Affirmed and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01395-CR

MELVILLE GEORGE BOUSLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 818,173

O P I N I O N

A jury found appellant, Melville George Bousley, guilty of the felony offense of intoxication assault. The trial court assessed punishment at ten years confinement in the Institutional Division of the Texas Department of Criminal Justice, but suspended the sentence and placed appellant under the terms and conditions of community supervision for ten years. Appellant contends: (1) the evidence is factually insufficient; (2) the trial court violated his Sixth Amendment right of confrontation; and (3) the conditions imposed on his community supervision are invalid. We affirm.

At 2:30 a.m. on December 13, 1998, appellant was driving his vehicle in the City of

Webster when he ran a red light and collided with another vehicle. Appellant and the sole passenger in his vehicle, Sabra Miller (the complainant), were both seriously injured in the accident and were subsequently transported to the hospital by a Life Flight helicopter. A specimen of appellant's blood was taken upon his arrival at the hospital and subsequent tests indicated he had a blood alcohol concentration of 0.133 grams of alcohol per 100 milliliters of blood. Ms. Miller's injuries included a brain injury, crushed facial bones, a broken clavicle, fractured ribs, a fractured hip, and a fractured tibia.

In his first issue, appellant asserts the evidence is factually insufficient to prove he drove his vehicle while intoxicated. To establish that appellant committed the offense of intoxication assault, the State had to demonstrate that he, by accident or mistake, caused serious bodily injury to another while operating a motor vehicle in a public place while intoxicated. TEX. PEN. CODE ANN. § 49.07 (Vernon Supp. 2001). The crux of appellant's factual sufficiency challenge is his assertion the State failed to establish that, at the time of the accident, he had lost the normal use of his mental or physical faculties due to intoxication or that he had a blood alcohol concentration of at least 0.10.

When assessing a factual sufficiency challenge, we must conduct a neutral review of all of the evidence. *Johnson v. State*, 23 S.W.3d 1, 10-11(Tex. Crim. App. 2000). We may only set aside the verdict if (1) the evidence is so obviously weak that it undermines our confidence in the jury's determination, or (2) the evidence of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Id*. When conducting a factual sufficiency review, we must be appropriately deferential to the fact finder's determinations of the credibility of the witnesses and the weight given their testimony. *Clewis*, 922 S.W.2d at 135. Therefore, we should only nullify the fact finder's factual determination when the finding is against the great weight and preponderance of the evidence. *Id*.

Appellant correctly observes that none of the State's witnesses testified that, at the time of the accident, appellant had lost the normal use of his physical or mental faculties. Moreover, no one testified that appellant looked or appeared intoxicated prior to the

accident. However, the State is not required to present testimony that appellant acted or appeared intoxicated because a blood alcohol level beyond the legal limit is probative evidence of a person's loss of his mental and physical faculties. *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). The State presented the jury with an emergency room physician who testified that upon appellant's arrival at the hospital a specimen of his blood was taken and later determined to have a blood alcohol concentration substantially exceeding the legal limit. The physician further testified that appellant was medically intoxicated when he arrived at the hospital. A medical student testified that the appellant's blood specimen was taken at 3:30 a.m. The State presented the testimony of a toxicologist who stated that someone who had a blood alcohol concentration of .133 at 3:30 a.m. would have had a blood alcohol concentration somewhere in the range of .113 and .153 at 2:20 a.m. We conclude that this evidence is factually sufficient to support the jury's verdict that appellant was intoxicated at the time of the accident.

In rebuttal, appellant presented the testimony of his toxicologist who asserted that appellant had a blood alcohol concentration of .07 when the accident occurred. Appellant contends this testimony invalidates the testimony of the State's toxicologist and negates the validity of the verdict. We are required, however, to give appropriate deference to the jury's determinations of credibility and weight; we must recognize that a verdict is not manifestly unjust simply because the jury resolved conflicting views of the evidence in favor of the State. *Cain v. State*, 958 S.W.2d 404, 410 (Tex. Crim. App. 1997). Here, the State presented factually sufficient evidence to support appellant's conviction. That evidence is not invalidated simply because the testimony of an expert for the defense contradicted the testimony of the State's witnesses. Accordingly, appellant's first issue is overruled.

Appellant's second and third issues assert the trial court violated appellant's Sixth Amendment right to confrontation by not allowing him to cross-examine the complainant, Sabra Miller, and another of the State's witnesses, Gregory Gray, about legal actions they

were pursuing against appellant as a result of the accident. During appellant's cross-examination of Miller, appellant's trial counsel began to ask her about a civil suit she had filed against appellant. The State raised a relevancy objection which the trial court sustained. After the trial court denied appellant's counsel the opportunity to make an offer of proof, appellant's counsel detailed the intended direction of his cross-examination, thus properly preserving any possible error.[1] TEX. R. EVID. 103(a)(2). Prior to appellant's cross-examination of Gray, who was driving the vehicle that collided with appellant's car, the trial court denied appellant's counsel's request to cross-examine Mr. Gray about his civil action against appellant. Appellant's counsel clearly conveyed the nature of his intended cross-examination, thus properly preserving any possible error. TEX. R. EVID. 103(a)(2).

We review trial courts' evidentiary rulings for an abuse of discretion. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The Sixth Amendment right to confrontation affords appellant the right to cross-examine the State's witnesses to challenge their perception of the facts and to expose any possible bias in their motivation for testifying. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974); *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App.1996). Appellant's right to cross-examine the witnesses against him extends to any fact that may affect a witness's credibility. *Carroll*, 916 S.W.2d at 497; *Recer v. State*, 821 S.W.2d 715, 717 (Tex. App.—Houston [14th Dist.] 1991, no pet.); TEX. R. EVID. 611(b). This includes any civil suit brought by a witness against appellant. *Shelby v. State*, 819 S.W.2d 544, 545 (Tex. Crim. App.1991); *Cox v. State*, 523 S.W.2d 695, 700 (Tex. Crim. App.1975). Accordingly, we find the trial court's decision to preclude appellant from cross-examining Miller and Gray about civil suits they were maintaining against appellant violated the Confrontaion Clause of the Sixth Amendment and constituted an abuse of the trial court's discretion.

[1] When evidence is excluded, the right to make an offer of proof or perfect a bill of exceptions is absolute. *Spence v. State*, 758 S.W.2d 597, 599 (Tex. Crim. App. 1988).

A violation of the right to cross-examine under the Confrontation Clause is subject to harmless error analysis. *Shelby*, 819 S.W.2d 546-47. Thus, having found error, we must now determine whether the error caused sufficient harm to require the reversal of appellant's conviction. We apply a three prong analysis when assessing the harm caused by a violation of an appellant's right to cross-examine. *Id*. at 547. First, we assume that the damaging potential of the cross-examinations was fully realized. *Id*. Second, we review the error in connection with the following factors:

> (1) The importance of the witness's testimony in the prosecution's case;
>
> (2) Whether the testimony was cumulative;
>
> (3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
>
> (4) The extent of the cross-examination otherwise permitted; and,
>
> (5) The overall strength of the prosecution's case.

Id. Finally, in light of the first two prongs, we must determine if the error was harmless beyond a reasonable doubt. *Id*.

As noted in our analysis of appellant's first issue, to establish that appellant committed the offense of intoxication assault, the State had to demonstrate that he, by accident or mistake, caused serious bodily injury to another while operating a motor vehicle in a public place while intoxicated. TEX. PEN. CODE ANN. § 49.07 (Vernon Supp. 2001). The focus of appellant's defense was the assertion that there was no valid evidence establishing that appellant was intoxicated at the time of the accident. Neither Miller's nor Gray's testimony addressed whether appellant was intoxicated at the time of the accident.

The focus of Miller's testimony was the extent of the injuries she received as a result of the accident. Appellant's defense did not contest the serious bodily injury element of the offense and Ms. Miller's testimony concerning her injuries was wholly corroborated by the testimony of her treating physician. As noted by appellant in his argument in support of his first issue, she specifically did *not* testify that appellant was

intoxicated at the time of the accident. She did testify that appellant had consumed alcohol prior to the accident, but this testimony was corroborated by the testimony of another witness for the State and by witnesses for the defense. Furthermore, she did not testify that appellant caused her injuries by mistake or accident. Rather, she testified that she had no recollection of the accident.

Mr. Gray's testimony also did not address whether appellant appeared intoxicated after the accident. Mr. Gray did testify that appellant ran a red light and caused their vehicles to collide, but this testimony was corroborated by the testimony of Paul Milstead, an eyewitness to the accident. In fact, every material element of Miller's and Gray's testimony was corroborated by other witnesses for the State. Consequently, we find the trial court's error was harmless and appellant's second and third issues are overruled.

Appellant's fourth and fifth issues, respectively, contend that the trial court erred in requiring, as a condition of appellant's community supervision, that appellant reside in Harris County and have no contact with Ms. Miller. However, appellant failed to complain at trial to these conditions. Absent an objection at trial, appellant is prohibited from complaining about the conditions on appeal. *Speth v.State*, 6 S.W.3d 530, 534-35 (Tex. Crim. App. 1999). Accordingly, appellant's fourth and fifth issues are overruled.

We affirm the decision of the trial court.

_____

J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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