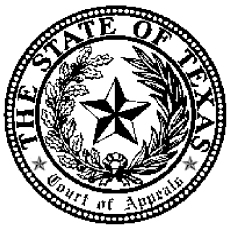
Affirmed and Opinion filed November 1, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00877-CR

PERCY FOREMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 772,040

O P I N I O N

Over a plea of not guilty, appellant Percy Foreman was convicted of sexual assault of a child, a felony offense. Appellant entered a plea of not guilty to two enhancement paragraphs–felony burglary and attempted sexual assault. The jury found both enhancement paragraphs true, and appellant was sentenced to 40 years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant raises three issues on appeal: (1) the trial court reversibly erred in admitting a summary of appellant's jail disciplinary records during the punishment phase of trial because they were inadmissible hearsay; (2) this error violated appellant's constitutional right to confront and cross-examine

witnesses against him; and (3) the court erred in excluding testimony at the punishment phase of trial that sought to attack a prior conviction. We affirm the judgment of the trial court.

DISCUSSION

The Jail Records

Police offense reports are hearsay and specifically inadmissible under Rule 803(8)(B). TEX. R. EVID. 803(8)(B). They are also inadmissible as a business record under Rule 803(6). *Cole v. State*, 839 S.W.2d 798, 811 (Tex. Crim. App. 1990). However, these are rules applicable to the guilt-innocence phase of a criminal trial. The cases cited by appellant, which hold that certain reports by law enforcement officers are inadmissible hearsay, involve the admission of evidence at the guilt-innocence phase of trial–not at punishment. In contrast, at the punishment phase of trial, a trial court has broad discretion in determining admissibility of evidence. *Cooks v. State*, 844 S.W.2d 697, 735 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 927, 113 S.Ct. 3048, 125 L.Ed.2d 732 (1993). Evidence as to any matter may be offered during the punishment phase if the court deems it relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, any other evidence of extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a) (Vernon Supp. 2001). Moreover, the Court of Criminal Appeals has held that a defendant's jail records, introduced at the punishment phase of trial, chronicling the defendant's violation of jail rules, cell transfers, and fighting, is not inadmissible hearsay; rather, the jail records qualify as records made in the regular course of business. *Jackson v. State*, 822 S.W.2d 18, 30-31 (Tex. Crim. App. 1990). Therefore, the authority cited by appellant is not applicable to appellant's issue on appeal, and we overrule his first point of

error.

In his second issue on appeal, appellant argues that the admission of the jail records summary violates his right to confront and cross-examine witnesses against him. We disagree. The rights of confrontation and cross-examination are not absolute. *Porter v. State*, 578 S.W.2d 742, 745 (Tex. Crim. App. 1979). "Confrontation and cross-examination are not essential where the evidence bears indicia of reliability sufficient to ensure the integrity of the fact-finding process." *Id.* Reliability may be inferred where the evidence falls within a firmly rooted hearsay exception. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). During the punishment phase of a criminal trial, a jail record is admissible under the business-record exception to the hearsay rule. *Jackson*, 822 S.W.2d at 30-31. Moreover, in *Jackson*, the Court of Criminal Appeals specifically held that admitting jail records containing bad behavior at the punishment phase of trial, did not violate the right to confrontation and cross-examination. *Id.* Therefore, appellant's jail records are sufficiently reliable, and their admission into evidence does not violate appellant's right to confrontation and cross-examination of the witnesses against him. We overrule this complaint.

The Exclusion of Evidence

Appellant's third issue on appeal complains that the trial court reversibly erred at the punishment phase of trial in excluding exculpatory evidence from a prior conviction. Patrice Clark, appellant's stepdaughter, was called to testify that a prior attempted sexual assault on her, of which appellant was duly convicted, did not occur. The trial court excluded the evidence and ruled that Ms. Clark's testimony was inadmissible as a collateral attack on the judgment.

Standard of Review

We review a complaint regarding the admission or exclusion of evidence at the punishment phase of trial under an abuse of discretion standard. *Mitchell v. State*, 931

S.W.2d 950, 953 (Tex. Crim. App. 1996); *Erdman v. State*, 861 S.W.2d 890, 893 (Tex. Crim. App. 1993).

A collateral attack is permissible if a judgment is void or constitutionally infirm. *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001); *Ex parte Shields*, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (op. on reh'g). Likewise, a prior conviction that was alleged for enhancement may be collaterally attacked if it is void or if it is tainted by a constitutional defect (as it would be if an indigent defendant were denied counsel in a felony trial). *Galloway v. State*, 578 S.W.2d 142, 143 (Tex. Crim. App. 1979).

Discussion

Because appellant pleaded guilty to the prior attempted assault on Ms. Clark, and because appellant does not claim that the judgment in that case is void or constitutionally infirm, the trial court's decision to exclude Ms. Clark's testimony on the grounds that the testimony served as a collateral attack on the judgment, cannot be viewed as an abuse of discretion. *Id.* at 578 S.W.2d at 143 (holding that a prior conviction used for enhancement may be attacked collaterally if it is void or tainted by a constitutional defect and cannot be attacked collaterally if the challenge alleges lesser infirmities like sufficiency of the evidence); *Valdez v. State*, 826 S.W.2d 778, 783 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (holding that defendant could not collaterally attack prior convictions at the punishment phase of trial based on the assertion that indictments were fundamentally defective). Accordingly, the judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 1, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).