

Evidence of unadjudicated juvenile offense is admissible in adult punishment hearing.[Alvarado v. State](12-2-2)

On March 9, 2012, the Amarillo Court of Appeals held that article 37.07, section 3(a), allows evidence of an unadjudicated juvenile offense to be admitted during punishment so long as it is relevant and shown beyond a reasonable doubt that it was the defendant that committed the offense.

¶ 12-2-2. **Alvarado v. State**, MEMORANDUM, No. 07-10-00465-CR, 2012 WL 762026 (Tex.App.-Amarillo, 3/9/12).

Facts: At approximately 6:00 a.m. on March 1, 2009, Billy Vanier discovered a vehicle on the road in an area northwest of Lubbock. After investigating, he discovered Amy Cahill asleep over the steering wheel of the vehicle. Cahill had no clothes on from the waist down. Vanier saw that Cahill had injuries to her face. Cahill appeared to be intoxicated. Vanier called the Lubbock Sheriff's Office to report the incident. Once officers arrived, Cahill was taken to the emergency room of University Medical Center in Lubbock. Cahill was unable to remember the events that led to her being found asleep in her vehicle and did not know how she had sustained the injuries.

A sexual assault examination was performed on Cahill. She had extensive injuries across her entire body including fractures of the orbital floor and wall of her eye and nasal bone fractures. Semen was found in Cahill's vagina and anus. However, Cahill could not recall having had sex with anyone. The semen that was found was eventually matched by DNA to appellant. Appellant's DNA was also discovered under Cahill's fingernails and in the front and back seats of Cahill's vehicle.

During the investigation of how Cahill was injured, officers became aware that Cahill had attended a party the preceding evening. Tiffany Kibiger was the host of the party that Cahill had attended. Kibiger remembered that Cahill had attended the party and had been among the last to leave. However, when Cahill left the party, she was fully clothed and in control of her body. Kibiger did not know appellant and had not seen him at the party.

On April 24, 2009, appellant was interviewed by Jason Stewart, an investigator with the Lubbock Sheriff's Office. Initially, appellant denied knowing Cahill. However, after Stewart disclosed that DNA proved that appellant had sex with Cahill, appellant admitted that he and Cahill had sex at the party but that it was consensual and that he did not injure Cahill. Appellant also indicated that he had received rides to and from the party from two different friends, but both of these friends denied this assertion.

Appellant was charged by indictment with aggravated sexual assault against Cahill. At the close of the State's case-in-chief, appellant moved for a directed verdict on the bases that the evidence was insufficient to prove a lack of consent, and that appellant caused Cahill's injuries. The trial court overruled this motion. The jury found appellant guilty of the offense of aggravated sexual assault, and the case proceeded to punishment.

During sentencing, the State sought to prove up an unadjudicated sexual assault committed by appellant when he was a juvenile against a 16-year-old mentally challenged female. A hearing was held outside the presence of the jury regarding the admissibility of this evidence. Appellant objected on the basis that the risk of unfair prejudice of the evidence substantially outweighed its probative value. Appellant did briefly mention that the offense was an unadjudicated offense occurring when appellant was a minor. The State presented argument and case law that the evidence was admissible under Texas Code of Criminal Procedure article 37.07, section 3. The trial court agreed with the State's argument, overruled appellant's objection, but granted appellant a running objection "to those matters." After hearing the punishment evidence, the jury sentenced appellant to life imprisonment in the Texas Department of Criminal Justice, Institutional Division.

By his third issue, appellant challenges the admission of evidence of the unadjudicated juvenile sexual assault during punishment.

Held: Affirmed

Memorandum Opinion: By his third issue, appellant contends that the trial court abused its discretion by admitting evidence during sentencing of an unadjudicated sexual assault offense that appellant committed when he was a juvenile. In his brief, appellant contends that the trial court incorrectly construed Texas Code of Criminal Procedure article 37.07, section 3(a)(1), as allowing the admission of evidence of unadjudicated juvenile offenses during the punishment phase of trial. See TEX.CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp.2011).

Initially, a fair reading of appellant's trial objection to this evidence was based on the probative value of the evidence being substantially outweighed by the danger of unfair prejudice. Such an objection does not comport with an appellate argument regarding the proper statutory construction of article 37.07. See *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex.Crim.App.2004) (when trial objection does not comport with issue raised on appeal, the appellate issue has not been preserved for our review). However, based on the State's argument and the authority presented by it as well as the trial court's statements immediately preceding its granting of a running objection to appellant, we conclude that the trial court was aware of appellant's complaint regarding the construction of article 37.07, and granted appellant a running objection on that basis. See TEX.R.APP. P. 33.1(a)(1)(A).

However, even if properly preserved, appellant's third issue has been decided against him by the Texas courts. Addressing the specific argument raised by appellant in this issue, the Eastland and the Texarkana courts have rejected the construction of article 37.07, section 3(a)(1), advanced by appellant. See *Strasser v. State*, 81 S.W.3d 468, 470 (Tex.App.-Eastland 2002, pet. ref'd); *Rodriguez v. State*, 975 S.W.2d 667, 687 (Tex.App.-Texarkana 1998, pet. ref'd). We agree with our sister courts that article 37.07, section 3(a), allows evidence of an unadjudicated juvenile offense to be admitted so long as it is relevant and shown beyond a reasonable doubt that it was the defendant that committed the offense. See TEX.CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1); *Strasser*, 81 S.W.3d at 469; *Rodriguez*, 975 S.W.2d at 687; see also *McMillan v. State*, 926 S.W.2d 809, 813 (Tex.App. -Eastland 1996, pet. ref'd). Appellant does not challenge

the sufficiency of the evidence to establish that he committed the unadjudicated sexual assault of which he complains. Consequently, we overrule appellant's third issue.

Conclusion: Having overruled each of appellant's three issues, we affirm the judgment of the trial court.