Affirmed and Opinion filed January 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00353-CR

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RANFORD COURTNEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 754,213

O P I N I O N

Appellant was charged by indictment with the offense of sexual assault. A prior conviction was alleged for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. Following appellant's plea of true to the enhancement allegation, the trial court assessed punishment at 40 years confinement in the Texas Department of Criminal Justice—Institutional Division. Appellant raises three points of error. We affirm.

I. Refreshed Memory

The first point of error contends the trial court erred in not permitting appellant to

refresh the complainant's memory with a statement she had made to appellant's investigator.

A.

During the cross-examination of the complainant, the following exchange occurred:

Q. Do you remember speaking to an investigator named Hubbard just about a week ago, on the 18th of March? At your residence?

A. I don't know his name, but I did talk to some man at my house.

Q. And did you tell that man that you were awakened when [appellant] was on top of you?

A. Yes.

Q. Did you tell him that you felt pressure in your vaginal area?

A. I can't – (Witness crying)

DEFENSE COUNSEL: May I approach again?

TRIAL COURT: Yes.

Q. [Complainant], why don't you read this over and see if it refreshes your recollection.

THE STATE: Unless this investigator took a written statement from [the complainant] that she swore and signed to, she can't be impeached with that.

DEFENSE COUNSEL: I'm not using it to impeach her. Just using it to refresh her recollection.

TRIAL COURT: Sustained.

DEFENSE COUNSEL: Does that mean I can't tender it to her?

TRIAL COURT: Right.

DEFENSE COUNSEL: I'm entitled to give her any document to refresh her recollection. I'm not offering it into evidence.

TRIAL COURT: I sustain the objection at this time.

Q. Did you tell the investigator on the 18th in your house that when you found [appellant] on top of you, you pushed him off?

A. Yes.

Q. And that he didn't resist?

A. Yes.

B.

Appellant argues the trial court's ruling violated Texas Rule of Evidence 612, which provides that a witness's memory may be refreshed. In the context of criminal cases, the rules

states:

> If a witness uses a writing to refresh memory for the purposes of testifying either
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> (1) while testifying;
>
> ... or
>
> (3) before testifying, in criminal cases;
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> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

In *Welch v. State*, 576 S.W.2d 638 (Tex. Crim. App. 1979), the Court of Criminal Appeals stated:

> A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded.

Id. at 641, *citing Wood v. State*, 511 S.W.2d 37 (Tex. Crim. App. 1974).

Contrary to the State's trial objection, Rule 612 does not require that the witness have prepared the memorandum used to refresh her memory. *See Callahan v. State*, 937 S.W.2d 553, 559 (Tex. App.—Texarkana 1996, no pet.). Therefore, the trial court erred in sustaining

the State's objection on the basis advanced at trial.

However, our law provides that if the trial court's decision is correct on any theory of the law applicable to the case, it will be sustained even though the trial court gave the wrong reason for its ruling. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App.1990); *Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex. Crim. App. 1988). We find this rule of law applicable in the instant case. As a predicate to refresh a witness's memory, there must be a showing that the witness was unable to answer the question because his present recollection failed. In other words, there must be a showing that the witness's memory needed to be refreshed. *See Callahan*, 937 S.W.2d at 559. Here, no such showing was made. Consequently, the trial court's decision to not permit defense counsel to show the complainant the statement was correct, albeit for the wrong reason. *Id.* The first point of error is overruled.

II. Prior Sexual Assault

The second point of error also deals with the cross-examination of the complainant. This point contends the trial court erred in excluding evidence of the complainant being the victim of a prior sexual assault. Outside the presence of the jury, the following exchange occurred:

> DEFENSE COUNSEL: [The complainant] had told my investigator that she now had a recovered memory of -- formerly repressed memory of having been abused when she was seven, not by [appellant] but somebody she didn't recall. I'm very suspect of those kind of memories. And the fact that something like that could play a role in a young girl's -- in the role of behavior of a young girl with behavioral problems or emotional problems. I'd like to inquire into that area.
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> TRIAL COURT: It will be denied.
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> DEFENSE COUNSEL: Can I make a bill while the jury is out?
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> TRIAL COURT: You've got it in there haven't you?
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> DEFENSE COUNSEL: Yeah.

B.

On appeal, the decision regarding admissibility of evidence is within the trial court's sound discretion and should not be set aside absent a showing of an abuse of discretion. *See Joiner v. State*, 825 S.W.2d 701, 708 (Tex. Crim. App. 1992), *cert. denied,* 509 U.S. 925, 113 S.Ct. 3044, 125 L.Ed.2d 729 (1993). In other words, a trial court's evidentiary ruling should be upheld if it is "within the zone of reasonable disagreement." *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g).

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* TEX. R. EVID. 401. As a general rule, relevant evidence is admissible; however, irrelevant evidence is absolutely inadmissible. *See* TEX. R. EVID. 402.

The evidence reflects that appellant and the complainant's mother entered into a relationship in March of 1997. The alleged offense occurred on May 12, 1997. At the time of her testimony in March of 1998, the complainant was sixteen years of age. The trial court excluded evidence of a sexual assault that occurred nine years previously when the complainant was seven years old, in 1989. The complainant did not know appellant in 1989 or have any relationship with him. Under these facts, we hold the trial court would not have abused his discretion in finding a 1989 sexual assault committed by someone other than appellant was not relevant to prove any issue of consequence in the instant case.

Second, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, cause undue delay, or result in the needless presentation of cumulative evidence. *See* TEX. R. EVID. 403. Therefore, assuming testimony of the prior sexual assault was relevant, we hold the trial court would not have abused his discretion in excluding it because such evidence would have confused the issues and caused undue delay in the proceedings.

For these reasons, the second point of error is overruled.[1]

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[1] The State asks us to hold evidence of repressed memory is inadmissible. In support of this holding, the State cites two concurring opinions, one each from the Supreme Court and the Court of Criminal Appeals.
(continued...)

III. Truth and Veracity

The third point of error contends the trial court erred in not permitting a defense witness to answer questions regarding the complainant's reputation for truth and veracity. During the presentation of his case-in-chief, appellant called his brother as a witness. The witness testified that he was with appellant on the date and at the time the alleged offense occurred. Additionally, the witness testified as follows:

Q. Let me ask the question. Did you form an opinion about her truthfulness and veracity?

A. Yes, sir, I did.

Q. What was that opinion?

A. Not very reliable.

Q. Did you — were you aware of her reputation among the other people you knew that knew her?

[PROSECUTOR]: Judge, I object. That's an improper question.

THE COURT: Sustained.

Q. What was her reputation for truthfulness and veracity?

A. I can only speak for what I saw and —

[PROSECUTOR]: Judge, I object to the answer.

THE COURT: Sustained.

Subsequently, appellant's sister testified and was asked: "having known [the complainant] for all those years and babysat for her one summer, riding around on the bus, did you ever come to form an opinion as to her truthfulness or veracity?" Following an objection by the State, the witness responded: "I said she isn't very truthful."

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[1] (...continued)
See S.V. v. R.V., 933 S.W.2d 1, 28 (Tex. 1996) (Gonalez, J., concurring) ("Given what we know today about the subject, expert testimony regarding repressed memory is the type of junk science that should be kept out of our courtrooms."); *Shutz v. State*, 957 S.W.2d 52, 77 (Tex. Crim. App. 1997) (McCormick and Mansfield, J.J., concurring) ("I also believe that any testimony relating to so-called 'repressed memory syndrome' is inherently suspect and should not be admissible in Texas courtrooms."). However, neither of our high courts has handed down a majority opinion stating that such testimony is *per se* inadmissible. Having previously held the trial court did not err in excluding the testimony under either rule 402 or rule 403, we need not decide whether evidence of repressed memory is inadmissible as a matter of law.

Appellant contends in his third point of error that the answer to which the prosecutor objected was not objectionable. Appellant claims that, although he elicited testimony regarding the witness's opinion of the complainant's reputation for truthfulness and veracity, he should have been permitted to elicit testimony regarding the complainant's general reputation for truthfulness and veracity.

Rule 404(a)(2) of the Texas Rules of Evidence provides:

> Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> * * * * *
>
> In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same[.]

Appellate courts review the evidentiary rulings of a trial court under an abuse of discretion of standard. *See Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Opinion testimony and testimony as to a person's reputation are generally the only forms of evidence admissible to prove character, except when the character of a person is an essential element of a charge, claim, or defense, proof may then be made of specific instances of conduct, and when character evidence has been admitted, evidence of specific instances of conduct is allowable in rebuttal. *See* TEX. R. EVID. 405.

Contrary to appellant's claim, appellant was permitted to ascertain the witness's opinion as to the complainant's reputation for truthfulness. The witness, in answering appellant's objected-to question, did not attempt to give his opinion of the complainant's reputation for truthfulness, but attempted to testify as to what he had "seen."

In light of the foregoing, we hold the trial court did not err in its handling of the testimony of appellant's brother in connection with his opinion of the complainant's truthfulness and veracity. *See generally* TEX. R. EVID. 405. Further, assuming *arguendo* the trial court did err, we hold the error was harmless as the same testimony was successfully elicited

from the next witness. *See* TEX. R. APP. P. 44.2 The third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Yates, Frost and Baird.[2]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Former Judge Charles F. Baird sitting by assignment.