Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01293-CR

JOHNNY J. HUNT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 844,450

O P I N I O N

Johnny Hunt appeals his conviction for criminally negligent homicide. In two issues, appellant argues the trial court erred in allowing testimony from the victim's father at the guilt-innocence stage of the trial and denying appellant's motions for mistrial. In a third issue, appellant contends that the evidence adduced at trial is legally and factually insufficient. We affirm.

Background

This case arises from a tragic traffic accident. A jury found that appellant, a truck driver with over thirty-one years experience, drove at an unreasonable speed and disregarded a traffic light when proceeding through an intersection on a feeder-road. Appellant's truck collided with a the car in which the deceased, Ideria Holmes, rode.

Ms. Holmes' father, Raymond Holmes, did not witness the accident, but arrived at the accident scene after his daughter had been taken to the hospital. Mr. Holmes testified at trial. Almost immediately upon being called to the stand, Mr. Holmes began to cry. After a few minutes, the jury was removed and appellant's request for a mistrial was denied. Upon its return, the jury was instructed to disregard the episode. Mr. Holmes then testified about learning of the wreck, arriving at the scene, talking with emergency personnel, and trying to find out if his daughter had been injured. During his testimony, Mr. Holmes was, according to the court, "emotional," "choked," and "obviously fighting back tears." The testimony lasted approximately fifteen minutes.

Later, four other witnesses for the State were asked for their observations of Mr. Holmes' grief. Appellant objected to only one of the four exchanges. During defense counsel's closing argument, Mr. Holmes stood up crying and screaming at defense counsel, arguing with counsel about the color of the traffic signal. Again, appellant requested and received a instruction to disregard but was refused his request for a mistrial.

A number of individuals who saw the accident gave conflicting estimates of the speed at which appellant's truck was traveling. There was also disagreement about whether the traffic signal had been red or yellow as appellant entered the intersection. In an effort to establish what a reasonable speed would have been for the area of the crash, the State and appellant vigorously argued, through several witnesses, about relevant signage and a municipal ordinance.

Appellant received a two-year, fully-probated sentence.

Issues

Appellant submits that the trial court committed reversible error in permitting Mr. Holmes to testify at trial. Next, appellant claims that his motion for a mistrial should have been granted after Mr. Holmes repeatedly broke down crying at trial. Third, appellant claims that the trial evidence was legally and factually insufficient to demonstrate a gross deviation from ordinary care. We address the first two claims jointly because they involve the same facts and standard of review.

Mr. Holmes' Testimony and Ruling on First Motion for Mistrial

Mr. Holmes' testimony at the guilt stage of trial is alleged to constitute irrelevant and therefore inadmissible victim impact testimony. We agree that the testimony was irrelevant. However, the State correctly notes that no objection was lodged to the final fifteen minutes of testimony regarding the activities of the father after he learned of the accident. Appellant's contention that defense counsel repeatedly objected to Mr. Holmes' testimony is not borne out by the record. Therefore, our identification of error is constrained to the initial objection to a single question concerning Mr. Holmes' relationship with his daughter.[1] *See Rhoades v. State*, 934 S.W.2d 113, 119-20 (Tex. Crim. App. 1996) (error waived absent timely, specific objection). To this objection, appellant requested and received an instruction to disregard. The court stated: "I'm instructing you to disregard all of the testimony and exchanges that have taken place with this witness. We are going to start over."

Appellant suggests that we review the contested testimony under Texas Rule of Evidence 403. However, because we hold that the testimony from Mr. Holmes which was properly objected to was irrelevant as a matter of law, there is no need to review any balancing allegedly implied by the trial court's ruling. A trial court has no discretion to admit irrelevant evidence. *See Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App.

[1] The exact question posed was: "Mr. Holmes, what was your relationship like with your daughter?"

1990). We therefore next determine whether the erroneously admitted evidence was harmful.

Generally, any error in asking an improper question is cured and rendered harmless by an instruction to disregard. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999); *Ransom v. State*, 789 S.W.2d 572, 585 (Tex. Crim. App. 1989) (citing *Guzmon v. State*, 697 S.W.2d 404, 408 (Tex. Crim. App. 1985) *cert. denied*, 475 U.S. 1090, 106 S.Ct. 1479 (1986)). The exception to this rule is where it appears that the question is clearly calculated to inflame the minds of the jury, and is of such character as to suggest the impossibility of withdrawing the impression produced in their minds. *Guzmon*, 697 S.W.2d at 408. If the exception applies, the error is harmful, and a mistrial should have been granted. *Id.* Where the exception applies, it appears that asking the question must have been tantamount to prosecutorial misconduct. *See Perkins v. State*, 902 S.W.2d 88, 96 (Tex. App.—El Paso 1995), *reh'g denied*, 905 S.W.2d 452 (Tex. App.—El Paso 1995, writ ref'd) (citing *Huffman v. State*, 746 S.W.2d 212, 218 (Tex. Crim. App. 1988). Each case has its own characteristics, and we examine the entire record with the attendant circumstances, the nature of the evidence sought, and its possible relationship to other testimony in order to determine the probability or possibility of injury. *Guzmon*, 697 S.W.2d at 408. (citing *Sensabaugh v. State*, 426 S.W.2d 224, 227 (Tex. Crim. App. 1968)).

Experience dictates our determination that the question regarding Mr. Holmes' relationship with his daughter was not clearly calculated to inflame the minds of the jury. It is clear from the record that the question, together with those that preceded it, occurring during the first one or two minutes of Mr. Holmes' testimony, was intended to be background information introducing the witness to the jury. Such introductory questions, while perhaps legally irrelevant, are commonplace and accepted. We are mindful that the State referred to Mr. Holmes in her opening statement. The prosecutor also asked two officers who worked the accident scene and one eye-witness whether they had observed and/or interacted with Mr. Holmes. None of these witnesses was asked more than a handful

of questions on the subject. Only one witness gave inflammatory testimony and that testimony was sarcastic and not responsive to the question propounded. Furthermore, defense counsel's objection was immediately sustained.

In sum, because the error was not so egregious as to have been clearly calculated to inflame the jury, we hold that the instruction given by the court cured any injury caused by the State's improper question to Mr. Holmes.

Closing Argument Outburst and Second Ruling on Motion for Mistrial

A trial court's denial of a mistrial is reviewed under an abuse of discretion standard. *Ladd*, 547 S.W.3d at 567 (citing *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993)). Conduct from bystanders which interferes with the normal proceedings of a trial will not result in reversible error unless the defendant shows a reasonable probability that the conduct interfered with the jury's verdict. *Landry v. State*, 706 S.W.2d 105, 112 (Tex. Crim. App. 1985) (citing *Ashley v. State*, 362 S.W.2d 847 (Tex. Crim. App. 1963). Injury to a defendant is measured on a case-by-case basis. *Id*.

Stahl v. State, relied upon by appellant, is qualitatively distinct. 749 S.W.2d 826 (Tex. Crim. App. 1988). In *Stahl*, the State explicitly argued that the victim's mother had a substantive right to testify independent of the relevance of her observations to the elements of the crime charged. The State put the mother on the witness stand and then surprised her with a morgue photo of her dead daughter, at which point she began screaming at the defendant. She shouted: "Oh, my god. Oh, my God. My baby. My God. May he rest in hell. May he burn in hell. Oh, my baby." The evidence in *Stahl* convinced the Court of Criminal Appeals that the whole episode had been contrived by the State to inflame the jury. These are not the facts here. Here no inference of prosecutorial misconduct is supported by the record.

We conclude that the trial court acted within its discretion in refusing to grant appellant's second motion for mistrial. Here, as in *Ashle*y, a family member of the deceased

spoke out during defense counsel's final argument. In *Ashley*, the Court of Criminal Appeals held that the outcry was promptly cured by the trial court's instruction to the jury. We think the instruction here likewise sufficed.[2] We have detailed relevant contextual facts above. Viewing the evidence as a whole, we cannot say within a reasonable probability that the outburst interfered with the jury's verdict.

For these reasons, we overrule appellant's first issue.

Legal Insufficiency [3]

Evidence is legally sufficient if, viewed in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See generally Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Appellant was charged with criminally negligent homicide. Section 6.03 of the Texas Penal Code defines criminal negligence thus:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a *substantial and unjustifiable risk* that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it *constitutes a gross deviation from the standard of care that an ordinary person would exercise* under all the circumstances as viewed from the actor's standpoint. [italics added]

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[2] The instruction given was: "Ladies and gentleman of the jury, unfortunately you just observed an emotional outburst here in the courtroom, and I am instructing you at this time that you are to put that entirely out of your mind. You are not to consider anything what was said (sic) or done by anyone in the audience for any purpose whatsoever in reaching your verdict."

[3] While styled as a claim of legal insufficiency, it also possible that appellant asserts that running a red light and driving at an unreasonable speed, under these circumstances, cannot, as a matter of law, constitute a substantial and unjustifiable risk or a gross deviation from the standard of care. To the extent this interpretation of appellant's claim is accurate, we disaffirm appellant's conclusion.

Appellant submits that the evidence was legally (and factually) insufficient to prove the italicized elements in the preceding definition. The basis for this claim is the State's alleged failure to offer direct proof that appellant drove at an unreasonable speed on the feeder and ran a red light. However, circumstantial evidence is sufficient to sustain a conviction, and sufficiency review of cases involving circumstantial evidence is no different from review of cases based on direct evidence. *See, e.g., Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999); *Smith v. State*, 965 S.W.2d 509, 515 (Tex. Crim. App. 1998).

Here, the State offered testimony from several eye-witnesses, including Nikivia Holmes, Ronnie Hargrave, Antonio Thomas, Keith Wolfe, Nelson Banks, and Henry Duncan, as well as two experts. While testimony from these witnesses differed to a certain degree, the testimony from each indicated that appellant entered the intersection without the right-of-way or that appellant was driving, either explicitly or inferentially, at an unsafe speed. This direct testimony is enough to enable a rational jury to determine that appellant's behavior constituted a gross deviation from the ordinary standard of care.

Factual Sufficiency

Evidence at trial is factually insufficient if a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if: (1) it is so weak as to render the result clearly wrong and manifestly unjust, or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Id.* In our review, we must be careful not to intrude on the jury's role as the sole judge of the credibility of the witnesses or the weight to be given their testimony. *Id*. at 9.

We have identified the relevant evidence presented by the State above. Reviewing appellant's rebuttal evidence, we observe that Joe Hinton, an expert, stated that a reasonable speed for the area was higher than that initially asserted by the State's witnesses. Mr. Hinton

also controverted the State expert's estimation of the speed appellant's truck was traveling as it entered the intersection. The court also received evidence regarding the nature of driving a tractor-trailer, including its propensity to jack-knife under hard braking, the duration of the yellow light at the intersection, the speed of the victim's car, and the usual speed of traffic in the area.

By its verdict, the jury chose to believe the State's version of events over that offered by the defense, and found appellant's actions to be a gross deviation from the ordinary standard of care. While appellant presented evidence contradicting the State's theory of the case, the result below is neither clearly wrong or unjust, nor against the great weight and preponderance of the evidence.

We overrule appellant's third issue. Accordingly, the judgement of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed December 20, 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.