leap to infer that a witness who is in prison might shade his or her testimony out of the hope that favorable testimony for the State might result in early release, yet we have previously held otherwise.[15] That is why I would require a showing that the witness has some direct interest in the outcome of the termination suit such as being named as a possible managing conservator for the child before allowing cross-examination about that type of collateral proceeding.

Conclusion

Ultimately, this case is probably best understood as a "we would have let it in" case. Had I been the trial judge evaluating the offer of proof, I probably would have clarified that Appellant was free to question Gonzales about her love for her grandchild and her desire to keep that child safe. But this isn't a call on the field; it's a booth review. Consequently, I am unwilling to second-guess the trial judge for her reasonable, and constitutionally permissible, limitation on cross-examination.

Filed: March 27, 2019

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[15] *Cf. Willingham v. State*, 897 S.W.2d 351, 358 (Tex. Crim. App. 1995) (defendant failed to show any "specific connection" between witness's alleged hope for early release from prison and his motive to testify).

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