Opinion issued October 28, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00334-CV

NKEOMA BRENDA EZENAGU, Appellant

V.

OLUSHEGUN OLAGUNDOYE AND KINGHAVEN COUNSELING GROUP, Appellees

---

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2016-33668

MEMORANDUM OPINION

This is an appeal from a take-nothing judgment following a jury trial in an personal injury suit. In three issues on appeal, appellant, Nkeoma Brenda Ezenagu ("Brenda"), argues that (1) the jury's verdict is against the great weight and

preponderance of the evidence; (2) the trial court erred in excluding evidence; and (3) the trial court erred in refusing a requested jury question.

We affirm.

Background

Brenda began working for appellee, Kinghaven Counseling Group, in August 2015, as a billing agent, responsible for calling insurance companies to handle patients' bills. Shortly thereafter, Brenda alleged that Kinghaven's CEO, appellee Olushegun Olagundoye, began to sexually assault her until she left Kinghaven in February 2016. In her live pleading, her third amended petition, Brenda asserted causes of action against Olagundoye and Kinghaven for assault and battery, intentional infliction of emotional distress, failure to pay earned wages, sexual harassment and hostile work environment, and retaliation. Olagundoye and Kinghaven answered and filed general denials. The parties proceeded to trial on January 8, 2020.

A. Trial Testimony

Brenda

Brenda testified that she first came to the United States from Nigeria in 2013 and started working at Kinghaven in August 2015. Brenda testified that during her first week at Kinghaven, Olagundoye sent her a text message to come to his office. Brenda recalled that Olagundoye asked if she had a boyfriend or if she was married

and Brenda replied that she was going through a divorce. Brenda testified that Olagundoye stated that he would take care of her if she did her own part of the bargain. When Brenda asked "what is the bargain," Olagundoye replied, "[y]ou have to take care of me while I take care of your job and take care of you." Brenda responded, "No sir, that's not why I'm here" and "All I'm here to do is just to get a job." Brenda testified, "I remember [Olagundoye] raping me in that office that day and wanting me not to mention it to anybody. That if I mentioned it to anybody, that first of all, he was going to report me to immigration, bond me back to Nigeria in shackles, and take the job away from me."

The first weekend after starting her job, Brenda stated that she could not sleep, was not herself, and could not function. She testified that she did not tell her parents because of their own problems and that getting married was the pride of her parents and she was already getting a divorce. Because she was not comfortable talking about it and she did not want her parents to find out, she also did not tell her sisters.

Brenda testified that she worked from 8:00 a.m. to 5:00 p.m., and if he was in the office, Olagundoye would summon her two to three times a week. She recalled that during the day, he would ask her to come to his office during lunch, where Olagundoye would sexually harass and assault her. Brenda stated that Olagundoye would touch her in inappropriate places such as her butt and breasts and that she would tell him to stop.

In another assault, Brenda described walking into his office and telling him that she was on her menstrual period. He said there were ways around that and he "talked about going through my anus." He then overpowered her and she fell on the ground while Olagundoye started to remove her pants. She recalled that she was wearing a black dress, and she told him to "just do what you know how to do. Take advantage of me just like you know how to take advantage of me." She testified that he raped her "though my anus, though the back." When she said "take advantage of me," Brenda explained that he always overpowered her, she was already damaged, and she had just given up. Brenda also testified that his doors were always closed, and he would either ask her to shut the door behind her or he would shut the door after she entered. Although she could scream or yell, she never felt that anyone else was around.

Brenda recalled another time when he called her to his office on a Sunday after church and subjected her to sexual assault and rape. Although she could not remember how many times this occurred, she recalled being hurt multiple times.

Brenda discussed the last assault that occurred in February 2016 in which she sustained a back injury. She described going to his office, Olagundoye closing the door, and her running around the office. Although she asked him for mercy, he pushed her to the floor and she heard a crack. He then jumped on top of her while she was numb and could not move her body.

Brenda testified that she told Olagundoye that she did not want to continue to be raped or sexually assaulted on the floor of his office. Olagundoye would respond in different ways such as, "You're an adult" or "Just stop fighting with me and I will not, you know, be forceful with you. Just don't fight with me." Brenda said she never welcomed the harassment or did anything to provoke Olagundoye to touch her.

Brenda testified that she told Olagundoye that she was resigning because of the rape and sexual assault. She considered what she experienced as "abuse, sexual slavery, and torture" and that the sexual abuse had become so abusive that it was unbearable. She testified that she had to leave Kinghaven because Olagundoye's last sexual assault caused a back and ankle injury after he flung her to the floor.

Brenda testified that she left Kinghaven in February 2016. Brenda told the HR manager, Abumere, everything that she had been experiencing and Abumere indicated that she was experiencing something similar, although not as bad.

When asked why she did not leave prior to February 2016, Brenda responded that she was afraid that Olagundoye would deport her, she did not know how deportation worked, and she was a "novice." Brenda acknowledged that a video of her had been uploaded to YouTube of her dancing and singing, but at the time, she had not yet broken her back. She also agreed that she provided Olagundoye with a

picture of a friend who would not mind dating a married man. Brenda denied that she brought the lawsuit for a green card or to extort money from Olagundoye.

On cross-examination, Olagundoye's counsel noted that a chiropractor's initial exam mentioned that Brenda had neck pain, shoulder pain, upper arm pain, forearm pain, wrist pain, lower back pain, pelvic pain, knee pain, swelling, and lower leg pain. Brenda agreed that it was accurate and that she was in severe pain. Brenda was then asked about her YouTube video and how she was dancing quite a bit and Brenda agreed. When asked how she was able to sing and dance while she was experiencing level 10 pain in almost every part of her body, Brenda refused to answer. When asked if she was singing and dancing despite all the pain, Brenda said, "No, because you're not allowing me to explain." Brenda was then asked if she attempted to introduce a friend to Olagundoye. Brenda responded that she had sent him a picture of her friend because the friend would date a married man, but she had difficulty answering why she would introduce a friend to someone who raped women.

When asked if she saved the black dress she was wearing during one of the alleged rapes, Brenda answered that she saved the dress and that it was at her place. When asked "wouldn't that have helped had you produced that dress," Brenda responded, "That dress is my story." When asked if it was odd that Olagundoye would talk to Brenda's supervisor and ask that she send Brenda to his office to

sexually harass her, Brenda responded, "First of all, my supervisor never knew anything about what I was going through at that time. Second of all, he never asked me to come to the office during my lunch break or during the work hours to rape me in his office. My testimony, like I have always said, even during the deposition, that [Olagundoye] would invite me to his office after work hours. That was when the horrendous rapes and assaults happened."

Abumere Imoukhuede

Abumere, the HR manager, testified by deposition that she did not know why Brenda left Kinghaven and that Brenda did not lodge a complaint with her. She confirmed that Brenda told her that she was being sexually assaulted by Olagundoye, but Brenda did not say that she was being harassed or raped. She agreed that what Brenda told her meant sexual intercourse. When asked what Brenda said, she replied, "She told me that she—I guess she had—I wouldn't say sexual relation. I would say it was more geared towards, . . . assault, but I know there was some sort of sexual situation going on." When asked if it was more geared toward assault than rape, Abumere replied, "No. It was more geared towards harassment than assault." In another exchange, Abumere was asked if Olagundoye sexually harassed her. Abumere responded that she did not want to talk about it and further clarified that "No, I'm not saying—I just don't want to talk about that."

Abumere stated that as far as she knew, Brenda did not report any sexual harassment to any of the supervisors or managers. Abumere thought that if someone screamed from inside Olagundoye's office, a receptionist would most likely have heard. She also testified that if someone made noises from inside Olagundoye's office, someone from the psychiatry department would probably have heard.

Anthony Obgo

Anthony Obgo, a publisher of a community newspaper, testified that Olagundoye had a reputation in the community as someone who did not tell the truth. Obgo testified that Brenda did not go to the police because she thought she would be deported if she revealed the abuse to anyone. He further testified that Brenda stayed at Kinghaven because she needed a job and she was vulnerable to Olagundoye's threat of calling immigration.

On cross-examination, Ogbo testified that although Brenda experienced a horrible ordeal, he did not recommend or take her to the hospital, but instead recommended that she get a lawyer.

Dr. Michael Ditsky

Dr. Ditsky, a licensed psychologist, testified that after examining Brenda, he diagnosed her with post-traumatic stress disorder and a major depressive disorder. He further testified that "she was making efforts to avoid external reminders; namely, people, places, conversations associated with the events of her alleged

rape." Dr. Ditsky testified that he believed Brenda's discussions with him were reliable and accurate. Dr. Ditsky testified that Brenda reported "multiple rapes, even during her menses, repeatedly over about a six-month period of time" that were perpetrated by Olagundoye. Dr. Ditsky explained that Brenda kept going to work in spite of the rapes because "it was her only means of sustenance or survival at the time." Dr. Ditsky testified that Brenda told him that the rapes occurred "[a]fter work, when she would be called into his office."

On cross-examination, Dr. Ditsky admitted that he was not provided any records of Brenda's medical history and that he met with Brenda for two hours and fifteen minutes over a two-year period. Dr. Ditsky also admitted that patients may try to fake their symptoms to get money or a green card. Dr. Ditsky testified that the Brenda he saw in a YouTube video showing her singing and dancing was not the same person he met in his office. Dr. Ditsky also testified that if she were not telling him the truth, that would mean that she was falsely accusing Olagundoye of rape. Dr. Ditsky recalled that Brenda told him that she injured her back after Olagundoye had pushed her to the floor, but he did not recall Brenda saying that she had other injuries, such as an ankle, leg, foot, hip, or knee injury.

Olushegun Olagundoye

Brenda called Olagundoye as an adverse witness. Olagundoye testified that he was 64, married, and from Nigeria. He was the CEO of Kinghaven, a counseling

group that treats patients who have been raped or sexually assaulted or patients who have other mental health issues. Olagundoye testified that he met Brenda, but he denied that he ever invited Brenda to his office.

Brenda's counsel had Olagundoye read a text message he sent to Brenda, stating, "Come to my office now, please." When Olagundoye could not explain the discrepancy between his text message and his in-court testimony, Olagundoye responded, "Like your story, you're making everything up." Olagundoye read another text message where he asked Brenda to come see him at 6:10 p.m. Brenda replied, "When, sir?" and Olagundoye replied, "Now, if you are free."

Olagundoye testified that Kinghaven had never received a report of sexual harassment, and if someone were found to have committed sexual harassment, human resources would intervene, which could result in termination. Brenda's counsel asked who would terminate him if he were the harasser, to which Olagundoye responded, "Harasser can never be Olushegun Olagundoye." Olagundoye agreed that Brenda never led him to believe that she wanted an intimate relationship.

On direct-examination, Olagundoye clarified his statement that he could never be the harasser, stating, "I've never harassed anybody and—and, you know, that question shouldn't have come up." Olagundoye testified that he was not denying that he had a relationship with Brenda's sister, Ijeoma Ezenagu, or that he wanted to

buy her things. He admitted that he supported Ijeoma financially and that he did not give her a job because Brenda was already working at Kinghaven.

Olagundoye testified that he had never been accused of sexual harassment before, Brenda was never invited to his office after business hours, he did not sexually assault her, he did not chase her around his office and physically restrain her, he did not cause her injuries, and he did not sexually assault her two to three times a week while she worked there. When asked about his physical health, Olagundoye testified that his multiple medical conditions affected his sexual performance. He further testified that he did not know why Brenda made the allegations but that people in the community were trying to extort money from him.

Maria Orduna

Orduna, who previously worked at Kinghaven from September 2015 to May 2016 as Olagundoye's assistant, testified that she worked outside Olagundoye's office and that the door to his office was always open. While she worked at Kinghaven, she recalled one time that Brenda went to Olagundoye's office where Brenda stayed for less than 5 minutes. She never saw blood in Olagundoye's office or that furniture had been moved to indicate that a fight had occurred. She was not aware of him harassing any female workers or inappropriately touching any workers at Kinghaven. She never heard anyone complain about Olagundoye harassing or

inappropriately touching anyone, and she never heard Brenda complain about those things.

On cross-examination, Orduna admitted that she was not looking for moved furniture or whether anything was on the floor. She testified that Brenda did not work on weekends or after hours because billing always closed at 5:00 p.m. Orduna testified that when she left, everyone in the building was already gone.[1]

Sharon Reed

Reed, Kinghaven's corporate representative, testified that she had not received any complaints of Olagundoye harassing, assaulting, or raping any employee. She had known him for nine years and she had never known him to conduct himself in that manner. Reed stated that on all of the nights in which she had worked late, she never saw or heard Brenda.

Antonina Samuel

Samuel, Brenda's supervisor at Kinghaven, testified by video that some of Brenda's tasks were not being completed in a timely manner and that she had a few

[1] Brenda contradicted some of Orduna's testimony. She testified that Orduna was not working at Kinghaven at the time of the assaults and that Brenda had been at Kinghaven for two to three months before Orduna started working at Kinghaven. Brenda also testified that before Orduna started working for Olagundoye, Olagundoye had no secretary. Brenda explained that Orduna only saw Brenda visit Olagundoye's office a couple of times because Brenda would visit during her breaks and that was the same time that Orduna went on her breaks.

outbursts in regard to the work that was required. Samuel testified that when Brenda was told to do something, if she felt it was too much she would just say, "Hey, it's too much. I'm not doing it. That's too much work." Samuel recalled that Brenda was not clocking in, not returning from lunch on time, and did not call or arrive to work on a couple of days. Samuel also testified that if noises were coming from Olagundoye's office, the psychiatry department would have heard.

B. The jury's verdict and the trial court's judgment

After the close of the evidence, the trial court submitted a jury charge with nine questions. As relevant here, question one asked, "Did Olagundoye commit an assault against [Brenda]?" Question two asked, "On the occasion in question, was Olagundoye acting within the scope of his employment with Kinghaven?" Question five asked, "Did Kinghaven constructively discharge [Brenda] from employment?"

On January 17, 2020, the jury answered "no" to questions one, two, and five. Brenda filed a motion for new trial and a supplemental motion for new trial. On March 18, 2020, the trial court signed a final judgment, stating that based on the jury's verdict, Brenda would take nothing from Olagundoye and Kinghaven. The trial court overruled the motion for new trial, and Brenda timely appealed.

Great Weight and Preponderance of the Evidence

In her first issue, Brenda argues that the jury's failure to find in her favor was against the great weight and preponderance of the evidence. Specifically, Brenda

argues that "Olagundoye inflicted severe physical and mental damages on Brenda through his repetitive sexual assaults.

A. Standard of Review

"When a party attacks the factual sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Benavente v. Granger*, 312 S.W.3d 745, 748 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001)). In reviewing a challenge that a finding is against the great weight and preponderance of the evidence, we consider and weigh all of the evidence and may set aside the verdict only if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.*; *see Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). A jury may believe one witness and disbelieve another, and it may resolve inconsistencies in any witness's testimony. *Eberle v. Adams*, 73 S.W.3d 322, 327 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

"The general rule is that a finding of the jury is entitled to great deference by the appellate court unless the record reflects that the jury is motivated by passion, prejudice or something other than conscientious conviction." *Lehmann v. Wieghat*, 917 S.W.2d 379, 385 (Tex. App.—Houston [14th Dist.] 1996, writ denied). A jury finding cannot be set aside on appeal merely because this Court would have weighed

the evidence differently or reached another conclusion, but only if it is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. *See Cropper v. Caterpillar Tractor Co*., 754 S.W.2d 646, 651 (Tex. 1988).

B. Analysis

To raise factual sufficiency arguments on appeal, Brenda had to assert her complaints in her motion for new trial. *See* TEX. R. CIV. P. 324; *Cecil v. Smith*, 804 S.W.2d 509, 510–11 (Tex. 1991). To preserve error, the motion for new trial must state the factual sufficiency complaint with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. *See, e.g.*, *Halim v. Ramchandani*, 203 S.W.3d 482, 487 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (motion for new trial did not preserve factual sufficiency complaint because arguments asserted on appeal were not asserted in new trial motion); *see also* TEX. R. APP. P. 33.1(a); TEX. R. CIV. P. 321, 322; *D/FW Commercial Roofing Co. v. Mehra*, 854 S.W.2d 182, 189 (Tex. App.—Dallas 1993, no writ) (finding that general factual-insufficiency point in motion for new trial did not inform trial court of complaint regarding double recovery raised on appeal).

Here, Brenda filed a motion for new trial and a supplemental motion for new trial. Both motions include a heading, "Legally Appropriate Reasons for New Trial," and under that heading, it states, "Factual sufficiency of the evidence." The motion for new trial further states, "[T]here is a question of the factual sufficiency

of the evidence presented to the jury as detailed in paragraphs 6-9." Paragraphs 6–9, however, merely complain of the trial court's improper exclusion of evidence, denial of a retaliation instruction, and the trial court's request to read a jury instruction off the record.

Likewise, the supplemental motion for new trial refers to factual sufficiency of the evidence as detailed in paragraphs 11–16 and 18–20. As before, paragraphs 11–16 and 18–20 do not argue that any of the jury's answers were factually insufficient. Instead, those paragraphs raised issues concerning the trial court's improper exclusion of evidence. Because Brenda's motion for new trial and supplemental motion did not raise a specific complaint about the factual sufficiency of any jury finding, the issue was not preserved.[2] *See Halim*, 203 S.W.3d at 487; TEX. R. APP. P. 33.1; TEX. R. CIV. P. 321, 322, 324.

Even if the issue was properly preserved, we cannot conclude that the jury's finding that no assault occurred is against the great weight and preponderance of the evidence. The jury heard six days of testimony from 13 witnesses. The only witnesses to the alleged assaults were Olagundoye and Brenda. The jury heard

[2] On appeal, Brenda likewise makes no specific complaint about which jury finding she is challenging as against the great weight and preponderance of the evidence. *See* TEX. R. APP. P. 33.1. The jury answered three questions, but Brenda does not specify, either in her motion for new trial or on appeal, which findings she challenges as factually insufficient.

Brenda's version of the facts, that she was sexually assaulted multiple times by Olagundoye. The jury also heard Olagundoye's version that Brenda was attempting to extort him by making false accusations of sexual assault. Both parties were vigorously cross-examined and both parties presented circumstantial evidence to support their version of the facts. At the end of trial, the jury had to decide which party's version of the facts to believe. As the judge of the credibility of the witnesses, the jury was entitled to choose which party it believed was testifying truthfully; accordingly, the evidence was sufficient to support its finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (citing *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986)). As a result, the jury's finding that Olagundoye did not assault Brenda was not against the great weight and preponderance of the evidence.

We overrule Brenda's first issue.

Admission of Evidence

In her second issue, Brenda argues that the trial court erroneously excluded evidence on three separate occasions.

A. Standard of Review

We review a trial court's ruling on the admission or exclusion of evidence under an abuse of discretion standard. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000); *Owens–Corning Fiberglass Corp. v. Malone*, 972

S.W.2d 35, 43 (Tex. 1998). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). To obtain reversal of a judgment based upon error of the trial court in the exclusion of evidence, the challenging party must show that (1) the trial court did in fact commit error and (2) the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Gee v. Liberty Mut. Fire Ins. Co*., 765 S.W.2d 394, 396 (Tex. 1989).

To preserve error concerning the exclusion of evidence, the complaining party must demonstrate the substance of the excluded evidence through an offer of proof or a bill of exception, unless the substance of the evidence is apparent from the context. TEX. R. EVID. 103(a)(2) (providing that if court's ruling excludes evidence, then to preserve error, party must inform court of its substance by offer of proof, unless substance was apparent from context); *Compton v. Pfannenstiel*, 428 S.W.3d 881, 885 (Tex. App.—Houston [1st Dist.] 2014, no pet.). "While the reviewing court may sometimes be able to discern from the record the general nature of the evidence and the propriety of the trial court's ruling, it cannot, without an offer of proof, determine whether exclusion of the evidence was harmful." *Compton*, 428 S.W.3d at 886 (quoting *Akukoro v. Akukoro*, No. 01–12–01072–CV, 2013 WL 6729661, at

*6–7 (Tex. App.—Houston [1st Dist.] Dec. 19, 2013, no pet.) (mem. op.)). Thus, failure to demonstrate the substance of the excluded evidence through an offer of proof or bill of exception results in waiver of any error in its exclusion. *In re J.R.P.*, 526 S.W.3d 770, 780 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 335 (Tex. App.—Dallas 2008, no pet.).

B. Analysis

1. Testimony of Ijeoma Ezenagu

In her first evidentiary complaint, Brenda asserts that the trial court improperly excluded the testimony of her sister, Ijeoma, because Brenda did not disclose Ijeoma's address in discovery. Olagundoye responds that the trial court did not err in excluding the testimony and that Brenda failed to preserve the issue.

During a pretrial hearing on June 4, 2019, the trial court considered Olagundoye's motion to exclude Ijeoma's testimony because Brenda did not disclose her current address.[3] Brenda's counsel informed the trial court that they had been in contact with Ijeoma and that they planned to call her as a witness at trial. Olagundoye's counsel stated that they could not reach Ijeoma and that Brenda did not disclose a current address. After Brenda's counsel explained that she did not know Ijeoma's address and could not produce something that she did not have, the

[3] *See* TEX. R. CIV. P. 193.6 (requiring conditional exclusion of undisclosed "witness (other than a named party) who was not timely identified").

trial court stated, "And the other half of the corollary to that is if you don't have it, you're not required to produce it, then you don't get to call the witness. So the witness is excluded. You can make a bill. You can bring her and make a bill and preserve her testimony, if you wish, outside the presence of the jury."

At trial, Brenda never called Ijeoma as a witness or made an offer of proof. *See* TEX. R. EVID. 103(a)(2) (providing that if trial court's ruling excludes evidence, then to preserve error, party must inform court of its substance by offer of proof, unless substance was apparent from context). Brenda also did not attempt to make a formal offer of proof after trial. *See* TEX. R. APP. P. 33.2(c).

In her reply brief, Brenda argues that she made the trial court aware of the substance of Ijeoma's testimony so that a formal offer of proof was not necessary. Brenda cites to three places at trial where she made the trial court aware of Ijeoma's testimony. We disagree with Brenda's assertion that she made the trial court aware of Ijeoma's excluded testimony. Although Brenda cites to three places in the record, those record citations were merely cross-examination questions posed by Brenda's counsel to Olagundoye and do not present this Court with the substance of the excluded testimony. Because Brenda did not present an offer of proof or a bill of exception, we conclude that Brenda has waived any error in the exclusion of Ijeoma's testimony. *See Compton*, 428 S.W.3d at 886; *Akukoro*, 2013 WL 6729661, at *6–7; TEX. R. APP. P. 33.1; TEX. R. EVID. 103(a)(2).

2. Text Messages Between Brenda and Olagundoye

In her second evidentiary complaint, Brenda argues that the trial court improperly excluded text messages between Brenda and Olagundoye. Brenda provides no citation to the record where the trial court precluded her from admitting text messages, which text messages were excluded, or any indication that she preserved this issue for appeal. Without this information, nothing is presented for review. *See* TEX. R. APP. 33.1, 38.1(i) (requiring briefs to contain appropriate citations to record); *see also Hakemy Bros., Ltd. v. State Bank and Trust Co.*, 189 S.W.3d 920, 927–28 (Tex. App.—Dallas 2006, pet. denied) (stating appellate court has no duty to make independent search of voluminous record for evidence to support appellant's contentions).

3. Redaction of Brenda's Medical Records

In her third evidentiary complaint, Brenda argues that the trial court improperly excluded the diagnosis of Brenda's injuries. Specifically, Brenda argues that the trial court "permitted an overly broad redaction of Brenda's medical records, which excluded basic facts about Brenda's condition. In doing so, the trial court denied her the means to show the jury the entire scope of the attendant circumstances so it could properly decide the case." Olagundoye responds that the issue was waived because Brenda failed to make an offer of proof.

Brenda complains about overly broad redactions in her medical records included in plaintiff's exhibits 21 and 22. Both of these exhibits were from Brenda's previously designated medical experts. Because Brenda had de-designated her experts before trial, the trial court stated that she could not admit their expert testimony through the medical records. After the close of evidence, the trial court told Brenda's counsel that if she wanted the exhibits admitted, they could only be admitted with the redactions.

Brenda does not cite to anywhere in the record where she made an offer of proof of the unredacted exhibits. *See* TEX. R. EVID. 103(a)(2) (providing that if trial court's ruling excludes evidence, then to preserve error, party must inform court of its substance by offer of proof, unless substance was apparent from context). Nor did she attempt to make a formal offer of proof after trial. *See* TEX. R. APP. P. 33.2(c). Thus, the unredacted exhibits are not included in the appellate record, and we are precluded from determining whether the trial court made overly broad redactions to these exhibits. *See Compton*, 428 S.W.3d at 886; *Akukoro*, 2013 WL 6729661, at *6–7; TEX. R. APP. P. 33.1; TEX. R. EVID. 103(a)(2); *see also Bishop v. Comm'n for Lawyer Discipline*, No. 01-18-01115-CV, 2020 WL 4983246, at *13 n.25 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.) (mem. op.).

We overrule Brenda's second issue.

Jury Charge

In her third issue, Brenda argues that the trial court erred in refusing to submit a retaliation question in the jury charge.

A. Standard of Review

The trial court "shall submit the questions, instructions and definitions . . . raised by the written pleadings and the evidence." TEX. R. CIV. P. 278. "Whether the charge submits the controlling issue in the case, in terms of theories of recovery or defense, is a question of law which is reviewed de novo." *Hamid v. Lexus*, 369 S.W.3d 291, 295 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A legal-sufficiency standard applies: if there is more than a scintilla of evidence to support a finding in favor of the party that pleaded the issue, it is error to refuse the submission. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *Roy v. Howard-Glendale Funeral Home*, 820 S.W.2d 844, 846 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Failure to submit an issue cannot be a ground for reversal unless the party with the burden of proof has requested the issue in "substantially correct wording." TEX. R. CIV. P. 278; *Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 848 (Tex. App.—Houston [1st Dist.] 2015, no pet.). A request is not substantially correct if it is too vague or contains a term that requires a definition, but the party fails to tender the definition. *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 493 (Tex. App.—

San Antonio 1994, writ denied); *see Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 479 (Tex. 1978); *Gonzalez v. Latino Learning Ctr., Inc*., No. 01–91–00333–CV, 1996 WL 303480, at *3 (Tex. App.—Houston [1st Dist.] June 6, 1996, no writ) (not designated for publication) ("If a party does not submit a requested instruction or definition in writing, he waives any error by the trial court in not submitting the requested material.").

B. Analysis

Brenda argues that the trial court erred in failing to submit a question on retaliation. In her brief, Brenda cites to the clerk's record which contains "Plaintiff's Jury Charge," dated June 7, 2019, as including the question she presented to the trial court and "as tendered was not affirmatively incorrect and neither was the attendant instruction." Olagundoye responds that Brenda's reliance on the June 7, 2019 retaliation question was not the same question presented to the trial court during trial.

Based on discussions between Brenda and the trial court, the record shows that Brenda submitted her proposed charge, presumably containing her retaliation question, at 4:30 a.m. on January 15, 2020. Brenda does not provide any record cite, nor have we found one, pointing to her proposed retaliation question submitted on January 15, 2020. In her reply brief, Brenda disagrees that her requested retaliation question and instruction was not in front of the trial court during the charge

conference. Brenda asserts that the trial court even recited the question during their discussion of the charge.

We do not disagree that Brenda presented a proposed jury question on retaliation to the trial court. However, the trial court stated that it was not including the proposed jury charge question because it was not in substantially correct form. *See* TEX. R. CIV. P. 278 ("Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment."). Thus, for this issue to be reviewed on appeal, this Court must be able to review Brenda's requested jury question, along with any instructions, submitted to the trial court to determine whether it was actually in substantially correct wording.[4] *See id*. Because Brenda's requested jury question and instructions on retaliation are not included in the appellate record, we conclude that Brenda has waived the issue. *See Texas First Nat. Bank v. Ng.*, 167 S.W.3d 842, 865 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgm't vacated w.r.m.); *see also Yzaguirre v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, No. 04-09-00550-CV, 2010 WL 1404620, at *1 (Tex. App.—San Antonio Apr. 7, 2010, no pet.) (mem.

[4] Although Brenda states that the trial court recited her requested jury question, the record also reveals that Brenda's requested question contained additional language beyond what was read. The record and Brenda's brief also suggest that Brenda included instructions with her retaliation question that are also not contained in the appellate record.

op.) (concluding that appellant waived error on trial court's exclusion of requested instruction because court of appeals could not determine if instruction was substantially correct when not included in clerk's record or attached to motion for new trial).

We overrule Brenda's third issue.

Conclusion

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.