COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00299-CR

EDWARD RAY TAYLOR JR. APPELLANT

V.

THE STATE OF TEXAS STATE

FROM CRIMINAL DISTRICT COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 1405682D

MEMORANDUM OPINION[1]

A jury convicted Edward Ray Taylor Jr. of two offenses—continuous sexual abuse of a child and indecency with a child—and assessed his punishments at 60 years' and 20 years' confinement respectively. Taylor raises three points on appeal. First, he contends that the trial court erred by not admitting a complainant's allegedly false outcry against another alleged

[1]*See* Tex. R. App. P. 47.4.

perpetrator.[2] Second, he asserts that the trial court erred by denying his motion for mistrial when one of the State's witnesses purposefully presented inadmissible evidence. Finally, he argues that the trial court erred by overruling his charge objection on the continuous-sexual-abuse-of-a-child count, an objection he based on a failure to require juror unanimity. We affirm.

Evidence

Two of Taylor's nieces testified that he sexually molested them. Because the nature of Taylor's appellate points do not call for us to analyze the particulars, we will not detail the precise accusations or the trial testimony except as needed.

Taylor's Three Points on Appeal

1. Did the trial court err by not admitting one niece's allegedly false outcry?

In his first point, Taylor argues that in an offer of proof he presented evidence that one of his nieces told the forensic interviewer not only that he had molested her but also that his son had touched her inappropriately as well. In a second offer of proof, Taylor's son testified and denied ever touching his cousin inappropriately. The trial court sustained the State's objection that this evidence was irrelevant, so the jury never heard it.

Taylor contends that because he established that the outcry against his son was false—solely by virtue of his son's denial—he had the constitutional right to cross-examine his niece in front of the jury to show possible motives, bias, and

[2]There were two named complainants in the continuous-sexual-abuse-of-a-child count. *See* Tex. Penal Code Ann. § 21.02(b) (West Supp. 2017).

prejudice on her part. *See* Tex. R. Evid. 101(d); *Carroll v. State*, 916 S.W.2d 494, 497–98 (Tex. Crim. App. 1996) (quoting *Jackson v. State*, 482 S.W.2d 864, 868 (Tex. Crim. App. 1972)); *Lape v. State*, 893 S.W.2d 949, 955–57, 959 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Hughes v. State*, 850 S.W.2d 260, 262 (Tex. App.—Fort Worth 1993, pet. ref'd); *Rushton v. State*, 695 S.W.2d 591, 594 (Tex. App.—Corpus Christi 1985, no pet.); *Thomas v. State*, 669 S.W.2d 420, 422–23 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd).

We agree with Taylor's overall legal proposition. *See Davis v. Alaska*, 415 U.S. 308, 311–18, 94 S. Ct. 1105, 1108–11 (1974). But we disagree that it applies here.

Each of Taylor's cases predates *Hammer v. State*, 296 S.W.3d 555, 562–63 (Tex. Crim. App. 2009), which controls to the extent those cases are inconsistent. In *Hammer*, the court of criminal appeals wrote that in *Davis v. Alaska* the Supreme Court drew an important distinction between (1) an attack on a witness's general credibility and (2) a more particular attack on a witness's possible biases, prejudices, or ulterior motives. *Id.* at 562 (citing *Davis*, 415 U.S. at 316, 94 S. Ct. at 1110). A defendant does not have an absolute constitutional right to impeach a witness's general credibility in any fashion he chooses, but a defendant does have a constitutional right to expose a witness's motivation in testifying. *Id.*

A witness's general character for truthfulness may be shown only through reputation or opinion testimony; it may not be attacked by specific instances of

untruthfulness. *Id.* at 563 (citing Tex. R. Evid. 608). "Our state evidentiary rules," as the court noted, "frown on unnecessary character assassination." *Id.*

In contrast, to establish a witness's specific bias, self-interest, or motive for testifying, 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 motive, at that point the opponent may introduce extrinsic evidence to prove the motive or bias. *Id.* (citing Tex. R. Evid. 613(b)). Additionally, a party may offer evidence of specific acts of misconduct to show a person's motive for performing some act. *Id.* (citing Tex. R. Evid. 404(b)).

The *Hammer* court specifically addressed evidence of false sexual-abuse allegations: "Prior false allegations of rape do not tend to prove or disprove any of the elements of the charged sexual offense." *Id.* at 564. More importantly, such allegations are not admissible to attack credibility generally. *See id.* (citing Tex. R. Evid. 404(b), 608(b)). "A sexual assault complainant," added the court, "is not a volunteer for an exercise in character assassination." *Id.*

The court did not, however, categorically prohibit evidence of false accusations: "If . . . the cross-examiner offers evidence of a prior false accusation of sexual activity for some purpose other than a propensity attack upon the witness's general character for truthfulness, it may well be admissible under our state evidentiary rules." *Id.* at 565. For example, this kind of evidence can show a witness's bias or motive or be used for "some other relevant, noncharacter purpose." *Id.* at 566.

Assuming, without deciding, that Taylor "proved" a false allegation against his son simply by his son's having denied it, we conclude that rules 404(b) and 608(b) still prohibit the proffered evidence for the reasons stated in *Hammer*. Taylor was trying to attack the complainant's general credibility with a specific instance of purported lying, but he never linked that alleged falsehood against his son to why the complainant might have a motive to lie about her allegations against Taylor himself. *See id.* at 562–66. We overrule Taylor's first point.

2. Should the trial court have granted Taylor's motion for mistrial after the State presented damaging inadmissible evidence?

In Taylor's second point, he contends that the trial court abused its discretion by denying his motion for mistrial when the prosecutor purposefully presented harmful and inadmissible evidence. This is the exchange between the prosecutor and Detective Grant Gildon of which Taylor complains:

> [Defense counsel]: I believe that's all I have, Detective Gildon. Appreciate it. Thank you, sir.
>
> THE WITNESS: Yes, sir. Thank you.
>
> THE COURT: Any other questions from the State?
>
> [Prosecutor]: Just one.
>
> REDIRECT EXAMINATION
>
> BY [Prosecutor]:
>
> Q. On both CPS [Child Protective Services], were they found reason to believe?
>
> A. Yes, they were.

> [Defense counsel]: Objection, Your Honor, as to what some other entity found.
>
> THE COURT: Well, I'll sustain the objection at this time.
>
> [Defense counsel]: Ask the jury be instructed to disregard the last answer.
>
> THE COURT: All right. The jury will disregard the last answer of the witness.
>
> [Defense counsel]: Move for mistrial.
>
> THE COURT: Denied.
>
> [Defense counsel]: Thank you.
>
> [Prosecutor]: No further questions.
>
> [Defense counsel]: No questions, Your Honor.

We agree that the prosecutor acted deliberately in eliciting this testimony. This was not an instance of a witness's inadvertently blurting out the wrong information, and the prosecutor intentionally made the information about CPS—an entity for which Detective Gildon does not work—part of a leading question.

But when a trial court denies a motion for mistrial, our review is for an abuse of discretion. *See Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009). "A mistrial is an appropriate remedy in 'extreme circumstances' for a narrow class of highly prejudicial and incurable errors." *Id.* And when a trial court instructs a jury to disregard improper evidence, absent any contrary evidence we must presume that the jury followed the instruction. *See Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App.), *cert. denied*, 484 U.S. 905 (1987).

Caselaw supports the proposition that a CPS worker can testify that CPS found "reason to believe."[3] *See Bowers v. State*, No. 02-02-00250-CR, 2003 WL 22026428, at *6 (Tex. App.—Fort Worth Aug. 29, 2003, pet. ref'd)[4] (stating not error to admit testimony of CPS investigator that CPS found reason to believe); *Johnson v. State*, 970 S.W.2d 716, 720 (Tex. App.—Beaumont 1998, no pet.) (holding no error in admitting CPS worker's testimony that CPS determined reason to believe sexual abuse occurred). *But see United States v. Charley*, 189 F.3d 1251, 1267 n.23 (10th Cir. 1999) (disagreeing with *Johnson*), *cert. denied*, 528 U.S. 1098 (2000); *Ex parte Wheeler*, 203 S.W.3d 317, 324–25 (Tex. Crim. App. 2006) (stating that asking defense's accident-reconstruction expert whether he knew that defendant's insurance carrier had found defendant at fault was manifestly improper).

Because Detective Gildon was not a CPS worker, Taylor successfully objected to "what some other entity found," which sounds like a hearsay objection although not couched that way. On appeal, Taylor characterizes the evidence as "irrelevant" but also as "sufficiently damaging, harmful and

[3]After investigating allegations of child abuse or neglect, CPS has to assign one of five possible dispositions to each allegation; the five possible dispositions are (1) reason to believe (based on a preponderance of the evidence), (2) ruled out, (3) unable to complete, (4) unable to determine, and (5) administrative closure. 40 Tex. Admin. Code § 700.511(b) (2017) (Tex. Dep't of Family & Protective Servs., Disposition of the Allegations of Abuse or Neglect).

[4]*Bowers* carries a "publish" designation but was apparently never published. *Cf.* Tex. R. App. P. 47.2(a), (b).

purposefully introduced that a mistrial would be warranted . . . ." *Bowers* and *Johnson* show that this kind of evidence can be admissible if introduced through a CPS worker. *See Bowers*, 2003 WL 22026428, at *6; *Johnson*, 970 S.W.2d at 720. Accordingly, because the mere mention of a CPS "reason to believe" finding is not grounds for a mistrial in and of itself, and because nothing in the record suggests the jury failed to follow the trial court's instruction to disregard, we overrule Taylor's second point. *See Ocon*, 284 S.W.3d at 884; *Gardner*, 730 S.W.2d at 696.

3. Did the trial court err by overruling Taylor's objection to the charge because it did not require unanimity?

Finally, Taylor argues that the trial court erred by overruling his objection to the charge because it failed to require unanimity on the continuous-sexual-abuse charge. We have twice before addressed and rejected this argument. *See Ingram v. State*, 503 S.W.3d 745, 747–48 (Tex. App.—Fort Worth 2016, pet. ref'd); *Pollock v. State*, 405 S.W.3d 396, 404–05 (Tex. App.—Fort Worth 2013, no pet.). For the reasons discussed in those cases, we continue to hold that section 21.02(d)[5] of the penal code does not violate the constitutional and

[5]That section provides:

> If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

statutory requirements of jury unanimity, and the trial court thus did not err. We overrule Taylor's third point.

Conclusion

Having overruled Taylor's three points, we affirm the trial court's judgments.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: November 30, 2017

Tex. Penal Code Ann. § 21.02(d).