DISSENT; and Opinion Filed August 30, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00519-CV

IN THE INTEREST OF S.V. AND S.V., CHILDREN

On Appeal from the 254th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-04-11968

DISSENTING OPINION[1]

Before Justices Bridges, Fillmore, and Boatright
Dissenting Opinion by Justice Boatright

The issue of whether missing exhibits are necessary to resolve an appeal is unusual: it does not involve trial court error or default by an appellant, and rather than looking back at complaints about the trial, it looks forward to whether we are able to resolve an appeal.

Keeping in mind the unusual nature of our inquiry, I dissent from my colleagues' excellent opinion. I do so for two reasons. First, I think the majority should have used a different standard of review. Second, I think we need the missing video in order to resolve the appeal.

1. The standard of review is de novo.

The trial court determined that the missing evidence was not necessary to resolve the appeal. The majority treats the trial court's determination as a question of fact to be reviewed

[1] So that my opinion will accompany the majority's Opinion on Rehearing in the reporters, I withdraw my opinion issued August 17, 2017; the following remains my dissenting opinion.

under an abuse of discretion standard. I disagree with this treatment because of the nature of the determination itself.

The distinction between a finding of fact and a conclusion of law is fundamental. Findings of fact are about “who did what, when, where, how, or why.” *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). They also include determinations of credibility and demeanor. *Id.* “Findings of fact are ultimate determinations of what specifically occurred, who did or did not do certain acts, what the values of services and property are worth, and the answer to any other specific inquiry necessary to establish conduct or the existence or nonexistence of a relevant matter.” *Pac. Employers Ins. Co. v. Brown*, 86 S.W.3d 353, 356–57 (Tex. App.—Texarkana 2002, no pet.). Thus, fact issues are matters that witnesses can testify to or exhibits can establish and matters that a jury or trial court can “find” based on the evidence.

A conclusion of law, on the other hand, does not determine the facts of the case; it sets forth a principle of law. *Banker v, Banker*, 517 S.W.3d 863, 873 (Tex. App.—Corpus Christi 2017, pet. denied). “[C]onclusions of law may be a statement of a principle of law or the application of the law to the ultimate facts in the case.” *Pac. Employers Ins. Co., Inc.* 86 S.W.3d at 357. A witness may not testify to a legal conclusion. *United Way of San Antonio, Inc. v. Helping Hands Lifeline Found., Inc.*, 949 S.W.2d 707, 713 (Tex. App.—San Antonio 1997).

This fundamental distinction between the nature of findings of fact and conclusions of law explains the opposing standards of review we apply when reviewing the two categories of trial court ruling. The trial court is able to see and hear witnesses who are testifying to fact issues, so we review findings of fact under an abuse of discretion standard if they involve an evaluation of witness credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). That standard requires us to show almost total deference to a trial court’s findings of fact and to view the evidence in the light most favorable to the trial court’s ruling. *Id.*

However, we review a trial court's conclusions of law de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When the ruling at issue does not involve matters of credibility or demeanor of witnesses, a trial court is not in an appreciably better position than the reviewing court to determine the matter. *Rosa v. Caldwell*, 159 S.W.3d 695, 698 (Tex. App.—Amarillo 2004, pet. denied). Accordingly, we are not obligated to give any particular deference to the trial court's legal conclusions. *Nicol v. Gonzales*, 127 S.W.3d 390, 394 (Tex. App.—Dallas 2004, no pet.). We "have the power and the duty to evaluate independently the legal determinations of the trial court." *Id.*

The question before us is whether two missing exhibits are necessary to resolution of Father's appeal. This question has nothing to do with an evaluation of witness credibility and demeanor. It is not a question of historical fact; it does not ask who did what, when, where, how, or why. It is not a matter on which a witness could testify or a question we would ask a jury. Instead, the question explores the evidence we need in order to satisfy our legal obligation after the trial is over and final judgment has been entered. Because we are in an appreciably better position to answer a question about our own legal obligation on appeal than a trial court is, deference to the trial court does not seem reasonable.

The majority, however, says it would review this threshold issue for an abuse of discretion, and it cites cases calling for giving the trial court's ruling almost total deference. In making that determination, the majority appears to rely on the use of the word "findings" in our rule 34.6(f) order, in the trial court's response to that order, and in several appellate courts' opinions. I think we must use caution in attributing legal substance to words regularly used informally—as shorthand, really—by both trial and appellate courts. Not only orders, but formal opinions can contain attributions of "findings" by appellate courts, or references to matters the appellate court "finds," although we know an appellate court cannot find facts. *See, e.g., Qantel*

Bus. Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302, 303–04 (Tex. 1988) ("If the appellate court finds that there is any evidence of probative value which raises a material fact issue, then the judgment must be reversed and the case remanded for the jury's determination of that issue."). Courts may speak of what another court "found," even when referring directly to a conclusion of law. *See, e.g., Jacobini v. Zimmerman*, 487 S.W.2d 249, 250–51 (Tex. Civ. App.—Fort Worth 1972, no writ) ("By conclusion of law it was found that contractor had implied obligation to construct in good and workmanlike manner, and that the proper measure of damages was upon a difference in value and depreciation basis."). And courts may combine a trial court's findings of fact and conclusions of law, referring to them collectively as "findings" and describing what the trial court "found" as a result. *See, e.g., Slicker*, 464 S.W.3d at 863 ("As noted, the trial court made six findings of fact and one conclusion of law relating to its maintenance award, finding that Wife had exercised diligence but lacked sufficient property and the ability to earn sufficient income to provide for her minimum reasonable needs."). Given the frequent use of "finding" language in this informal fashion, I hesitate to ascribe careful analysis to its use.

But even if a trial court does purposefully characterize certain of its determinations as findings of fact, we are not bound by its characterizations. *Ray v. Farmers' State Bank of Hart*, 576 S.W.2d 607, 608 n.1 (Tex. 1979). Despite the trial court's identification of a ruling as a conclusion of law, we may treat it as a finding of fact. *Slicker v. Slicker*, 464 S.W.3d 850, 860–61 (Tex. App.—Dallas 2015, no pet.). Likewise, if a trial court mistakenly calls a legal conclusion a finding of fact, we will treat it as a conclusion of law. *Seasha Pools, Inc. v. Hardister*, 391 S.W.3d 635, 640 (Tex. App.—Austin 2012, no pet.) ("[W]e may treat the court's ruling as a factual finding or legal conclusion regardless of the label used.").

It is not sufficient, then, simply to accept the trial court's characterization of a ruling. We must analyze the nature of the ruling to be certain we are applying the correct standard of review. In this case, the trial court determined the missing exhibits were not necessary to the appeal's resolution. That ruling does not set forth facts from testimony or exhibits, and it does not express the trial court's determination of a witness's credibility. It does not speak to the existence or non-existence of any relevant fact. Instead, it represents the trial court's conclusion concerning the legal status of the missing exhibits on appeal. By its nature, it is properly characterized as a conclusion of law. And given its nature, we are significantly better situated to draw that conclusion.

I do not think the majority's authorities require a different conclusion on our part. The majority relies first on three criminal cases for application of an abuse-of-discretion standard. In *Johnson v. State*, the Corpus Christi court reproduced the trial court's list of findings and conclusions, and among the conclusions of law was: "The missing record is necessary to resolve the appeal." *Johnson*, No. 13-16-00023-CR, 2017 WL 1281391, at *2–3 (Tex. App.—Corpus Christi Apr. 6, 2017, no pet.) (mem. op.). The appellate court reviewed "the trial court's findings for abuse of discretion and its conclusions of law de novo," and then agreed with the trial court's evaluation. *Id.* at *4. Although the *Johnson* court states at the end of its opinion that the trial court did not abuse its discretion in concluding appellant was harmed by the missing record, the court does not explain its use of this single standard when it had acknowledged that it reviewed the trial court's legal conclusions and that those legal conclusions are reviewed de novo. *Id.* I do not agree that *Johnson* supports the application of an abuse-of-discretion standard.

The majority's second authority is another criminal case. In *Lucas v. State*, No. 05-01-00078-CR, 2003 WL 21771333 at *4 (Tex. App.—Dallas Aug. 1, 2003, pet. ref'd) (not designated for publication), we applied an abuse of discretion standard to analyses of rule

34.6(f)(1) and (2), which involve questions of historical fact. But *Lucas* did not review a rule 34.6(f)(3) determination. And although the court in the majority's third criminal authority, *Beal v. State*, did review a rule 34.6(f)(3) determination, it did not treat the issue of whether missing evidence was necessary to resolve an appeal as a fact question reviewed for abuse of discretion. *Beal*, No. 01-12-00896-CR, 2016 WL 1267805, at *3 (Tex. App.—Houston [1st Dist.] Mar. 31, 2016, no pet.) (mem. op., not designated for publication). Neither case stands for the proposition that a rule 34.6(f)(3) determination is a finding of fact that must be reviewed for an abuse of discretion.

The majority also relies on two civil cases for its preferred standard of review. The court in *The Estate of Neal v. River Inn Association of Unit Owners* relates that it ordered the trial court to make "the necessary findings" concerning the lost record of a hearing,that "the trial court's findings of fact" were filed, and the court made "findings" concerning all four rule 34.6(f) circumstances. *Estate of Neal*, No. 14-10-00307-CV, 2011 WL 238340, at *1–2 (Tex. App.—Houston [14th Dist.] Jan. 25, 2011, no pet.). But immediately after listing those "findings," the court states: "Based on the trial court's findings, we *conclude* that appellants are entitled to a new trial pursuant to Texas Rule of Appellate Procedure 34.6(f)." *Id.* at *2 (emphasis added). In addition, although the opinion repeatedly refers to the rule's circumstances as "findings," it nowhere speaks to application of an abuse-of-discretion standard of review. The second civil case cited by the majority, *In re N.T.H.*, does refer once to that court's order remanding the case "for findings under rule 34.6(f)." *N.T.H.*, No. 2-02-283-CV, 2003 WL 21284138, at *1 (Tex. App.—Fort Worth June 5, 2003, no pet.). However, the opinion goes on to identify the rule's requirements correctly as "circumstances," and makes no reference to findings of fact or to an abuse-of-discretion standard. Instead the appellate court relates that it

has determined the requirements of the rule have been satisfied, arguably de novo, and holds that the appellant was entitled to a new trial. *Id.*

Finally, in response to the dissent, the majority cites a criminal case that addresses whether a missing transcript is necessary to a defendant's right to bring appellate claims for ineffective assistance of counsel. *Nava v. State*, 415 S.W.3d 289 (Tex. Crim. App. 2013). I do not quibble with the majority or the Court of Criminal Appeals when they refer to the trial judge's recollections from trial as findings; indeed, the *Nava* trial judge testified to those recollections. *See id.* at 303–04. But from those factual recollections, the trial judge drew the legal conclusion that the missing record was not necessary to the appeal's resolution. *See Pac. Employers Ins. Co., Inc.* 86 S.W.3d at 357 (application of the law to the ultimate facts in a case is a conclusion of law). Then the court of appeals, and subsequently the Court of Criminal Appeals, engaged in detailed legal analysis to determine whether that legal conclusion was accurate. *Nava v. State*, 379 S.W.3d 396, 410–14 (Tex. App.—Houston [14th Dist.] 2012); *Nava*, 415 S.W.3d at 302–08. Neither court conducted its analysis with reference to an abuse-of-discretion standard. Therefore, neither opinion requires that we do so.

We are free to treat a rule 34.6(f)(3) determination as a question of law reviewed de novo in this case, and that is exactly what we should do. The issue of whether missing evidence is necessary to resolve an appeal is about what we need to have in order to be able to resolve an appeal. A trial court is ideally positioned to determine many crucial things, but not this Court's obligations on appeal. Rule 34.6(f)(3) asks a question of law that we must answer.

2. We need the missing video in order to be able to resolve the appeal.

Father contends that his issues involving sufficiency of the evidence and best interests of his children cannot be properly reviewed on appeal without a complete record. "In complaints about factual sufficiency of the evidence, the appellant's burden cannot be discharged in the

absence of a complete or an agreed reporter's record." *Gavrel v. Rodriguez*, 225 S.W.3d 758, 763 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968)). "Without a complete record, it is impossible to review all the evidence presented to the jury or to apply the appropriate evidentiary sufficiency standard of review." *Id*. When the court of appeals reviews a factual sufficiency issue, it must weigh *all* of the evidence in the record. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). The review, therefore, must include evidence that is favorable to the verdict as well as evidence that is not. *Gavrel*, 225 S.W.3d at 763. Accordingly, even if we could presume the missing exhibits would have supported the conclusion at issue, we must still review them. *Id.* "Such a review is fundamentally necessary to the resolution of the appeal." *Id.* The determination of a child's best interest depends on a review of the entire record. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). Accordingly, for a determination of Father's issues that touch on the best interest of his children, our review must include all the evidence in the record, both favorable to him and unfavorable to him.

In our case, unfortunately, there is almost no evidence about what the missing video shows. We have testimony that a missing photograph showed lyrics of a song, the children performed that song, the song contained the words "We love you," and the children smiled and laughed while they sang. But that is not evidence about the video. The only evidence we have about the video is that it showed a song on a whiteboard and that the children sometimes made videos of singing.

That's it. The majority thinks this evidence "sufficiently informs us as to the content of the video," but I think that the cases the majority cites strongly suggest that it does not.

In *Cox*, an interrogatory that had been read into the record was missing on appeal, but the language from the interrogatory was still in the record. *Cox v. Six Flags Over Texas, Inc.*, No.

05-97-00545-CV, 2000 WL 276894, at *3 (Tex. App.—Dallas Mar. 15, 2000, no pet.) (not designated for publication). We held that the missing document was not necessary to resolve the appeal, because it merely duplicated evidence that was in the record. *Id*. Here, we have testimony that the children sang a song that contained the words "we love you," but there is no testimony about other words in the song, dialogue, facial expression, or any feature of the video that would describe it in sufficient detail to constitute the duplication we observed in *Cox*.

In *Gutierrez*, the Corpus Christi court held that missing charts that were drawn to illustrate testimony were not necessary to resolve the appeal, because all the testimony was still in the record. *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596, 617 (Tex. App.—Corpus Christi 1993, writ denied). But no one contends that the missing video illustrates testimony in our case. Instead, the majority tries to illustrate the missing video with a fragment of testimony.

In a third case, the Texarkana court held that a missing report containing a list of numbers was not necessary to resolve the appeal because a witness "testified in detail about the exact figures contained in the original report," and the report was cumulative of testimony that was in the record. *See, e.g.*, *Galvan v. State*, 988 S.W.2d 291, 298 (Tex. App.—Texarkana 1999, pet. ref'd). But there is no exact, detailed trial testimony about the content of the missing video in our case.

After citing *Cox* and *Gutierrez*, the majority writes, "Therefore, Father has failed to establish he was harmed by their loss," relying on the Court of Criminal Appeals' opinion in *Issac* and an Amarillo opinion, *Dunn*, that cited *Issac*. But there are two problems with the majority's conclusion. First, the majority does not try to show what, if anything, *Cox* and *Gutierrez* have to do with a harm analysis, or how they might support a conclusion that the loss of the video was harmless. Second, *Issac* did not perform a harm analysis. *Issac v. State*, 989

S.W.2d 754, 757 (Tex. Crim. App. 1999). *See also Dunn v. Bank-Tec South*, 134 S.W.3d 315, 330 (Tex. App.—Amarillo 2003, no pet.) (relying solely on *Issac*).

In *Issac*, the Court of Criminal Appeals considered whether rule 34.6 or an older rule applied to the case. *Issac*, 989 S.W.2d at 757. The old rule did not have a provision like 34.6(f)(3); it required a new trial even if missing evidence was not necessary for the appeal. *Id.* The appellant argued that the old rule applied and a new trial was automatic. *Issac v. State*, 982 S.W.2d 96, 97 (Tex. App.—Houston [1st Dist.] May 7, 1998, pet. granted), *aff'd*, *Issac*, 989 S.W.2d at 754. The State argued that the new rule, 34.6(f)(3), applied and that it imposed a harm analysis under rule of appellate procedure 44.2, which describes reversible error in criminal cases. *Id.* The Court of Criminal Appeals responded that rule 34.6(f)(3) applied, and that the new rule was

> itself a harm analysis. If the missing portion of the record is not necessary to the appeal's resolution, then the loss of that portion of the record is harmless under the rule, and a new trial is not required. In enacting that provision of the rule, we necessarily rejected the contention that a missing record could never be found unnecessary to an appeal's resolution.

Issac, 989 S.W.2d at 757. The Court was saying that, if missing evidence is necessary to resolve the appeal, there is harm, and a new trial is required; it did not say that missing evidence is necessary to resolve the appeal only if there is a finding of harm. *Id. Accord Nava*, 415 S.W.3d at 306; *Routier v. State*, 112 S.W.3d 554 (Tex. Crim. App. 2003); *Haynes v. Haynes*, No. 04-15-00107-CV, 2017 WL 2350970, at *3 (Tex. App.—San Antonio May 31, 2017, no pet. h.) (mem. op.). Nor does *Issac* require a separate harm analysis and a finding of fact reviewed under an abuse of discretion standard. We know that for two reasons.

First, a harm analysis under rule 44.2—which, again, applies to criminal cases—involves questions of the trial court's error at trial and whether the trial court's error at trial affected a party's substantial rights. TEX. R. APP. P. 44.1, 44.2, 44.4. A rule 34.6(f)(3) analysis could not

be more different. It is not predicated on an error by the trial court, or even by the appellant. The question is not whether an improper judgment was rendered or whether the trial court prevented an appellant's presentation of his appeal. Instead, our analysis looks forward, considering the record that remains before us, to determine whether we can satisfy our legal obligation on appeal. If we cannot, the rule directs us to grant the motion for new trial. *Issac* speaks to this forward-looking understanding: if the record we have cannot provide what we need for our review, an appellant is harmed, and a new trial is in order.

The second reason we know that *Issac* did not require a separate harm analysis and a finding of fact reviewed under an abuse of discretion standard is that it did not perform a separate harm analysis, and it did not treat a rule 34.6(f)(3) determination as a finding of fact reviewed for abuse of discretion. *Issac*, 989 S.W.2d at 757. *Accord Nava*, 415 S.W.3d at 306; *Routier*, 112 S.W.3d at 554; *Haynes*, 2017 WL 2350970, at *3.

In this way, *Issac* confirms that rule 34.6(f)(3) requires us to determine whether missing evidence is necessary to resolve an appeal. Reviewing that question of law de novo, I would conclude that the missing video was not like the duplicative, cumulative, or illustrative evidence that rendered the missing evidence in *Cox, Gutierrez*, or *Galvan* unnecessary. The majority contends that my application of this standard reads rule 34.6(f)(3) too narrowly, but the guidelines I apply are drawn directly from the majority's own cases. All of them support the conclusion that we need the missing exhibits to have a complete record so that we may undertake sufficiency and best-interest reviews as the law requires. Which is to say that relevant legal authority supports the conclusion that we need Father's missing exhibits for the resolution of this appeal.

Therefore, I would grant his motion for new trial.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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