Opinion issued November 3, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00756-CR

RODERICK EUGENE WOODARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd Judicial District Court
Harris County, Texas
Trial Court Case No. 1248152

MEMORANDUM OPINION

A jury found appellant, Roderick Eugene Woodard, guilty of the offense of injury to a child[1] and assessed his punishment at confinement for ninety-nine years.

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[1] *See* TEX. PENAL CODE ANN. § 22.04(a) (Vernon 2011).

In his sole point of error, appellant contends that the trial court erred in denying him the ability to impeach a State's witness with evidence of the witness's two prior misdemeanor convictions.

We affirm.

Background

Before trial, the State notified appellant that one of its witnesses, the complainant's mother, Athena Bradley, had three previous criminal convictions. In 2007, Bradley was convicted of the felony offense of possession of a controlled substance in Louisiana. She also had misdemeanor convictions for the offense of illegal operation of a sexually-oriented business in 1998 and the offense of indecent exposure in 1996. Before presenting its evidence, the State moved to prevent appellant from using the misdemeanor convictions to impeach Bradley's testimony. Appellant argued that the misdemeanor convictions were admissible because they involved "moral turpitude" and the felony conviction would "bridge the gap" to allow impeachment of Bradley with the misdemeanor convictions. The trial court ruled that it would allow impeachment of Bradley with the 2007 felony conviction but not with the previous misdemeanor convictions.

At trial, Houston Fire Department paramedic Eugene Thomas testified that on December 10, 2007, he was dispatched to Bradley's apartment, where he found the complainant, a one-year old girl, whose breathing "wasn't adequate for a

baby." After paramedics placed a ventilation mask on the complainant's face, Thomas spoke briefly with appellant, who said that "he was holding [the complainant] in his arms and he fell and he landed on top of her at . . . the bottom of [a] landing." Thomas noted that paramedics then took the complainant to a hospital as a "serious trauma case."

Houston Police Department Officer R. Tardy testified that he was dispatched to a hospital to investigate the complainant's injury as a potential case of child abuse. He found the complainant in the hospital's pediatric Intensive Care Unit, and she looked "completely out of it" with "massive swelling on the left side of the head." Tardy then interviewed appellant, who explained that while he was carrying the complainant, he "slipped on some water . . . and fell forward onto the baby." Appellant said that he "tried to perform CPR . . . [and] call 911, but messed up because he was nervous." Tardy explained that he did not believe appellant's description of the event because "when you are walking, you slip and fall backwards[,] . . . you don't slip and go forward."

Dr. Stephen Fletcher, a pediatric neurosurgeon, testified that he treated the complainant when her CAT scan "necessitated the expertise of a neurosurgeon." Fletcher explained that the complainant suffered a skull fracture on the left side of her head, a "subdural hematoma," which he defined as a "collection of blood" on the surface of her brain, and a retinal hemorrhage. The complainant also suffered

from seizures during her stay at the hospital. Fletcher noted that while he commonly treats infant skull fractures resulting from falls, a subdural hematoma indicates "more of a trauma" and is "common with a shaking of a baby with extreme force." Fletcher explained that, taken together, the injuries indicated that the complainant was "beaten up or something" and would not have been incurred only as the result of a fall.

Dr. Christopher Greeley, a pediatrician, testified that he was part of a "consulting team" assigned to review the complainant's injuries. At the hospital, Greeley spoke with Bradley, Bradley's mother, and appellant in an effort to determine what had caused the complainant's injuries. He noted that appellant "made no verbal responses" to his questions regarding the complainant. Greeley then explained that the complainant's injuries would not likely have occurred as a result of a household accident and were more consistent with "fall[ing] out of a two-story window" or being hit by a car. He opined that the injuries were also consistent with an intentional infliction of "a significant amount of force."

Bradley testified that she left the complainant with appellant, whom she was dating at the time, when she left to take her other children to school. When she returned to her apartment, appellant was sitting in the kitchen holding the complainant, who was "barely breathing." Although appellant told her that he had attempted to call for emergency assistance, Bradley noted that the telephone was

still in its base. Appellant told Bradley that he had slipped while holding the complainant, but later, at the hospital, he seemed "like he was hiding something." Appellant then claimed that the complainant was "sitting on the rest room counter and she fell" and he "shook" the complainant when he attempted to perform CPR on her. On cross-examination, Bradley admitted that, during their relationship, appellant would frequently watch her children while she was at work.

Standard of Review

In reviewing a trial court's decision to admit or exclude evidence of a prior conviction, we must accord the trial court "wide discretion." *Jackson v. State*, 11 S.W.3d 336, 339 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). An appellate court will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002).

Impeachment Evidence

In his sole point of error, appellant argues that the trial court erred in denying him the opportunity to impeach Bradley's testimony with the two misdemeanor convictions because her "intervening felony conviction for possession of a controlled substance . . . should have bridged the gap allowing

impeachment" and the denial of his right to "meaningful confrontational cross-examination" equates to constitutional error of the first magnitude. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

Evidence of a witness's prior criminal conviction shall be admitted for purposes of impeachment if the crime was a felony or a crime of moral turpitude and the court determines that the probative value of admitting the evidence of the conviction outweighs its prejudicial effect. TEX. R. EVID. 609(a). However, such evidence is not admissible if more than 10 years has elapsed since the date of the conviction or the witness's release from confinement, whichever is later, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. TEX. R. EVID. 609(b).

Appellant had the burden of showing that Bradley had been convicted of a felony or a crime involving moral turpitude, either through her or by establishing her convictions by public record. *Id.*; *Sinegal v. State*, 789 S.W.2d 383, 387 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd). A proponent seeking to introduce evidence pursuant to rule 609 has the burden of demonstrating that the probative value of a conviction outweighs its prejudicial effect. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). A trial court should conduct a balancing test to determine whether the probative value of a prior conviction is outweighed by its

prejudicial effect. *Hernandez v. State*, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). However, if a conviction is more than 10 years old, the probative value must "substantially outweigh" any prejudicial effect. TEX. R. EVID. 609(b); *Jackson*, 11 S.W.3d at 339. In a standard rule 609(a) balancing analysis, the following factors should be considered: (1) the prior conviction's impeachment value; (2) its temporal proximity to the offense on trial, and the witness's subsequent criminal history; (3) the similarity between the prior offense and the present offense; (4) the importance of the witness's testimony; and (5) the importance of the credibility issue. *Hernandez*, 976 S.W.2d at 755 (citing *Theus*, 845 S.W.2d at 880).

Appellant argues that denying him the opportunity to impeach Bradley with her two prior misdemeanor convictions violated his right under the Confrontation Clauses of the United States and Texas Constitutions and, as a result, "no showing of want of prejudice" will cure the alleged error. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111 (1974) (holding that denial of effective cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it"). However, at trial, appellant objected to the exclusion of the misdemeanor convictions only on the grounds that they were crimes of moral turpitude. He did not object to the evidence on Confrontation Clause grounds and raises it for the

first time on appeal. A Confrontation Clause objection must be made in the trial court to preserve the complaint for review on appeal. *See Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004). As a result, appellant's Confrontation Clause argument was waived. *See id.*

Appellant next argues that Bradley's misdemeanor convictions were admissible because her 2007 felony conviction for possession of a controlled substance "bridge[s] the gap" for her two previous misdemeanor convictions. Texas courts have found that subsequent convictions of a misdemeanor involving moral turpitude or a felony can indicate a "lack of reformation," making remote convictions "more palatable." *Hernandez*, 976 S.W.2d at 755; *see also Medley v. State*, No. 01-07-00017-CR, 2008 WL 920342, at *3 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op.) ("We recognize the practice of 'tacking' later convictions for felonies or misdemeanors involving moral turpitude to remove the taint of remoteness from prior convictions from more than 10 years before the trial."). However, even if a court "tacks" on a remote conviction to a subsequent conviction, it is still subject to rule 609(a)'s requirement that the probative value of the conviction outweigh any prejudicial effect. *Hernandez*, 976 S.W.2d at 755; TEX. R. EVID. 609(a).

At trial, appellant objected to the exclusion of the misdemeanor convictions on the grounds that they were crimes of moral turpitude and the felony conviction

"would bridge the gap and allow it to go back." Appellant made no argument that the probative value of the misdemeanor convictions would outweigh any prejudicial effect. On appeal, appellant asserts that the offense of indecent exposure and operation of a sexually-oriented business are crimes involving moral turpitude and the credibility of Bradley was "an essential element in the case." Appellant also asserts that his inability to cross-examine Bradley about the misdemeanor convictions precluded the jury from "consider[ing] all the factors possibly establishing ill feeling, bias, motive, and animus on her part."

Bradley's 1996 offense of indecent exposure constitutes a crime of moral turpitude because of the "intent to arouse or gratify [the] sexual desire of any person." *See Polk v. State*, 865 S.W.2d 627, 630 (Tex. App.—Fort Worth 1993, pet. ref'd). Even assuming that her 1998 offense of illegal operation of a sexually-oriented business also constitutes a crime of moral turpitude, there is no indication that Bradley's prior convictions would have had much impeachment value. Although Bradley testified about appellant's conflicting explanations for the incident, much of her testimony concerned the trip to the hospital and the extent of the complainant's injuries. Moreover, appellant did not attempt to impeach Bradley with her felony conviction, even though the trial court ruled it admissible. And, although appellant asserts that cross-examination may have shown the "ill feeling, bias, motive, [or] animus" of Bradley, he fails to explain how the

misdemeanor convictions would have established any such bias. Thus, even assuming that the felony conviction did "bridge the [temporal] gap" for the misdemeanor convictions, the trial court could have reasonably concluded that their probative value was outweighed by any prejudicial effect. *See* TEX. R. EVID. 609(a). Accordingly, we hold that the trial court did not abuse its discretion in excluding Bradley's misdemeanor convictions from evidence. *See Montgomery*, 810 S.W.2d at 380.

We overrule appellant's sole point of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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