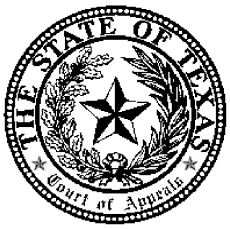
Affirmed and Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00942-CR

STEVEN WARNELL BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 845,307

O P I N I O N

Mr. Steven Brown appeals his conviction for the January 30, 1999 aggravated assault of Ms. Lisa Williams. Mr. Brown alleges that the trial judge violated his state and federal constitutional rights of confrontation when he improperly prevented cross-examination of Ms. Williams' regarding her crack-cocaine habit.

Background

Mr. Brown's conviction was the third attempt by the prosecutor's office. Two prior trials resulted in hung juries. In both prior trials, evidence of Ms. Williams' crack cocaine habit, which apparently persisted at least until the date of the assault, was admitted into

evidence. Mr. Brown's sought unsuccessfully to introduce Ms. William's previous trial testimony by cross-examination in this, the third trial. Mr. Brown argues the following questioning by the State opened the door to questioning regarding Ms. Williams' drug use:

> Q: And Ms. Williams you have previously been convicted . . . of the offense of prostitution back on July 24, 1996 am I correct?
>
> A: Yes, sir.
>
> Q: And have you been in trouble at all with the law since 1996?
>
> A: No, sir.

Issues Presented

Mr. Brown argues that the trial court's action violated his rights of confrontation under the Texas and U.S. Constitutions, as well as his rights under Texas substantive law. Mr. Brown and the State agree that his right of confrontation under the Texas Constitution is no different from that under the U.S. Constitution. We therefore assume for the purpose of this appeal that this is indeed true and treat the Constitutional claims together.

Texas Statutory Error

I. Error under Rules 404 and 608.

Our courts have long recognized an exception to Texas Rule of Evidence 608(b) permitting cross-examination of a witness regarding specific acts of bad conduct where necessary to correct a false impression left on direct-examination. *See Turner v. State*, 4 S.W.3d 74, 79 (Tex. App.—Waco 1999, no pet.), *citing Ochoa v. State*, 481 S.W.2d 847, 850 (Tex. Crim. App. 1972).[1] On the other hand, the collateral matter doctrine generally prevents a party from cross-examining a witness about matters that would be immaterial to

[1] Naturally, where the witness is the criminally accused, it is almost always the State arguing for the ability to cross-examine regarding prior bad acts to correct a false impression. *See, e.g., Heartfieled v. State*, 470 S.W.2d 895 (Tex. Crim. App. 1971). The State attempts to summarily distinguish both *Ochoa* and *Heartfield* in its brief on the basis that these cases predate the Texas Rules of Evidence. Because both cases implicate (what is now) Texas Rules of Evidence 607-609, which incorporated and codified prior law, these cases are clearly on point. *See Ramirez v. State*, 802 S.W.2d 674, 677 (Tex. Crim. App. 1990) (Miller concurring).

the examining party's own case. The collateral matter doctrine has been substantially codified in Texas Rules of Evidence 607, 608 and 609. Our first inquiry then is whether the testimony at issue was collateral and therefore inadmissible, or admissible to correct a false impression, if created.

The State urges the testimony at issue in this case was collateral and therefore properly excluded.[2] In support of it's argument, the State cites *Norrid v. State*, 925 S.W.2d 343 (Tex. App.—Dallas 1996, no writ). In *Norrid*, the complaining witness testified she was frightened of the defendant, who then attempted to cross-examine her about her sexual preferences, alcoholism, medications she was taking, and her psychological treatment. The *Norrid* questioning clearly did not bear on the complaining witness's credibility, as required under Rule 607. Similarly, *Lagrone v. State* is inapplicable here. 942 S.W.2d 602, 613 (Tex. Crim. App. 1997). *Lagrone* did not involve an allegation of false impression, but rather a contention that drug addiction had affected a witness's perception.

Texas law regarding whether a statement creates a false impression is set forth in *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 982, 114 S.Ct. 481, 126 L.Ed.2d 432 (1993), *citing Hammett v. State*, 713 S.W.2d 102, 105 (Tex. Crim. App. 1986). Following *Delk* and *Hammett*, we examine the record for non-textual evidence shedding light on how broadly the question at issue would have been interpreted by the jury. *Id.* We find no such evidence here. Assuming the question was asked just as it appeared in the record and that the tenor was no different than the "black letters" reflected,

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[2] The State also urges that the actions of the trial court were proper under Texas Rule of Evidence 404. This rule is implicated, *in addition to* Rules 607-609, where the testifying witness is also either the criminally accused or the alleged victim. Ms. Williams was the alleged victim. However, the testimony sought to be introduced here was clearly not offered to prove action in conformity therewith within the parameters of Rule 404. The testimony cannot therefore have properly been excluded under Rule 404. *Martinez v. State*, cited by the State, is a classic case of proper exclusion under Rule 404, where the criminally accused desired to show that the victim had a violent character and was therefore, presumably, the aggressor in the fight out of which the prosecution arose. 17 S.W.3d 677, 687 (Tex. Crim. App. 2000). One way to understand the manner in which Rule 404 works together with Rules 607-609 in this context is to recognize that Rule 404(b) deals with behaviors used to show conformity with the acts alleged (either by the accused or the victim) to form the basis of the underlying charge (or defense). By contrast, Rules 607-609 deal with behaviors bearing on whether the witness has told the truth at trial.

we next examine the breadth of the question in light of the major substantive issue in the case. *Id*.

The major substantive question in this case was whether Mr. Brown assaulted Ms. Williams. Unlike in *Hammett*, here the question asked by the State has no relation to the substantive question and bears solely on Ms. Williams' credibility.[3] On the other hand, under a black-letter analysis, we believe the phrase "trouble with the law at all" necessarily implicates law enforcement. While the question is too broad to limit permissible cross-examination solely to prostitution, it is not broad enough to include activities not involving some interaction with law enforcement.

The decisions in *Turner v. State* and *Ochoa v. State*, both relied upon on appeal by Mr. Brown, do not contradict our interpretation. While the opinions in both of those cases reference "trouble with the law" language, in neither case was that language actually at issue. Moreover, the evidence introduced or sought to be introduced in both of those cases involved bona-fide interactions with law enforcement. *See also Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988) (involving prior felony, *i.e.* law enforcement).

Because Ms. Williams' drug use clearly did not involve law enforcement in any respect, we find that the answer to the State's question on direct cannot have been misleading. We therefore conclude that the trial court properly refused Mr. Brown's request to admit evidence of Ms. Williams' drug habit under Texas Rule of Evidence 608(b).

Violation under the Texas and Federal Constitutions

The test for determining whether a defendant's right of confrontation has been violated is set out in *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435-36 (1986), which states:

[3] Mr. Hammett was charged with driving while intoxicated. Mr. Hammett was asked on direct about a prior conviction for public intoxication. The prosecutor then argued that the door was opened for questioning regarding non-public intoxication crimes.

> the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront [ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." [internal citations omitted]

Mr. Brown argued at trial and on appeal that testimony regarding Ms. Williams' drug use was necessary only to correct a false impression. Because no false impression was created as a matter of law, the testimony was collateral and inadmissible. *A priori*, Mr. Brown was not prohibited from engaging in otherwise appropriate cross-examination within the confines of *Van Arsdall*. We therefore hold that Mr. Brown's state and federal rights of confrontation were not violated.

Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed October 25, 2001.

Panel consists of Justices Yates, Edelman, and Wittig[4].

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

[4] Senior Justice Don Wittig sitting by assignment.