Affirmed and Memorandum Opinion filed January 25, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00831-CR

RUBEN CANALES, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 58,471

M E M O R A N D U M O P I N I O N

A jury convicted appellant, Ruben Canales, Jr., of assault-family violence, which was enhanced by a prior conviction for assault-family violence.[1] During the punishment phase of trial, the jury found appellant to be a habitual offender and sentenced him to twenty-five years' confinement.[2] In two issues, appellant contends the trial court erred by (1) sustaining the State's objection to his cross-examination of the complainant and (2) including an erroneous instruction in the punishment charge regarding the habitual-

[1] Tex. Penal Code Ann. § 22.01(a)(1), (b)(2) (West Supp. 2010).

[2] Tex. Penal Code Ann. § 12.42(d) (West Supp. 2009).

offender issue. Because the dispositive issues are clearly settled in law, we issue this memorandum opinion. *See* Tex. R. App. P. 47.4. The trial court's judgment is affirmed.

I. BACKGROUND

In August 2008, appellant and Sophia Diaz were involved in a dating relationship. Diaz had two children, one of whom was fathered by appellant. On the evening of August 29, 2008, after appellant and Diaz attended a barbecue at which appellant consumed alcohol, they engaged in a verbal and physical altercation at Diaz's apartment. Diaz testified that appellant struck her on the face, body, and limbs, strangled her, and also "started throwing . . . [her] furniture." Appellant eventually forced Diaz into a bedroom where he made her lie on the bed with him. After appellant fell asleep, Diaz retrieved her children and went to the police station. Photographs of Diaz's injuries taken at the police station reveal that she sustained scratches to her face, a swollen eye and bottom lip, and red marks on her neck. Diaz also testified that she sustained a bloody nose during the assault.

On the same day, Officer Kevin Nutt responded to a family-violence incident at Diaz's apartment. When he arrived, the door was partially open. Officer Nutt entered the apartment and saw an overturned couch, a broken chair, and what appeared to be blood spatter on the wall. Officer Nutt found appellant asleep in a bedroom. When appellant did not respond to a verbal command, Officer Nutt shook him awake. According to Officer Nutt, appellant seemed confused and possibly "under the influence of something." Appellant also had what appeared to be blood on his shorts. Appellant stated that he did not know the blood's source and denied having been in a physical altercation.

Appellant was charged with assault-family violence. At trial, Diaz testified that she still loved appellant and wanted him to help raise their child, she had attempted several times to have the charges against appellant dismissed, and she was being forced to testify "[t]hrough a subpoena." Appellant was convicted and sentenced to twenty-five years' confinement.

II. CROSS-EXAMINATION

In his first issue, appellant contends the trial court erred by sustaining the State's objection during appellant's cross-examination of Diaz. Specifically, appellant complains about the following exchange:

> [Defense Counsel:] Is there anyone else right now that - - that you've got assault charges pending against?
>
> [Prosecutor:] Objection, Your Honor, relevance.
>
> [Trial Court:] Sustained.
>
> [Sophia Diaz:] Do I answer?
>
> [Trial Court:] No. Thanks for asking.

Appellant argues the purpose of this question was to establish that Diaz had accused other persons of assault, which would have weakened her credibility and showed she had a motive to lie. According to appellant, because this question was proper and necessary for a full cross-examination of Diaz, the trial court's ruling violated his Sixth Amendment right to confrontation.

A. Standard of Review

We review a trial court's decision to limit cross-examination under an abuse-of-discretion standard. *Sansom v. State*, 292 S.W.3d 112, 118 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). The Confrontation Clause of the United States Constitution guarantees a defendant the right to cross-examine witnesses. *See* U.S. Const. amend. VI; *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000). A defendant may cross-examine a witness on any subject "reasonably calculated to expose a motive, bias or interest for the witness to testify." *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996). The right to cross-examination "includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness's credibility." *Virts v. State*, 739 S.W.2d 25, 29 (Tex. Crim. App. 1987).

Errors in limiting cross-examination are subject to a harm analysis for constitutional error. Tex. R. App. P. 44.2(a); *Kelly v. State*, 321 S.W.3d 583, 605 (Tex. App.—Houston [14th Dist.] 2010, no pet.). We determine harm by applying a three-pronged test. *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). First, we must assume that the damaging potential of the cross-examination was fully realized. *Id.* Second, with that assumption in mind, we review the error in connection with the following factors: (1) the importance of the witness's testimony in the State'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 cross-examination otherwise permitted; and (5) the overall strength of the State's case. *Id.* Finally, in light of the first two prongs, we determine whether the error was harmless beyond a reasonable doubt. *Id.*

B. Analysis

Assuming, without deciding, that the trial court erred by limiting appellant's cross-examination of Diaz, we conclude the error was harmless. Pursuant to the first *Shelby* prong, we assume for purposes of our harm analysis that the jury was informed and believed Diaz presently had assault charges pending against one or more other persons. With this assumption in mind, we examine the evidence.

Diaz's testimony was not cumulative and was essential in the State's case. She testified that (1) she and appellant engaged in an altercation at her apartment during which appellant "started throwing . . . [her] furniture," (2) appellant struck her repeatedly in the face, causing scratches, a swollen eye, and a bloody nose, and (3) she was able to leave after appellant fell asleep. Despite the great importance of Diaz's testimony, the remaining factors of the second *Shelby* prong weigh in favor of harmless error. Diaz's testimony was corroborated by photographs of her injuries taken shortly after the altercation and Officer Nutt's testimony that, after he entered Diaz's apartment, he found overturned and broken furniture, blood on the wall, and appellant asleep with a possible blood-stain on his shorts. Diaz's credibility was further strengthened because she did not

want appellant to be convicted and, thus, had no incentive to fabricate assault charges. Furthermore, the trial court did not limit appellant's cross-examination of Diaz on any other significant issue. In light of these facts, we determine beyond a reasonable doubt that the verdict would have been the same even if the jury had been informed and believed that Diaz presently had assault charges pending against other persons. Accordingly, we determine beyond a reasonable doubt that the trial court's limitation of appellant's cross-examination was harmless. *See* Tex. R. App. P. 44.2(a). We overrule appellant's first issue.

III. CHARGE ERROR

In his second issue, appellant contends the trial court erred by submitting erroneous habitual-offender and second-offender application paragraphs in the jury charge. Specifically, appellant argues the application paragraphs were confusing and allowed the jury to find he was a habitual offender without determining that his previous felony convictions were sequential—a requirement under the habitual-offender statute. *See* Tex. Penal Code Ann. § 12.42(d). We conclude no error occurred.

To establish the defendant is a habitual offender, "'[t]he [chronological] sequence of events must be proved as follows: (1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; (4) the offense for which defendant presently stands accused is committed.'" *Jordan v. State*, 256 S.W.3d 286, 290–91 (Tex. Crim. App. 2008) (quoting *Tomlin v. State*, 722 S.W.2d 702, 705 (Tex. Crim. App. 1987)); *see also* Tex. Penal Code Ann. § 12.42(d).

The State alleged appellant was convicted of three felonies on November 1, 2002 and another felony on September 5, 2005, and this subsequent felony was committed after appellant's convictions of the prior three felonies became final but before he assaulted Diaz. During the punishment hearing and in the jury's presence, appellant pleaded "true" to each of the enhancement allegations. Penitentiary packets of all four convictions were also admitted. Thus, the facts supporting a finding that appellant was a habitual offender were undisputed.

The trial court was not required to submit the enhancement issue to the jury because appellant pleaded "true" to each enhancement allegation. *See Harvey v. State*, 611 S.W.2d 108, 112 (Tex. Crim. App. 1981); *Howell v. State*, 563 S.W.2d 933, 936 (Tex. Crim. App. [Panel Op.] 1978). Instead, the trial court should have instructed the jury to answer "true" to the enhancement paragraphs. *See Urbano v. State*, 808 S.W.2d 519, 523 (Tex. App.—Houston [14th Dist.] 1991, no pet.). Because the trial court was not required to submit the enhancement issue, we cannot hold that the charge submitted was erroneous. *Cf. Hardin v. State*, 951 S.W.2d 208, 210–11 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (concluding alleged inadequacy in a jury instruction could not be erroneous because defendant was not entitled to the instruction). We overrule appellant's second issue.

The trial court's judgment is affirmed.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.

Do Not Publish — Tex. R. App. P. 47.2(b).