Affirmed and Memorandum Opinion filed December 14, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00753-CR

VICENTE JESUS RAMIREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Cause No. 47894

MEMORANDUM OPINION

Appellant Vicente Jesus Ramirez appeals his conviction for intoxication manslaughter. In his sole issue on appeal, appellant contends the trial court erred in denying his request to include a concurrent cause instruction in the jury charge. We will affirm.

BACKGROUND

Appellant was driving westbound on a two-lane highway when he collided head-on with another vehicle, killing the other driver. The accident occurred at around 7:45 p.m. on August 13, 2007, as the sun was setting. Appellant admitted to emergency personnel on the scene that he had consumed five beers that night. His medical records confirmed a blood alcohol level in excess of 0.300 nearly an hour after the collision.

Appellant admitted that he was attempting to pass another vehicle when he collided with the complainant in the oncoming lane of traffic. State Trooper Glen Welters, who investigated the crash, determined that the cause of the accident was appellant's intoxication. Trooper Welters testified that he reached this conclusion based on the following factors: (1) appellant had consumed several alcoholic beverages on the night of the accident; (2) the accident occurred on a straight and unobstructed roadway; (3) appellant attempted to pass another vehicle in a no-passing zone with an intersection approaching; and (4) appellant failed to brake or otherwise take evasive action just before the crash.

Defense counsel questioned Trooper Welters whether the accident could have been caused independently by appellant's impaired vision, on account of the sun shining in his eyes. Trooper Welters answered that he did not know the precise angle or position of the sun at the time of the accident, and thus could not testify to such a cause. However, Trooper Welters did testify that if appellant's vision were indeed impaired, his decision to pass another vehicle would be further evidence of intoxication because, under those conditions, passing a vehicle is inherently unsafe. Defense counsel also questioned whether the accident was caused by appellant's attempt to evade a collision, positing that appellant drove toward the shoulder on the complainant's side of the road after realizing that he could not safely pass on his own side. Trooper Welters said that he considered the

possibility of that cause, but found no evidence of it during his investigation. The more "logical evasive action," he testified, "would have been to apply brakes and move back into his own lane." When finally asked whether the accident could have occurred if appellant were not intoxicated, Trooper Welters replied, "In my opinion, I don't believe so."

In a conference over the proposed jury charge, appellant requested that the charge include the following language, quoting *Wooten v. State*: "It is not enough that operation of a motor vehicle, even when operated by an intoxicated person, causes death; rather, the State must prove that a defendant's intoxication caused the fatal result." 267 S.W.3d 289, 295 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). The trial court denied the request. Appellant did not specifically petition the trial court to include an instruction under section 6.04(a) of the Texas Penal Code.

The jury found appellant guilty and assessed punishment at ten years' confinement. Appellant now challenges his conviction because the jury charge did not include a concurrent cause instruction.

DISCUSSION

A. Standard of Review

Our method for reviewing a claim of jury charge error is prescribed by *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g), *overruled on other grounds by Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex. Crim. App. 1988). *See also* Tex. Code Crim. Proc. Ann. art. 36.19 (West 2010). We must first determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If the charge is erroneous, we must then determine whether the charge caused sufficient harm so as to require reversal. *Id.* at 170–71. The degree of harm necessary for reversal depends upon whether error was actually preserved. *Almanza*, 686 S.W.2d at 171. Error properly

preserved will call for reversal so long as the error is not harmless. *Id.* If error was not preserved, the accused is entitled to a reversal only if he suffered egregious harm. *Id.*

B. Analysis

The Penal Code provides that a person is criminally responsible "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." Tex. Penal Code § 6.04(a) (West 2010). An accused is entitled to an instruction on every defensive issue, including one of concurrent causation, so long as the issue is raised by the evidence. *Bell v. State*, 169 S.W.3d 384, 394–95 (Tex. App.—Fort Worth 2005, pet. ref'd). To raise an issue under Section 6.04(a), the evidence must show that the concurrent cause was clearly sufficient by itself to produce the result, and the actor's conduct clearly insufficient. *Id.* The concurrent cause must be "another cause" in addition to the actor's conduct, i.e., an "agency in addition to the actor." *Robbins v. State*, 717 S.W.2d 348, 351 n.2 (Tex. Crim. App. 1986).

We conclude that the evidence did not entitle appellant to an instruction under Section 6.04(a). Defense counsel questioned Trooper Welters on several external factors in an attempt to introduce evidence that the collision might have resulted from a concurrent cause. Questions, however, do not amount to evidence. *Kercho v. State*, 948 S.W.2d 34, 37 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). Only the answers of witnesses are determinative. *Wells v. State*, 730 S.W.2d 782, 786 (Tex. App.—Dallas 1987), *pet. ref'd*, 810 S.W.2d 179 (Tex. Crim. App. 1990). In this case, the witness testimony established that the sole cause of the accident was appellant's intoxication. Trooper Welters immediately dismissed every suggestion on counsel's part that the accident may have resulted from anything else. Trooper Welters found no evidence that the crash was the result of appellant taking evasive action. Trooper Welters also declined to testify that the crash could have been influenced by the setting sun. We observe that even if the sun had

been in his eyes, appellant still failed to submit any evidence that his visual impairment would have been clearly sufficient to cause the accident.

Because the evidence does not raise the issue of concurrent causation, we find no error in the jury charge and do not reach the merits of appellant's harm argument. Appellant's sole issue is overruled, and the judgment of the trial court is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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