Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01073-CR

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HERIBERTO CANTU, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Trial Court Cause No. 82,057

O P I N I O N

During a family dispute, appellant slapped his daughter at least twice. He was convicted by a jury of simple assault. Punishment was one year confinement probated for two years and a $400 fine. Appellant challenges the factual sufficiency of the evidence to support his conviction. We affirm.

Background

Complainant, appellant's fifteen-year-old daughter, believed her father was smoking crack with two friends upstairs in their home. Complainant never actually saw any drugs but

stated she saw the men smoking "out of a pipe or something." She began complaining about their behavior by "bothering them" and "wouldn't leave them alone." In response, appellant and his friends moved to another room with a locking door. Complainant next called her stepmother, appellant's wife, Susan Cantu. Complainant told her about her father's activities. Mrs. Cantu summoned him to the phone. After they spoke, appellant and complainant began arguing. Appellant then slapped complainant's face at least twice.[1]

Complainant then called 911. Officer Tankersley, who took the call, testified he was cut off immediately after he answered. He testified that he called a total of four times to reestablish contact but someone at the residence kept hanging up on him. On one try, complainant answered and asked for help, but was cut off right after that. Tankersley stated complainant sounded "very scared" and "extremely distressed." On his final reconnect attempt, appellant answered the phone. Tankersley testified that appellant sounded cooperative in explaining the matter but that he also sounded fearful. The officer believed appellant tried to prevent complainant from talking to him.

Missouri City Police Officer Nelson was dispatched to the scene, which was characterized by Tankersley as an "assault in progress." Nelson, a five-year police officer and a fifteen-year paramedic, stated he often answers domestic disturbance calls. Upon arrival, Nelson observed the complainant on the front porch "bordering on hysteria," sobbing, barely able to speak. He also saw a large red handprint on complainant's left cheek and a red welt where the fingers landed. On her right cheek, was a solid red mark that was beginning to swell. The officer observed no other injuries and conplainant was given no medical treatment. He asked complainant how many times she had been hit. She replied, "I'm not sure, a lot." When he discussed the incident with appellant, appellant screamed at him, "This is ridiculous. I'm allowed to hit my child." Nelson also observed that appellant walked with a "jerk," which he thought was chemically induced. Nelson determined that under the circumstances of the case,

[1] Apparently appellant did not try to dissuade his daughter from her belief that he was smoking crack.

he believed that appellant was not reasonable in disciplining complainant, and that the injuries he observed were not reasonable discipline. He arrested appellant for assault.

About three months later, complainant, accompanied by appellant, went to the prosecutor's office, where she signed a sworn statement that appellant did not really slap her and she wanted the charges against him dropped. At trial, though, complainant testified that she was untruthful in the statement and that she signed it because she loved her father and did not want to see him go to jail. Complainant also testified that appellant had never struck her other than during this incident. Complainant stated she did not want to testify and that she had been subpoenaed to come to trial.

Susan Cantu testified that appellant had always been very lenient in disciplining complainant, despite the fact that complainant was often disrespectful and rebellious to appellant. She testified she did not believe appellant slapped complainant. She also stated that appellant has a limp and does not use drugs.

Standard of Review and Discussion

When we review a factual sufficiency claim, we assess the evidence in support of and contrary to the trier of fact's findings to determine whether the evidence is so weak that it renders the verdict clearly wrong and unjust or whether the verdict is contrary to the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000); *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We must observe the principle of deference to jury findings. *Cain*, 958 S.W.2d at 407. The jury is the judge of the facts, and an appellate court should only exercise its fact jurisdiction to prevent a result that is manifestly unjust or clearly shocks the conscience. *Id.; Clewis*, 922 S.W.2d at 135.

The Penal Code outlines the legal limits to the right of a parent to discipline a child. It states, "The use of force, but not deadly force, against a child younger than 18 years is justified: (1) if the actor is the child's parent . . . to the degree the actor reasonably believes

the force is necessary to discipline the child or to safeguard or promote his welfare." TEX. PEN. CODE ANN. § 9.61. Reasonable belief is defined as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* at § 1.07(42). Therefore, use of force under section 9.61 is not justified simply because of a parent's subjective belief that the force is necessary; rather, the use of force is justified only if a reasonable person would have believed the force was necessary to discipline the child or to safeguard or promote the child's welfare. *Teubner v. State*, 742 S.W.2d 57, 59 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). The standard is thus an objective one.

Appellant's argument that the evidence is factually insufficient to support his conviction largely boils down to his assertion that it should shock the conscience for the jury to have found it was unreasonable to slap his daughter twice under the above circumstances. Appellant also advances a "slippery slope" argument. He alarmingly suggests that for this court to affirm the judgment "is the first step towards judicial review of all instances of a parent disciplining their child" and "the flood gates will be opened to children wishing to bring charges against their parents every time the parent uses corporal punishment."

We first observe there seems to be little dispute about the fact that appellant slapped complainant at least twice in the face, with enough force to leave visible swelling and red marks. Further, there was little, if any, dispute that the incident arose out of complainant's adamant protests over her father and two friends illicitly smoking crack in the family home. There is also no dispute that complainant had presented significant disciplinary problems in the past. It is primarily with these facts in mind that we review the jury's verdict.

It is almost universally accepted that parents should be allowed wide latitude in disciplining their children. As such, it is discomforting for the police or a court to intervene into a family dispute. Compounding this issue is the fact that standards and mores of what is reasonably acceptable corporal punishment have changed significantly in recent decades and these standards diverge from community to community, family to family. However, the people

of Texas, through the voice of the legislature, have clearly stated that this parental discretion is not unbridled. TEX. PEN. CODE ANN. § 9.61. Thus, there is a point at which the law must step in and punish inappropriately harsh corporal discipline. Further, by adopting an objective reasonable person standard, the legislature has left the determination of where to draw the line where unreasonable discipline begins and ends to the collective wisdom of the jury.

In this case, after hearing all the evidence, and observing the demeanor of all the witnesses, the jury, composed of appellant's peers, from a cross-section of his community, was given a detailed charge. This charge included the instruction that the jury may only convict appellant if they found beyond a reasonable doubt that appellant unreasonably disciplined his daughter. In the end, it unanimously found that his discipline was unreasonable. Further, we observe the evidence is essentially undisputed that appellant, a full-grown man, resorted to the use of physical violence against his teenage daughter in response to what was, at worst, her annoying, non-violent behavior. Her behavior, in turn, was in response to her perception of appellant's use of dangerous drugs in the family home. In this light, while we agree with appellant in principle that the courts should not be called in to review, much less punish, every instance of corporal punishment by a parent,[2] the facts

[2] Common sense and prudent prosecutorial discretion, as demonstrated here, should eliminate patently frivolous criminal prosecutions for discipline of a child.

of this case and the jury's assessment of them do not present a compelling reason to reverse appellant's conviction.

In addition to the arguments and facts raised by appellant, we have independently reviewed the record. After viewing all the evidence in accord with our standard of review, we find the verdict does not shock the conscience, nor is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appellant's factual sufficiency issue is overruled.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 5, 2001.
Panel consists of Acting Chief Fowler and Justices Yates and Wittig.
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