In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00239-CR

HOYT MANNING HIBBARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 08-04-04268-CR

MEMORANDUM OPINION

In a jury trial, Hoyt Manning Hibbard ("Hoyt") was convicted of injury to an elderly individual and sentenced as a repeat offender to twenty-seven years of confinement in the Texas Department of Criminal Justice, Correctional Institutions Division.[1] In three issues, appellant challenges the factual sufficiency of the evidence supporting the jury's finding on the intent element, complains the trial court erred in finding complainant competent to testify, and contends the trial court erred in providing

[1] Appellant is also known as "Hoyet Manning Hibbard."

an additional jury instruction on voluntary and involuntary intoxication. We affirm the judgment of the trial court.

In his first issue, appellant contends that the "greater weight of the evidence failed to prove that the appellant intentionally or knowingly caused injury to [the complainant.]" In reviewing the evidence for factual sufficiency, we view the evidence in a neutral light to determine whether the evidence supporting the verdict is so weak or so against the overwhelming weight of the evidence as to render the verdict clearly wrong and unjust. *Grotti v. State*, 273 S.W.3d 273, 280 (Tex. Crim. App. 2008). The jury, not the appellate court, "accepts or rejects reasonably equal competing theories of causation." *Goodman v. State*, 66 S.W.3d 283, 287 (Tex. Crim. App. 2001). To be factually insufficient, the evidence supporting a finding of guilt must be "so deficient that it does not counterbalance the defensive evidence[.]" *Id.*

The indictment alleged that appellant "intentionally or knowingly cause[d] serious bodily injury" to his eighty-four-year-old mother, Helen Hibbard, "by pushing [her] to the ground." The file of her treating physician, Camil Kreit, recorded that Helen had been assaulted and fell and stayed down for three days before she received emergency treatment. Dr. Kreit testified that Helen sustained an impact fracture to her left hip, renal failure due to dehydration, and fractures to her arm and shoulder. According to Dr. Kreit, the shoulder break indicated a stronger impact than would be expected in a normal fall and concluded that his patient had sustained a "forceful fall." The injuries appeared to be

acute and Helen had no prior history of broken bones or injuries sustained in a fall and x-ray images taken during her hospitalization showed no evidence of any healed fractures.

Regarding his patient's mental state, Dr. Kreit testified that Helen had a "milder loss of short memory" but "otherwise she's okay" and he could rely on her to give an accurate history. There was no indication in her medical records that Helen was ever in a state where she did not understand what she was told. She was able to communicate, was oriented in time and place, and was able to converse. Her long term memory appeared to be intact. The dehydration had caused Helen to be confused but she improved once she was rehydrated.

The paramedic who provided emergency response testified that when he first arrived at the scene Helen told him she had fallen but provided no other information about how she fell. He gave her a dose of a short-acting narcotic and rolled her onto a backboard for transport. Once she was inside the ambulance, Helen told the paramedic that her son had punched her and pushed her to the ground and left her laying there on the ground. Helen answered all of his questions appropriately and did not appear to be incoherent. The paramedic testified that he had experience with elderly people, he believed he could recognize when someone was too demented or too senile to answer his questions, and that was not the case with this patient. The paramedic was present while the nurses at the hospital assessed the patient. Helen repeated to the nurses the same statements she had made to the paramedic.

A medical social worker working in the hospital rehabilitation unit testified that she interviewed Helen when she was admitted to rehabilitation after her initial hospital stay. The medical social worker's responsibilities included determining that the patient would be returning to a safe environment. Helen had been fully independent until this injury occurred. The injury left her physically impaired but not cognitively impaired. The medical social worker did not think that Helen had a cognitive problem at the time. She also interacted with Helen's husband, Elvia Hibbard. Although he could communicate effectively, the social worker thought Elvia did have a cognitive problem.

A detective interviewed Helen while she was in the rehabilitation unit at the hospital with the medical social worker present. During the interview, Helen was cognitively intact and "repeated several times what happened at the residence." Helen indicated that Hoyt was in his room and Helen was standing in the door just inside; that Hoyt ordered her out of the room, and that when she did not comply Hoyt pushed her to the floor. According to Helen, Hoyt assaulted his father, Elvia, at the same time. During the detective's investigation, Helen never equivocated or changed her story. At the time, although she was fearful of her son and indicated that he acted differently when he took drugs, she did not want to press charges. Helen thought Hoyt was "acting crazy because he was on dope[.]"

Helen's oldest daughter, Avalon Lowe, testified that she traveled from her home in Rye to the Hibbards' home in New Caney to visit with her mother and discovered Helen

on the floor, injured and in great pain. When she asked what had happened, Helen said that "Hoyt hit her and pushed her." Elvia had a swollen finger and a "light colored black eye" and told Avalon that "him and Hoyt had gotten into it." When Hoyt showed up Avalon told Hoyt he should leave, but Hoyt refused. Hoyt was acting like he had been drinking. At some point another one of Helen's daughters, Audrey Pearl, arrived with a cell phone and directed Hoyt to call for emergency services. Hoyt did not go to the hospital with his mother. Helen told the people at the hospital that Hoyt hit her and pushed her down. Helen seemed to understand what was happening. Avalon stayed with Helen throughout her twenty-six-day hospitalization and she never saw Hoyt come visit. Helen repeated the same story many times and her recollection of the events leading to her injury remained the same the entire time that she was in the hospital. Helen and Elvia stayed with Avalon upon Helen's release from the hospital. Helen's story never changed the entire time she was staying with Avalon.

Another of Helen's daughters, Martha Hibbard, testified that Helen had a weak knee and before she sustained this injury Helen "fell off and on, just in the yard." When she was a child, she saw Helen having epileptic seizures. On cross-examination, Martha testified that she would expect her mother to be truthful to police officers and doctors. Although her mother is a truthful person, Martha thought that she is "getting confused more."

Helen did not want her son to be prosecuted for injuring her. When asked if she knew why she was in court, she responded, "No, not really. I'm for Hoyt, I think." The prosecutor stated "we want you to be able to say what it is you came to say." Helen responded, "I can't say I want Hoyt out." The prosecutor asked, "Is that the main thing you're interested in today?" Helen responded, "That's the main thing." She added, "Mainly. Well, maybe lie because I came because my husband and me -- we want him out if he's going to get out." The prosecutor reminded her that she was asked to tell the truth to the jury about what happened when she broke her hip. Helen responded, "Well, I don't remember much about it." She remembered that she was in the hospital because she fell. She testified that her knees had a cut that makes her leg give way and she falls.

Although there is no evidence in the record that her story varied before she returned home to New Caney, Helen gave inconsistent testimony at trial. At first, Helen claimed she did not recall being in the hospital, then admitted she did know that she had been in the hospital. Helen testified, "I was around the house and my knee just g[a]ve away [sic] on me and then I fell." She remained on the floor for "about two days." Elvia was there but he could not lift her. Helen claimed she did "not really" remember being on the floor and only said so because others told her. Helen then said she remembered being in the hospital but she did not want to talk about it. She recalled that people came and talked to her, but she did not remember who they were. Helen admitted that people "always wanted to know how did you get hurt." She did not recall speaking with the

medical social worker. Helen said she returned to New Caney when she left the hospital, but she recalled living with Avalon in Rye and recalled it "wasn't so hot." Helen testified that Avalon "hit my broken shoulder" then immediately said that Avalon "hit me and broke my shoulder" and added, "That's all I know."

The following day, after having her memory refreshed by hearing a recording of her conversation with the detective, Helen testified that she did recall meeting with the detective at the hospital. Helen stated she thought someone talked to her but she did not remember his name. She thought she recalled a conversation about Hoyt. When asked if she recalled telling the detective "that Hoyt broke your hip when he pushed you down," Helen replied, "Yes, I guess so." The prosecutor asked, "You do remember saying that?" Helen replied, "I remember." The prosecutor asked, "Do you remember telling Detective Landrum that when that happened, Hoyt was high on dope?" Helen replied, "I thought he was." She also admitted that she recalled telling the detective that "Hoyt hit Elvia in the eye because Elvia tried to protect [her]" and that she told the detective she did not want Hoyt to be around her or Elvia "right then[.]" Finally, the prosecutor asked Helen, "And did you also tell Detective Landrum, that please don't tell Hoyt that you said that because then Hoyt would hate you?" Helen replied, "I thought he would."

On cross-examination Helen admitted that she did remember talking to "a detective or something." She also recalled telling the detective that she did not think Hoyt meant to do it. Defense counsel asked Helen if Hoyt has been there to catch her

when she was falling. Helen replied, "I can't remember that. I don't know." Defense counsel asked, "Do you ever remember falling and Hoyt reaching out to grab you to prevent you from falling?" Helen replied that she did, and added, "He grabbed me to keep me from falling because he could hardly catch me." On re-direct examination, Helen stated, "I don't know if [Hoyt] pushed me down or not."

During a three-week-long hospitalization for her injuries, Helen consistently told the people who were providing medical treatment that Hoyt had hit her and pushed her down. Before her release from the hospital, Helen told both her daughter Avalon and the detective investigating the case that Hoyt become angry with her and pushed her to the floor. Helen's multiple fractures were consistent with having sustained a forceful fall.

The strength of this evidence was weakened somewhat by Helen's trial testimony that her knee just gave out from under her. She also indicated that her son was trying to keep her from falling rather than pushing her to the floor. This testimony presents alternative explanations for Helen's injuries but fails to explain why appellant left his mother on the floor for two days. Furthermore, Helen was obviously a reluctant witness for the prosecution because she did not want her son to be prosecuted for injuring her.

The strength of the State's evidence was also weakened by trial evidence that raised an inference that Helen suffers from a cognitive impairment that may have affected her ability to accurately communicate what actually happened to her. On the other hand,

trained professionals who observed Helen immediately after she was injured, determined that she was not cognitively impaired at the time.

As the reviewing court, we must remain "cognizant of the fact that a jury has already passed on the facts and must give due deference to the determinations of the jury." *Lancon v. State*, 253 S.W.3d 699, 704-05 (Tex. Crim. App. 2008). "Appellate courts should afford almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility. The jury is in the best position to judge the credibility of a witness because it is present to hear the testimony, as opposed to an appellate court who relies on the cold record." *Id.* In this case, the jury could hear and observe Helen and the other witnesses and is in a far better position to determine whether the contradictions in the evidence in general and in Helen's statements in particular were the result of an initially mistaken impression, a pre-existing mental confusion, a recent cognitive impairment, a reluctance to provide evidence that could result in her son's imprisonment, or a desire to protect her son from the adverse consequences of his conduct. Viewed in a neutral light, the evidence is factually sufficient for the jury to determine that appellant intentionally or knowingly caused serious bodily injury to an elderly person by pushing her to the ground. We overrule issue one.

Issue two contends the trial court abused its discretion when it ruled that Helen was competent to testify. The trial court conducted a pre-trial hearing immediately following jury selection. Rule 601 of the Texas Rules of Evidence presumes that every

witness is competent to testify. *See* TEX. R. EVID. 601(a). "[P]ersons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated" are not competent to testify. TEX. R. EVID. 601(a)(2). When the competency of a witness is challenged, the trial court considers: (1) whether the witness has the capacity to observe intelligently at the time of the events in question; (2) whether the witness has the capacity to recall the events about which she is called to testify; and (3) whether the witness has "both an ability to understand the questions asked and to frame intelligent answers and, on the other hand, a moral responsibility to tell the truth." *Watson v. State*, 596 S.W.2d 867, 870 (Tex. Crim. App. 1980). We review the trial court's ruling regarding a witness's competence to testify for abuse of discretion. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995). In determining whether there has been an abuse of discretion, we review the entire testimony of the witness in addition to that given in the hearing on competency. *Clark v. State*, 558 S.W.2d 887, 890 (Tex. Crim. App. 1977).

Appellant argues that Helen "consistently maintained that she could not remember the circumstances of the event[.]" Although Helen repeatedly claimed, both in the pre-trial hearing and at trial, that she could not recall how she became injured, she also repeatedly recalled those circumstances. For instance, Helen testified that her knee gave way. She also testified that Hoyt grabbed her to keep her from falling. Although she

apparently did not wish to admit it, Helen also recalled telling the detective that Hoyt had pushed her to the floor. She also recalled being on the floor for days.

Helen was able to recall events that occurred before she sustained her injuries. She recalled events that occurred after she fell. All the people she spoke to while she was hospitalized felt she was able to comprehend what was happening to her. Her treating physician testified that Helen had some short term memory deficit but that she could give a reliable history.

"If a person afflicted with a physical or mental disability possesses sufficient intelligence to receive correct impressions of events [s]he sees, retains clear recollection of them and is able to communicate them through some means there is no reason for rejecting [her] testimony." *Watson*, 596 S.W.2d at 870-71. Here, the medical providers' testimony supported a finding that Helen could correctly perceive events. Although she claimed she could not remember what happened, she admitted to knowing enough facts that the trial court could reasonably infer that Helen was either feigning memory loss or, more likely, minimizing her recollection to avoid presenting testimony that would be detrimental to her son. Factual discrepancies alone do not compel a finding that a witness is incompetent. *See Clark*, 558 S.W.2d at 890. Helen could communicate without using an intermediary and she was able to answer those questions that she wanted to answer. On this record, the trial court could conclude that the witness possessed sufficient intellect to relate transactions with respect to which she was interrogated. *See* TEX. R.

EVID. 601(a). The weight and credibility to be assigned to her testimony and the resolutions of the inconsistencies therein was properly a matter for the jury. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979). We overrule issue two.

Issue three contends the trial court erred in giving the jury an additional instruction. During the jury's deliberations, the jury sent out a note that inquired, as follows: "1) Was there evidence to support drug use? Was referenced in closing arguments. 2) Does "being under the influence" fall out of the scope of 'intentionally' and 'knowingly'?" In response, the trial court gave the jury an instruction on voluntary intoxication and involuntary intoxication. *See* TEX. PEN. CODE ANN. § 8.04 (Vernon 2003).

On appeal, appellant complains that the trial court gave a substantive additional instruction. If the trial court gives the jury a substantive additional instruction, the procedure set forth in Article 36.27 is mandatory. *Brooks v. State,* 967 S.W.2d 946, 949-50 (Tex. App.--Austin 1998, no pet.); *see* TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 2006). Article 36.27 provides, as follows:

> When the jury wishes to communicate with the court, it shall so notify the sheriff, who shall inform the court thereof. Any communication relative to the cause must be written, prepared by the foreman and shall be submitted to the court through the bailiff. The court shall answer any such communication in writing, and before giving such answer to the jury shall use reasonable diligence to secure the presence of the defendant and his counsel, and shall first submit the question and also submit his answer to the same to the defendant or his counsel or objections and exceptions, in the same manner as any other written instructions are submitted to such counsel, before the court gives such answer to the jury, but if he is unable

> to secure the presence of the defendant and his counsel, then he shall proceed to answer the same as he deems proper. The written instruction or answer to the communication shall be read in open court unless expressly waived by the defendant.
>
> All such proceedings in felony cases shall be a part of the record and recorded by the court reporter.

TEX. CODE CRIM. PROC. ANN. art. 36.27.

In his appellate brief, appellant neither cites Article 36.27 nor contends that the trial court failed to satisfy any of the requirements of Article 36.27. *Id.* The error in *Brooks* was engaging in verbal communications with the jury without reducing the communication to writing as required by Article 36.27. *Brooks,* 967 S.W.2d at 949-50. In this case, the communication from the jury was written and was signed by the foreman. The trial court answered the communication in writing. Before communicating with the jury, defense counsel and the prosecutor had an opportunity to make objections and exceptions. The reporter's record does not show that the additional instruction was read in open court, but appellant neither complains on appeal that the trial court failed to read the instruction to the jury in open court nor suggests that the failure to do so resulted in harm. Thus, the trial court's failure to read the written instruction in open court is not presented for appellate review. *See Smith v. State,* 513 S.W.2d 823, 828-29 (Tex. Crim. App. 1974).

The other case cited by appellant, *Daniell v. State,* is also inapposite. *See Daniell v. State,* 848 S.W.2d 145, 147 (Tex. Crim. App. 1993). In *Daniell,* the trial court erred by

providing an additional instruction on factual matters. *Id.* Here, the trial court instructed the jury on the law relating to voluntary intoxication and involuntary intoxication, not the facts. Appellant does not suggest the instruction stated the law incorrectly. *See, e.g.*, *Brooks*, 967 S.W.2d at 950 (incorrectly stating the law relating to requisite mental state resulted in egregious harm).

Appellant argues that giving an additional instruction harmed him because he did not have an opportunity to address the subject of intoxication in voir dire or jury argument. The detective testified that Helen had stated that she thought Hoyt was "acting crazy because he was on dope." Nothing prevented defense counsel from addressing that evidence in jury argument, just as the prosecutor argued without objection. Although defense counsel complained that the charge was being supplemented "without having the ability to address it to the jury," counsel did not request additional argument. We overrule issue three and affirm the judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on May 3, 2010
Opinion Delivered May 26, 2010
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.