

Reversed and Remanded and Opinion filed September 21, 2000.



In The

Fourteenth Court of Appeals

NO. 14-97-00356-CR

MICHAEL WAYNE SWAIN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 11
Harris County, Texas
Trial Court Cause No. 9653749**

OPINION ON REMAND

Appellant, Michael Wayne Swain, was convicted of evading arrest and sentenced to confinement in the Harris County Jail for a term of 140 days. He appealed, contending the trial court erred in permitting the State to impeach his credibility with evidence that he was, at that time, on deferred adjudication for aggravated assault. We affirmed the conviction. On discretionary review, the Court of Criminal Appeals vacated our judgment and remanded the cause for reconsideration in light of its opinion in *Moreno v. State*, No. 0710-97, 1999 WL 974269 (Tex. Crim. App. Oct. 27, 1999). We reverse the conviction.

On December 15, 1996, at 2:00 a.m., Officer J. C. Taylor observed appellant on a bicycle stopped next to the driver's window of a car. The car was the first of two vehicles in a single file. As Officer Taylor approached, both cars immediately departed in different directions. Appellant quickly peddled away from the scene on his bicycle. Appellant did not have a headlight on his bike, and Taylor attempted to effect a stop. However, when Taylor attempted the stop, appellant sped up and turned onto another street. Taylor followed, pulled alongside appellant and yelled, "Stop! Come here!" Appellant looked at Taylor who was driving a marked police car and turned into the parking lot of a motel. Appellant then jumped off his bike while it was still moving and ran into the motel laundry room. Taylor pulled into the parking lot and apprehended appellant in the laundry room.

Appellant was charged and prosecuted with evading arrest. When appellant testified, he denied committing the offense. The State then introduced evidence showing he was on deferred adjudication for aggravated assault. When appellant objected, the State's attorney argued the evidence was being offered solely to show appellant's bias and his enhanced motive for prevarication. The trial judge permitted the examination after first giving the jury an oral limiting instruction.¹ In two points of error, appellant claims the admission of this evidence violated his right to due process and due course of law under the federal and state constitutions.

¹ The trial judge gave the following admonishment:

Members of the jury, I have an instruction for you regarding a matter that was discussed outside of the presence of the jury. You are instructed that the prosecutor is going to be permitted to ask a question of the Defendant as to whether or not the Defendant is presently on deferred adjudication community supervision, also known as probation, for an offense other than the two charges for which he is presently on trial. Such evidence cannot be considered by you against the Defendant as any evidence of guilt in this case. Such evidence may be solicited solely for the purpose of aiding you, if it does aid you, in passing upon the credibility of the Defendant as a witness, if it does, and to aid you, if it does, in deciding upon the weight you will give the testimony of the Defendant as a witness; and you will not consider the question and response for any other purpose.

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Two common means of impeaching a witness’ credibility are: (1) showing he has been previously convicted of a criminal offense and/or (2) “revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” *Id.* Deferred adjudication is not a conviction. Thus, it is not admissible as evidence of a prior conviction. However, in some instances, it may be admissible to show bias, prejudice, or motive. *See Paley v. State*, 811 S.W.2d 226, 229 (Tex. App.—Houston [1st Dist.] 1991, pet ref’d).

Every juror knows that a defendant has a natural interest in avoiding a conviction and subsequent punishment. However, the State contends that where, as here, the defendant is facing the possibility, if convicted, of adjudication for *a more serious offense*, the jury is entitled to know the magnitude of the defendant’s interest. In other words, the jury is entitled to the “whole picture” in order to evaluate and judge the witness’ credibility. *See Carroll v. State*, 916 S.W.2d 494, 500 (Tex. Crim. App. 1996). All facts and circumstances are relevant in this regard if, when tested by human experience, they tend to show the witness may shade his testimony for the purpose of helping to establish one side of the cause only. *See Jackson v. State*, 482 S.W.2d 864, 868 (Tex. Crim. App. 1972). Accordingly, the State claims appellant’s status as a probationer on deferred adjudication is logically relevant and highly probative on the issue of his credibility as a witness.

The Court of Criminal Appeals, however, has recently rejected this argument. *See Moreno*, 1999 WL 974269, at *5-6. In *Moreno*, the Court of Criminal Appeals observed that a defendant may be adjudicated for violating the law of this state whether or not he has actually been convicted of the offense. *Id.* at *5. Because the burden of proof is much lower in an adjudication hearing, a defendant’s guilt may be adjudicated for violating the law of this state even if he has been formally acquitted of such charge. *Id.* Thus, the court reasoned there is no logical nexus between a defendant’s conviction and his subsequent adjudication for another offense. Curiously, the court conceded a defendant might have an interest in testifying so as

to avoid admitting a *non-criminal* violation of the conditions of his community supervision, but discounted the possibility that he would shade his testimony to avoid admitting a *criminal* violation. *Id.*

On original submission, we found the evidence at issue to be highly probative on the question of appellant's credibility. Appellant was on trial for a misdemeanor offense. The jury was cognizant he had an interest in avoiding a *misdemeanor* conviction, but without evidence of appellant's deferred adjudication, the jury would not have known he also was in danger of a *felony* conviction. Thus, the jury could not have accurately assessed the full magnitude of appellant's incentive to falsify his testimony. While it is true that appellant could be adjudicated *without* a conviction, it is also true that adjudication is a virtual certainty *with* a conviction. Certainly, appellant could make no incriminating admissions during his misdemeanor trial without endangering his status as a probationer on deferred adjudication. Accordingly, appellant had an obvious interest in: (1) not admitting the commission of a criminal offense and (2) avoiding a criminal conviction.

Nevertheless, the Court of Criminal Appeals has concluded under very similar facts that while it is true a defendant "could be adjudicated guilty of a felony and sent to prison if he were convicted," it is but a fraction of the truth; in fact, "it is a fraction so small as to be seriously misleading." *Id.* at *5. Although we may question the verity of this conclusion, as an intermediate appellate court, we are obliged by *Moreno* to find the relevance of evidence of a defendant's deferred adjudication upon the issue of his credibility is "vanishingly low" and substantially outweighed by the danger of unfair prejudice. *Id.* at *6.² Accordingly, the trial court erred in permitting the State to introduce evidence of appellant's deferred adjudication.³

² The State contends *Moreno* was wrongly decided and directs us to a number of confusing aspects of the opinion. For example, the court assumed "the defendant's status on community supervision was relevant to his credibility as a witness for himself," but later holds "appellant's interest in avoiding conviction for the misdemeanor was not relevant to his credibility for any legal reason." *Id.* at *4, *5. We cannot, however, ignore the clear directive of a superior court.

³ The State claims the issue was not preserved for review because defense counsel did not expressly
(continued...)

Appellant has framed his points of error as a denial of his constitutional rights to due process and due course of law. Certainly, the admission of evidence improperly acquired may rise to the level of “constitutional error.” *See* Tex. R. App. P. 44.2(a); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding that the admission of a confession extorted by brutality and violence is a clear denial of due process). Here, however, the “inadmissibility” of the evidence at issue arose not from its improper acquisition, but from its prejudicial effect. In other words, the trial court’s ruling violated Rule 403 of the Rules of Evidence, not a constitutional guarantee of state or federal constitution. Thus, in deciding whether the error was harmless, we are guided by TEX. R. APP. P. 44.2(b).

“A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury’s verdict.” *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). When analyzing harm under Rule 44.2(b), we review the entire record to determine whether the error substantially influenced the verdict. No burden of proof is assigned to either party on appeal by Rule 44.2(b). *See McGowen v. State*, No. 14-94-00246-CR, 2000 WL 991321, at *3 (Tex. App.—Houston [14th Dist.] Jul. 20, 2000, pet. filed). If we have grave doubts about its effect on the outcome, or if we find that it had more than a slight influence, we must conclude that the error was such as to require a new trial. *See O’Neal v. McAninch*, 513 U.S. 432, 435-38 (1995); *McGowen*, 2000 WL 991321, at *3.

If evidence of appellant’s deferred adjudication has little or no probative value in assessing his credibility, we cannot say its admission was harmless. The State’s attorney emphasized appellant’s deferred adjudication during her closing argument. Although the prosecutor never asked appellant the nature of the offense for which he was on deferred adjudication, the jury was informed that it was a felony offense. We cannot say the evidence did not have at least a slight influence upon the outcome.

³ (...continued)

object to the evidence on the basis of Rule 403. However, in ruling upon the issue, the trial judge made direct reference to Rule 403. Moreover, defense counsel disputed the probative value of the evidence when making a lengthy objection to its admission. Thus, we find the issue was properly presented to the trial court.

Accordingly, appellant's first and second points of error are sustained. The judgment of the trial court is reversed, and the cause is remanded for a new trial.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 21, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Cannon.*

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

* Senior Justice Bill Cannon sitting by assignment.