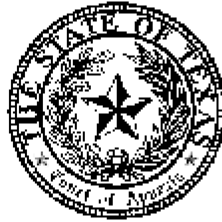
Affirmed and Opinion filed November 9, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-99-00113-CR

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RALPH BLANDON SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 757,161

O P I N I O N

Over his plea of not guilty, a jury found Ralph Smith guilty of aggravated assault. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). The jury assessed punishment at sixteen years' confinement in the Texas Department of Criminal Justice, Institutional Division. Smith raises seven points of error on appeal. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

The complainant, Flint, is Smith's former brother-in-law. Flint and Smith did not have a good relationship. In fact, Flint recorded a telephone conversation between himself and Smith, in which Smith threatened to kill him and "bury him in the bay." Smith himself said he returned from out of town to kill Flint.

Sometime after the conversation in which Smith threatened Flint, Flint walked into his front yard to take out the trash, and saw Smith and his new brother-in-law, Charlton, approaching him. Smith was carrying an object that appeared to be a pipe, and Charlton carried a gun. Smith hit Flint with the pipe fifteen or twenty times, and Charlton shot him at least once. Flint received numerous staples and stitches in his head for his injuries from the beating and shooting. Flint's roommate heard the gunshot, and saw Flint trying to stand up in his driveway. Flint yelled that Smith and Charlton had attacked, beaten, and shot him. The neighbor across the street also heard the gunshot, heard someone yell "help," and saw two people running away side by side.

At trial, Smith's defense was insanity. He presented testimony from an expert who testified that Smith was psychotic and delusional at the time of the offense. In spite of this testimony, the jury convicted Smith of aggravated assault on Flint.

DISCUSSION AND HOLDINGS

Legal and Factual Sufficiency of the Evidence

In his first two points of error, Smith contends that the evidence is legally and factually insufficient to support his conviction. Specifically, he contends that no rational trier of fact could have rejected his insanity defense, and that the verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We disagree.

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781,

61 L. Ed. 2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. *See Johnson v. State*, 23 S.W.3d 1, 6-7. Instead, we consider all the evidence equally, including the testimony of defense witnesses and the existence of alternative hypotheses. *See Orona v. State*, 836 S.W.2d 319, 321 (Tex. App.—Austin 1992, no pet.). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson*, 23 S.W.3d at 7 (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996)).

The jury is the sole judge of the facts, the witnesses' credibility, and the weight to be given the evidence. *See Clewis*, 922 S.W.2d at 129; *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Therefore, the jury may choose to believe or disbelieve any portion of the witnesses' testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Contradictions or conflicts between the witnesses' testimony do not destroy the sufficiency of the evidence; rather, they relate to the weight of the evidence, and the credibility the jury assigns to the witnesses. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). The jury exclusively resolves conflicting testimony in the record. *See Heiselbetz v. State*, 906 S.W.2d 500, 504 (Tex. Crim. App. 1995). A reviewing court must give appropriate deference to the fact finder so as to avoid intruding on the fact finder's resolution of the conflicts in the evidence. *See Johnson*, 23 S.W.3d at 7.

Proof of a mental disease or defect alone is not sufficient to establish an affirmative defense of insanity. *See Schuessler v. State*, 719 S.W.2d 320, 329 (Tex. Crim. App. 1986) *overruled on other grounds by Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990). The insanity defense requires a defendant to prove by a preponderance of the evidence that at the time of the charged conduct, and as a result of a mental disease or defect, he did not know that his conduct was wrong. *See* TEX. PEN. CODE ANN. § 8.01 (Vernon 1994). The issue of insanity "is not strictly medical, and expert witnesses, although capable of giving testimony that may aid the jury in its determination of the ultimate

issue, are not capable of determining that issue." *See Graham v. State*, 566 S.W.2d 941, 949 (Tex. Crim. App. 1978). The circumstances of the offense and the life experiences of the defendant may also aid the jury in considering whether a defendant was insane at the time he committed an offense. *See id.* Under some limited circumstances, the State may not need to present medical testimony that a defendant was sane to counter testimony by defense experts. *See id.* at 950.

Here, Smith presented evidence that he suffered from a chronic, severe mental illness; he had been diagnosed with acute schizophrenia, bipolar disorder, and schizo-affective disorder several times over the past twenty years. He also presented evidence that he suffered from hallucinations and delusions. Smith's expert, Dr. Young, testified that in his opinion, Smith was psychotic and delusional at the time of the offense. However, the evidence also showed that Smith was able to appreciate the wrongfulness of his conduct when he committed the offense. Smith believed that Flint molested Smith's niece and mistreated his sister. Believing these facts to be true, Smith threatened Flint, got a weapon, went with Charlton to attack him, and fled the scene. Dr. Young testified that someone who acts in conformity with a prior threat, brings a weapon, ambushes someone, and flees, commits a sane act.

When a party attacks an adverse jury finding on which he had the burden of proof, in order to prevail on appeal, he must demonstrate that such finding is outweighed by the great weight and preponderance of the available evidence. *See Johnson v. State*, 23 S.W.3d 1, 10 (Tex. Crim. App. 2000). Based on these facts, and affording appropriate deference to the jury's determination of the facts, we find that the great weight and preponderance of the evidence did not outweigh the jury finding against Smith's legal insanity defense. Smith's first two points of error are overruled.

In his third point of error, Smith contends that the evidence is insufficient to support his conviction because a fatal variance exists between the indictment and the evidence produced at trial. Smith argues that the evidence is inconsistent with the indictment because the indictment alleges that he assaulted Flint with "an object unknown to the grand jury," and the evidence at trial showed that Flint was beaten with a pipe.

When an indictment alleges that the manner or means of inflicting an injury is unknown and the evidence at trial does not establish the type of weapon used, a prima facie showing is made that the weapon

was unknown to the grand jury. *See Hicks v. State*, 860 S.W.2d 419, 424 (Tex. Crim. App. 1993). However, if the evidence at trial shows what object was used to inflict the injury, then the State must prove that the grand jury used due diligence in attempting to ascertain the weapon. *See id.*

Smith contends that the evidence showed that Flint was beaten with a pipe, and because the State did not show that the grand jury used due diligence in discovering the type of weapon used, his conviction should be reversed and he should be acquitted. Flint testified that Smith and Charlton approached him when it was dark and that Charlton had a gun and Smith held an object that "appeared to be a piece of pipe." However, Smith hit him immediately, and Flint lost his vision within the first few blows to the head, thereby being unable to identify the weapon. Otherwise, the evidence indicated that Flint's injuries were consistent with being struck by a blunt instrument to the head, the evidence is inconclusive as to the instrument that was responsible for Flint's injuries. The State's expert, a detective who visited the crime scene, testified that Flint had been beaten about the head with an object, and that his injuries were caused by a blunt instrument. This evidence did not conclusively establish the instrument responsible for Flint's injuries, thereby requiring the State to prove that the grand jury used due diligence in attempting to ascertain the murder weapon. *See id.* at 425.

Moreover, as the State notes in its brief, the indictment also alleged that Flint was attacked with a gun. The evidence clearly showed that Flint was shot. The jury was properly charged on the law of parties. As a result, Smith would be responsible for any action taken by the other attacker. The jury verdict found Smith guilty as alleged in the indictment. Unquestionably, the State proved up this second paragraph in the indictment.

We hold that the evidence was sufficient to support the jury's verdict that Smith caused serious bodily injury to Flint. Smith's third point of error is overruled.

Cross-examination on Extraneous Issues

In his fourth and fifth points of error, Smith contends that the trial court violated state and federal law when it prohibited him from cross-examining Flint about extraneous issues. Specifically, Smith contends that the trial court should have permitted him to cross-examine Flint about his divorce from Smith's sister and allegations that Flint molested his own daughter, Smith's niece. When Smith attempted

to cross-examine Flint on these issues, the trial court excluded the evidence on relevancy grounds. Smith contends that the evidence was necessary to show Flint's bias and motive to testify against Smith. Smith's position is not supported by the case law or the record.

The constitutional right of cross-examination is not without its limitations. A trial court has wide latitude to impose reasonable limits on cross-examination, based upon concerns about harassment, prejudice, confusion of issues, and the witness's safety. *See Norrid v. State*, 925 S.W.2d 342, 347 (Tex. App.—Fort Worth 1996, no pet.). Generally, a party cannot impeach a witness on a collateral matter. *See id.* A matter is collateral when the cross-examining party would not be entitled to prove it as a part of his case tending to establish his plea. *See Ramirez v. State*, 802 S.W.2d 674, 675 (Tex. Crim. App.1990). A party may impeach a witness with a collateral matter when that witness leaves a false impression concerning a matter relating to his credibility. *See id.* at 676. The trial court has discretion on the extent to which it allows a party to cross-examine a witness on a collateral matter to show bias. *See Hodge v. State*, 631 S.W.2d 754, 758 (Tex. Crim. App. 1982).

Here, the trial court prohibited Smith from cross-examining Flint about his marriage to Smith's sister and allegations that he molested Smith's niece. Smith attempted to show the evidence was relevant primarily by arguing that the evidence went to his insanity defense, although he did state once that he wanted to introduce the conversation to show the animosity between the two and a reason on Flint's part to "fabricate" (presumably to fabricate Smith's role in the attack). The trial court disagreed and disallowed the evidence on relevancy grounds, probably because the primary focus of Smith's argument was that it helped with his insanity defense.

Smith then made a bill of exceptions where Flint testified that his ex-wife had accused him of molesting their daughter, and Smith knew about these accusations. Flint also testified in the bill of exceptions about specific problems that he had with his ex-wife during and after their marriage, and further explained that he filed a lawsuit against Charlton for shooting him during the incident in this case.

This Court held in *Recer v. State* that "[w]here the possible bias . . . of the State's witness has been made patently obvious to the trier of facts, and the defendant has otherwise been afforded an

opportunity for a thorough and effective cross examination, no violation of the defendant's confrontation rights occur[s]." 821 S.W.2d 715, 718 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

The possible bias of Flint against Smith was made patently obvious to the jury when Flint unequivocally admitted to the jury during his direct testimony that he and Smith did not get along. Smith was also given the opportunity on cross-examination to go into the nature of Flint's relationship with Smith. Although the court prevented Smith from discussing matters related to the child molestation accusations against Flint and Flint's divorce, Flint discussed many aspects of his relationship with Smith on cross-examination. He talked about the fact that Smith lived in Flint's house for two months, that he drank in front of Flint's children, and only moved out after Flint threatened to call the police if he refused. Flint related that Smith had threatened him, and that Flint went to the police about these threats. He indicated that Smith helped his sister, Flint's ex-wife, in court during the divorce proceedings between Flint and his ex-wife.

Clearly, the trial court afforded Smith with ample opportunity for an effective cross-examination on the issue of bias. Moreover, the testimony elicited during the bill of exceptions could not have added to the information already before the jury because none of it suggests a greater motive for Flint to testify falsely against Smith. In addition to the fact that testimony about the molestation accusations and the acrimonious divorce was not relevant to any bias that Flint would have held against Smith, any probative value was outweighed by the likely prejudicial effect it would have had on the jury. *See* TEX. R. EVID. 403. The trial court properly excluded this testimony. *See id.* Smith's fourth and fifth points of error are overruled.

State's Remarks During Closing Argument

In his sixth point of error, Smith contends that the trial court erred in refusing to instruct the jury to disregard the State's remarks during its closing argument. During its closing, the State made the following comments:

> STATE: I suggest to you that this is the kind of fact pattern that could happen again. It's not all that uncommon. And I think if you saw Ralph Smith angry out on the street you'd probably walk the other way.

APPELLANT: I'm going to object. That's improper argument. Violating the golden rule and I would object to it.

THE COURT: Sustain the objection as to the jury. . . .

APPELLANT: Ask the court to instruct the jury to disregard, your honor.

THE COURT: I'll overrule that.

Smith classifies this as a "golden rule" argument and contends that the State was asking the jury to put themselves in the shoes of the victim. As an improper and incurable jury argument, Smith argues that the trial court should have granted his request to instruct the jury to disregard the State's comments. As a result, Smith asserts that he was harmed because the State's comments were manifestly improper and prejudicial, and he should be entitled to a new trial on punishment only. We disagree, as we explain below.

There are four permissible areas for proper jury argument: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) response to defendant's argument; or (4) a plea for law enforcement. *See Bonner v. State*, 820 S.W.2d 25, 27-28 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). Smith contends that the jury argument, "if you saw Robert Smith angry out on the street you'd probably walk the other way," does not fit into one of the above four permissible jury arguments. We agree. Therefore, the trial court erred in overruling the requested instruction that the jury disregard this argument. *See id.* at 28.

To determine whether this error warrants reversal, "we must calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence." *Orono v. State*, 791 S.W.2d 125, 130 (Tex. (Tex. Crim. App. 1990). In *Mosley v. State*, the Texas Court of Criminal Appeals laid out the following three factors to aid the court in determining whether error was harmful under Rule 44.2(b) of the Texas Rules of Appellate Procedure. 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) *cert denied* 526 U.S. 1070, 143 L.Ed.2d 550, 119 S.Ct. 1446. These are "(1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction)." *Id.*

Applying these factors, we first find that the prosecutor's argument was prejudicial. However, we consider this argument to be moderately, rather than severely, prejudicial. Secondly, despite the trial court's failure to instruct the jury to disregard these prejudicial remarks, we find that the evidence at trial indicated a high likelihood of a conviction, even without this prejudicial argument. We therefore find this error to be harmless. Accordingly, we overrule Smith's sixth point of error.

Statutory Terms and Conditions of Probation in the Jury Charge

In his seventh point of error, Smith contends that the trial court erred in failing to include all the statutory terms and conditions of felony probation in the jury charge. The charge advised the jury that it could recommend that Smith be granted community supervision, and it enumerated nine conditions of community supervision listed in Article 42.12, section 11(a) of the Texas Code of Criminal Procedure. Smith argues that he suffered egregious harm because the charge failed to include the remainder of the statutory terms and conditions of probation to guide the jury in its decision on whether to grant Smith probation. Again, we disagree.

Although the jury does not have authority to set the terms and conditions of community supervision, it is helpful to enumerate in the court's charge the terms and conditions the court may impose if the jury recommends community supervision. *See Flores v. State*, 513 S.W.2d 66, 69 (Tex. Crim. App. 1974); *Wade v. State*, 951 S.W.2d 886, 893 (Tex. App.—Waco 1997, pet. ref'd). However, failing to enumerate all of the statutory terms and conditions of community supervision in the court's charge is neither error nor harmful to the accused. *See Cortez v. State*, 955 S.W.2d 382, 384 (Tex. App.—San Antonio 1997, no pet.); *Wade*, 951 S.W.2d at 893. Moreover, when the charge lists conditions authorized by statute and does not inform the jury that only those listed could be imposed, the court does not err in failing to inform the jury that it could impose other reasonable conditions upon the defendant. *See Means v. State*, 955 S.W.2d 686, 692 (Tex. App.—Amarillo 1997, pet. ref'd).

Here, as we stated, the charge listed nine terms and conditions of community supervision that were authorized by statute. It also instructed the jury that if it recommended community supervision, the court could impose other conditions upon Smith. The trial court was not required to inform the jury of all the conditions which could be imposed on Smith.

We overruled Smith's seventh point of error, and affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Fowler, Edelman, and Baird[1].

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

[1] Former Judge Charles F. Baird sitting by assignment.