Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00240-CR

Clarence **WRIGHT**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR0287
Honorable Jefferson Moore, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: June 14, 2017

AFFIRMED

A jury found appellant, Clarence Wright, guilty of murder in the shooting death of Jeremiah Gomez, and the trial court assessed punishment at a life sentence. In four issues on appeal, appellant asserts (1) the evidence is legally insufficient to establish he had the requisite intent to commit murder, (2) the trial court erred in denying his requested jury charge on the lesser included offense of manslaughter, (3) the trial court erred when it overruled his objection to the introduction of a photo showing him holding a gun, and (4) the trial court erred when it implicitly rejected his claim that he acted under sudden passion arising from an adequate cause. We affirm.

BACKGROUND

Other than the complainant, only three people were present when Gomez was shot: appellant, appellant's fiancé, Amy Garcia, and Gomez's girlfriend, Natalie Lopez. Amy testified she and appellant took a bus to Gomez's apartment, and she knew Gomez only as "D" or "Diablo." Amy said she bought drugs from Gomez in the past, but she did not know why appellant wanted to go to Gomez's apartment. Amy stated she did not want to go to Gomez's apartment because she believed he was angry with her because Gomez thought she owed him money. Appellant did not tell Amy he had a gun or that he intended to shoot Gomez. According to Amy, appellant asked her to wear a black shirt and black jeans, but she did not ask for a reason. During the bus ride, Amy and appellant got into an argument about going to Gomez's apartment. Amy said the argument concerned Gomez's allegation that she owed Gomez money for drugs. Although Amy said appellant was not angry about her disagreement with Gomez, Amy got off the bus first, appellant got off later, and they met again at the apartment complex where they continued to argue.

Amy testified appellant knocked on the door to Gomez's apartment, Gomez opened the door and greeted appellant, and almost "immediately, [appellant and Gomez] — maybe like 30 seconds, there was like a little scuffle." Amy, who was standing behind appellant, did not hear any argument during the scuffle, and she did not see either man with a gun. She said Gomez was leaning into appellant and pushing him. Amy later testified she heard Gomez say "oh, hell no," she heard a gunshot, and she saw Gomez fall to the ground, at which point she ran away. Seconds later, as she ran to a nearby friend's house, she heard another gunshot, and then appellant was running with her. Amy said appellant fired the second shot at Natalie who was inside the apartment. Amy said that, as she and appellant hid in her friend's backyard, she asked him what was going to happen. Appellant responded they were going to jail. While they hid, appellant

removed his shirt, and Amy said she did not see a gun. Soon thereafter, both were arrested.[1] Amy stated that, after the arrest, appellant asked her to change her story, and to look for the gun, which he said was at the friend's house. Police later located the gun at the friend's house.

Natalie Lopez testified she and Gomez were sitting at a table when someone knocked on their door. When Gomez opened the door, Natalie saw appellant and Amy. Natalie knew appellant by the name "Bo" and the nickname "Hardcore." Natalie said that by the time she looked up to see appellant and Amy at the door, appellant already had a gun pointed at Gomez. She did not hear appellant say anything, but she saw appellant whisper something in Gomez's ear and then Gomez said, "No, man." She said Gomez tried to push appellant out of the doorway in an attempt to close the door. Gomez was standing somewhat behind the door when appellant reached around the door and fired the gun at Gomez. Natalie said appellant then turned to her, she told appellant "not to do that," and appellant fired the gun in her direction. Natalie was not hurt. When she gave her statement to the police, Natalie stated Gomez told her appellant was coming to the apartment, but Gomez did not "like the idea" because Gomez "was suspicious of the way [appellant] was acting towards him."

Dr. Samantha Evans, the Bexar County Medical Examiner's Office forensic pathologist, testified Gomez died from a single gunshot to the left scalp just behind his left ear. Evans stated the gunshot wound entrance indicated features of both contact and intermediate range, which is a unique category called "loose contact," meaning the end of the gun's muzzle was a half inch to an inch from the skin's surface when the gun fired.[2] Her examination revealed no indication of a

[1] Amy was initially charged with murder. One week before appellant's trial, in exchange for her testimony, the District Attorney offered Amy a deal for aggravated assault with a deadly weapon with a deferred adjudication recommendation.

[2] She defined contact range as a situation where the gun had direct contact with the skin at the wound. She defined intermediate range to mean the gun was anywhere from half an inch to several feet away from the body.

struggle, such as bruises or cuts. A toxicology report showed Gomez had methamphetamine in his system. Although Evans could not say how methamphetamine affected Gomez, she agreed use of the drug could cause paranoia, hallucinations, delusions, and violent behavior.

During appellant's interview with the police, he insisted he knew nothing about the shooting. However, the trial court admitted into evidence the recordings of conversations appellant had while in jail. One of the conversations was between appellant and his mother and the other was between appellant and Amy. Both audio recordings are at times difficult to hear; however, it appears appellant's dispute with Gomez involved appellant allegedly paying Gomez for some tattoos, which appellant did not receive. He said, "Me and this dude [Gomez] had problems, so I did what I had to do." During both conversations, appellant said he did not go to Gomez's apartment to get his money back. Instead, he "went over there to punish [Gomez]." Appellant insisted he "didn't have murder on [his] mind, it just turned out that way." Appellant told his mother:

> They trying to pin something on me [indecipherable] that didn't go down like that.
> I'm not saying I didn't murder him.
> They're trying to pin something on me, mama, that I ain't do. They say attempted capital murder. I ain't do no attempted capital murder. It was a straight murder. That's it. It was a straight murder, there was no attempted capital murder.
> I shot twice at [Gomez]. The first time I missed and the second time I hit him.
> I just wanted to go over there and punish him and show him that he was in the wrong for taking my money like that.
> I wasn't trying to murder but it end up that way. I was angry.

Appellant also told his mother that he and Amy talked before going to Gomez's apartment, he did not want his money back, and he was "just gonna go tell [Gomez] [indecipherable] and then I gonna shoot him." Appellant's conversation with Amy was similar, with appellant insisting the State would not "get" him for capital murder.

INTENT: SUFFICIENCY OF THE EVIDENCE

The jury was instructed it could find appellant guilty of murder if it found, beyond a reasonable doubt, either (1) that appellant intentionally or knowingly caused Gomez's death by shooting Gomez with a deadly weapon, or (2) with intent to cause serious bodily injury to Gomez, appellant committed an act clearly dangerous to human life by shooting Gomez with a deadly weapon. In his first issue on appeal, appellant asserts the evidence is legally insufficient to support a finding that he knowingly or intentionally killed Gomez, or that he intended to cause Gomez serious bodily injury. As support for his argument, appellant points to the recorded conversation with his mother, Amy Garcia's testimony, and the lack of evidence about the specific cause of the shooting. According to appellant, because the evidence shows he did not have murder on his mind, there is legally insufficient evidence to prove he possessed the requisite intent to commit murder. We disagree.

When reviewing the legal sufficiency of the evidence to support a conviction, we consider all of the evidence in the light most favorable to the verdict and determine whether any rational juror could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). This standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing reasonable inferences from the evidence. *See Adames*, 353 S.W.3d at 860. On appellate review, we therefore determine whether the necessary inferences made by the trier of fact are reasonable based on the cumulative force of all of the evidence. *See id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

"A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PEN. CODE ANN. § 6.03(a) (West 2011). There is no dispute appellant fired the two shots with a deadly weapon, and one of the shots hit Gomez in the head at close range. The specific intent to kill may be inferred from the use of a deadly weapon. *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). Based on Amy's and Natalie's testimony the shots were fired within a very short time of Gomez opening the door. Appellant's own words reveal he intended to "punish" Gomez and shoot him. Although Amy and Natalie testified Gomez was hit with the first bullet, appellant told his mother he fired twice at Gomez, missing him the first time and hitting him with the second shot. We conclude the evidence is sufficient to support the jury's finding that appellant either intentionally or knowingly caused Gomez's death by shooting Gomez with a deadly weapon, or acted with intent to cause serious bodily injury to Gomez by shooting Gomez with a deadly weapon.

JURY CHARGE ON MANSLAUGHTER

In his second issue, appellant asserts the trial court erred by denying his request for a jury charge on manslaughter. The two-step test for determining whether a trial court is required to give a requested instruction on a lesser-included offense is well-established. We discuss that law in the context of appellant's charged offense of murder and his request for a lesser-included-offense instruction for manslaughter.

The first step is to determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a question of law. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). Under this first step, an offense is a lesser-included offense if it is within the proof necessary to establish the charged offense. *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011); *see also* TEX. CODE CRIM. PROC. art. 37.09(1) (West 2006).

Here, both parties correctly agree manslaughter is a lesser-included offense of murder. *See Cavazos*, 382 S.W.3d at 384; *Girdy v. State*, 213 S.W.3d 315, 318 (Tex. Crim. App. 2006). We therefore proceed to the second step of the test.

The second step in the analysis asks whether there is evidence in the record that supports giving the instruction to the jury. *Sweed*, 351 S.W.3d at 68. Under this second step, a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011) (citations omitted). The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense. *Id.* "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385.

More particularly, the second step requires examining all the evidence admitted at trial, not just the evidence presented by the defendant. *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). The entire record is considered; a statement made by the defendant cannot be plucked out of the record and examined in a vacuum. *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000). Anything more than a scintilla of evidence is adequate to entitle a defendant to a lesser charge. *Sweed*, 351 S.W.3d at 68. Although this threshold showing is low, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. *Id.* "However, we may not consider the credibility of the evidence and whether it conflicts with other evidence or is controverted." *Goad*, 354 S.W.3d at 446-47. Accordingly, the standard may be satisfied if some

evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations. *Sweed*, 351 S.W.3d at 68.

In considering whether a lesser offense is a valid, rational alternative to the charged offense, we must compare the statutory requirements between the greater offense and the lesser offense to determine whether evidence exists to support a conviction for manslaughter. *Id.* A person commits the offense of manslaughter "if he recklessly causes the death of an individual." TEX. PEN. CODE ANN. § 19.04(a) (West 2011). "A person acts recklessly . . . when he is aware of but consciously disregards a substantial and unjustifiable risk . . . . The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." TEX. PEN. CODE § 6.03(c). Manslaughter is a result-oriented offense: the mental state must relate to the results of the defendant's actions. *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013).

On appeal, appellant argues Amy's testimony that she and he had been arguing before they arrived at Gomez's apartment showed he was in a "bad mood," and "his thinking arguably may not have been clear." Appellant also points to an inconsistency in Amy's testimony where she first stated she did not hear Gomez say anything, but she later testified Gomez said "Oh, hell no." Appellant concludes Amy's testimony coupled with his own statement that he did not have murder on his mind infers he acted recklessly. We disagree.

As the Court of Criminal Appeals held in *Cavazos*, "[p]ulling out a gun, pointing it at someone, pulling the trigger twice, fleeing the scene[,] and later telling a friend 'I didn't mean to shoot anyone' does not rationally support an inference that Appellant acted recklessly at the moment he fired the shots." *Cavazos*, 382 S.W.3d at 385. Similarly, here, appellant pulled a gun on Gomez almost as soon as Gomez opened the door; appellant reached around the apartment door and fired at Gomez while Gomez stood behind the door; and appellant immediately fled the scene.

His subsequent statement to his mother that he did not have murder on his mind does not rationally support an inference that he acted recklessly when he shot Gomez. "Without additional evidence supporting a finding of recklessness, [appellant's] testimony alone is insufficient to require an instruction on the lesser-included offense of manslaughter." *Id.* Because the facts did not raise manslaughter as a valid, rational alternative to the charged offense, appellant was not entitled to the requested jury instruction. *See id.* at 385-86.

ADMISSION INTO EVIDENCE OF A PHOTO

In his third issue, appellant asserts the trial court erred when it allowed the State to introduce into evidence Exhibit 104, which was a photo showing appellant with his face covered by a red bandana while he is holding a revolver in his right hand and making an obscene gesture with his left hand. Appellant contends the danger of unfair prejudice outweighed any probative value of the photo.

During the State's direct examination of Amy Garcia, the State showed her Exhibit 98, a photograph of a gun that Amy identified as belonging to appellant[3]. The State then showed her Exhibit 104, which she recognized as a photo she took of appellant a few months before the shooting. A police detective found the photo shown in Exhibit 104 posted on appellant's Facebook page. The photo showed the same gun as in Exhibit 98. The trial court admitted Exhibit 104 into evidence over appellant's objection. We review the trial court's decision to admit evidence, as well as its decision as to whether the danger of unfair prejudice substantially outweighed the probative value of the evidence, under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Therefore, in determining whether the danger of unfair prejudice substantially outweighs the probative value of the evidence, we do not conduct a de novo

[3] Natalie also testified the gun shown in Exhibit 98 looked like the gun appellant used to shoot Gomez.

review and we "should reverse the judgment of the trial court rarely and only after a clear abuse of discretion." *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003) (quotations omitted).

Evidence may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. TEX. R. EVID. 403. However, Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009); *Aragon v. State*, 229 S.W.3d 716, 724 (Tex. App.—San Antonio 2007, no pet.). Evidence may be unfairly prejudicial when it has "an undue tendency to suggest that a decision be made on an improper basis." *Pawlak v. State*, 420 S.W.3d 807, 809 (Tex. Crim. App. 2013). Rule 403 "envisions exclusion of evidence only when there is a clear disparity between the degree of prejudice of the offered evidence and its probative value." *Hammer*, 296 S.W.3d at 568.

When conducting a Rule 403 analysis, courts must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006). The objecting party bears the burden to show the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Poole v. State*, 974 S.W.2d 892, 897 (Tex. App.—Austin 1998, pet. ref'd).

"'[P]robative value' refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Gigliobianco*, 210

S.W.3d at 641. When the proponent of the evidence has other compelling or undisputed evidence to establish the proposition or fact that the evidence goes to prove, the probative value of the evidence will weigh far less than it otherwise might in the probative-versus-prejudicial balance. *Id.* On appeal, appellant acknowledges the photo was relevant and probative in that it connected him to the gun. However, the State adduced other evidence, including the gun itself and eyewitness testimony, connecting appellant to the gun. Therefore, the State did not need Exhibit 104. Accordingly, the second factor at most only somewhat favors exclusion.

Under Rule 403, mere prejudice will not render the evidence inadmissible; instead, the admission of the evidence must be unfairly prejudicial. *See* TEX. R. EVID. 403. Unfair prejudice does not arise from the mere fact that evidence injures a party's case. *Casey v. State*, 215 S.W.3d 870, 883 (Tex. Crim. App. 2007). "Virtually all evidence that a party offers will be prejudicial to the opponent's case, or the party would not offer it." *Id.* Unfair prejudice "refers to a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Gigliobianco*, 210 S.W.3d at 641. For example, evidence might be unfairly prejudicial if it invokes the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence. *Id.*

On appeal, appellant asserts the photo suggested to the jury that he was a member of a criminal gang and, therefore, the photo had a tendency to suggest a conviction on an improper basis. The photo showed appellant wearing a white sleeveless t-shirt and a red bandana that covered his face from the eyes down, and he was holding up his left hand with his middle finger extended in a commonly used "obscene" gesture. However, the photo showed appellant holding the gun Amy said was the same gun as the one used to shoot Gomez. In closing arguments, the State mentioned only that the jury had before it "a photo of the defendant with that same gun."

Although the photo may have been prejudicial, we cannot say it was unfairly prejudicial. Therefore, this factor favors admission of the evidence.

"Confusion of the issues" refers to a tendency to confuse or distract the jury from the main issues in the case. *Id.* For example, evidence that consumes an inordinate amount of time to present or answer might tend to confuse or distract the jury from the main issues. *Id.* The State's introduction of the photo was straightforward and did not take an inordinate amount of time. Therefore, this factor favors admission of the evidence.

"Misleading the jury" refers to a tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds. *Id.* For example, scientific evidence might mislead a jury that is not properly equipped to judge the probative force of the evidence. *Id.* The photo was not prone to this tendency because it concerned matters easily comprehensible by laypeople, and again, took very little time to introduce. Thus, this factor weighs in favor of admission.

Finally, "undue delay" and "needless presentation of cumulative evidence," concern the efficiency of the trial proceeding rather than the threat of an inaccurate decision. *Id.* The State's introduction of the photo entailed a brief description by a police detective of how he came to find the photo on appellant's Facebook page. Therefore, this factor weighs in favor of admission.

In sum, only one factor weighed against admitting the photo. In such a situation, the trial court could have reasonably concluded the probative value of the photo was not outweighed by the danger of unfair prejudice. Thus, we cannot say the trial court abused its discretion by admitting the photo.

SUDDEN PASSION DEFENSE DURING PUNISHMENT PHASE

Once a defendant is found guilty of murder, he may raise, during the punishment phase, the issue of whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. *Gaona v. State*, 498 S.W.3d 706, 710 (Tex. App.—Dallas 2016, pet.

ref'd). "If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree." TEX. PEN. CODE ANN. § 19.02(d) (West 2011). "Adequate cause" means "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *Id.* § 19.02(a)(1). "Sudden passion" means "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." *Id.* § 19.02(a)(2). Here, the trial court assessed punishment, and implicitly rejected appellant's defense that he caused Gomez's death under the immediate influence of sudden passion arising from adequate cause. In his final issue on appeal, appellant asserts the trial court erred.

Although the issue of sudden passion is a punishment issue, it is analogous to an affirmative defense because the defendant has the burden of proof by a preponderance of the evidence. *See Matlock v. State*, 392 S.W.3d 662, 667 & n. 14 (Tex. Crim. App. 2013); *Gaona*, 498 S.W.3d at 710. In this appeal, appellant challenges only the factual sufficiency of the evidence. In the factual-sufficiency review of a rejected affirmative defense, we view the entirety of the evidence in a neutral light, and we may not usurp the function of the fact-finder by substituting our judgment in place of the fact-finder's assessment of the weight and credibility of the witnesses' testimony. *Matlock*, 392 S.W.3d at 671. The standard of review is whether after considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See id.*

In addition to the testimony admitted during the guilt/innocence phase, the trial court also heard testimony from Dr. Jack Ferrell, Jr., a clinical and forensic psychologist who testified on appellant's behalf. Dr. Ferrell testified that methamphetamine use could cause paranoia, hyperactivity, and a lack of cognitive processing. Dr. Ferrell stated users sometimes cannot

process their environment and they can become suspicious of other people. When shown a photo of Gomez's mouth, Dr. Ferrell said the condition of Gomez's teeth might be a manifestation of "meth mouth." Dr. Ferrell said he also evaluated appellant, and appellant indicated he was from a "troubled-home situation," appellant's mother had drug and alcohol problems, and appellant began using drugs and alcohol at a young age. Appellant was also taking several medications, including for anxiety and depression.

Appellant contends Dr. Ferrell's testimony is consistent with the medical examiner's testimony that Gomez had methamphetamine in his system, and the use of that drug could cause paranoia, hallucinations, delusions, and violent behavior. Appellant argues the totality of the evidence indicates Gomez, "through furtive words or deeds, provoked [appellant] at the time of the offense[, and Gomez] provoked [appellant] to the point of ungovernable anger, i.e., it rendered his mind incapable of cool reflection." Therefore, appellant concludes, he proved by a preponderance of the evidence that he caused Gomez's death under the immediate influence of sudden passion arising from an adequate cause. We disagree.

The evidence showed Gomez opened the door for appellant, and appellant almost immediately drew his gun and fired at Gomez who was standing, at least partially, behind the door. Amy said she did not see Gomez do or say anything threatening. "Adequate cause" means "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." TEX. PEN. CODE § 19.02(a)(1). Sudden passion must arise at the time of the offense and cannot result solely from former provocation. *De Leon v. State*, 373 S.W.3d 644, 650 (Tex. App.—San Antonio 2012, pet. ref'd). Also, ordinary anger or causes of a defendant's own making are not legally adequate causes. *Id.*; *Hernandez v. State*, 127 S.W.3d 206, 211 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). After reviewing all of the evidence relevant to the issue of sudden passion arising from an adequate

cause in a neutral manner, we cannot say the trial court's negative finding on this issue was so against the great weight and preponderance of the evidence as to be manifestly unjust.

CONCLUSION

For the reasons stated above, we overrule appellant's issues on appeal and affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

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