In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00209-CR

BILLY GENE FISHER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-11-10604 CR

MEMORANDUM OPINION

A jury convicted Billy Gene Fisher of manslaughter and failure to stop and render aid. In two issues, Fisher contends that the trial court abused its discretion by excluding testimony on cross-examination of certain State witnesses. We affirm the trial court's judgment.

Background

According to testimony at trial, James Slaughter had stopped his motorcycle at an intersection and was preparing to make a turn, when a Dodge pick-up truck rear-ended

Slaughter's motorcycle. The Dodge fled the scene. Witnesses did not observe the Dodge attempt to avoid the collision. Slaughter died of "[m]ultiple blunt force injury."

Fisher had been driving the Dodge at the time of the accident. Red plastic material, visually consistent with that commonly used for a motorcycle tail lamp housing, was found in the Dodge's grill, and Slaughter could not be excluded as a contributor of DNA found on the Dodge. Officers testified that Fisher was not traveling at a safe speed, did not take evasive action, and was reckless.

Fisher pleaded "guilty" to failure to stop and render aid and pleaded "not guilty" to manslaughter. The jury found Fisher guilty of both offenses and found that he used or exhibited a deadly weapon during the commission of the offense or during immediate flight therefrom.

Standard of Review

"[T]he trial judge retains wide latitude to impose reasonable limits on [] cross-examination 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 904, 178 L.Ed.2d 760 (2011) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). "Although the extent of cross-examination is subject to the sound discretion of the trial judge, the trial judge abuses that discretion when he prevents appropriate cross-examination." *Carroll v.*

State, 916 S.W.2d 494, 499 (Tex. Crim. App. 1996). We also review a trial judge's decision to admit or exclude evidence under an abuse of discretion standard. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006).

Exclusion of Rebuttal Testimony

In issue one, Fisher contends that the trial court abused its discretion by excluding testimony regarding whether Slaughter wore a helmet when riding his motorcycle.

On direct-examination, State's witness Billy Sechelski testified that, in addition to standard safety equipment, Slaughter installed three brake lights and a loud exhaust on his motorcycle. The defense argued that, through Sechelski's testimony, the State opened the door to testimony that Slaughter did not wear a helmet when riding his motorcycle. The trial court denied the defense's request to examine Sechelski regarding this topic. The defense later made offers of proof through Sechelski and another witness, Paul Brantner, to show what the excluded testimony would have been.

On appeal, Fisher contends that whether Slaughter wore a motorcycle helmet was "relevant to rebut the false impression that [Slaughter] was extraordinarily safe in the operation of the motorcycle."[1]

"As a general proposition, when a party introduces matters into evidence, he invites the other side to reply to that evidence." *Wheeler v. State*, 67 S.W.3d 879, 885

[1] Fisher also contends that exclusion of the testimony violated his confrontation clause right under the Sixth Amendment of the United States Constitution. Because Fisher did not present this complaint at trial, it is not preserved for appellate review. *See* Tex. R. App. P. 33.1(a); *see also Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000).

n.13 (Tex. Crim. App. 2002). When a witness leaves a false impression with the jury, the opposing party is allowed to correct that false impression. *Ramirez v. State*, 802 S.W.2d 674, 676 (Tex. Crim. App. 1990). However, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]" Tex. R. Evid. 103(a); *see* Tex. R. App. P. 44.2(b). "We should not overturn the conviction if we have fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but slight effect." *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008).

Assuming, without deciding, that the trial court erred by excluding evidence that Slaughter did not wear a motorcycle helmet, we cannot say that Fisher's substantial rights were affected.[2] *See* Tex. R. App. P. 44.2(b). Whether Slaughter wore a motorcycle helmet has no bearing on whether Fisher committed the charged offenses. The jury heard evidence that Fisher was driving recklessly, was operating his Dodge in a manner capable of causing death or serious bodily injury, rear-ended Slaughter's motorcycle, took no evasive action to prevent the collision, could have prevented the collision, was required to stop and render aid, and left the scene after the collision. Thus, the record contains evidence from which the jury could conclude that Fisher committed the offenses of manslaughter and failure to stop and render aid. *See Nonn v. State*, 117 S.W.3d 874, 883

[2] We also note the "evidentiary caveat . . . that the opponent must correct the 'false impression' through cross-examination of the witness who left the false impression, *not* by calling other witnesses to correct that false impression." *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002). Accordingly, Fisher could not use Brantner's testimony to correct a false impression allegedly created by Sechelski's testimony.

(Tex. Crim. App. 2003) ("[P]roperly admitted evidence of guilt is one factor to be considered when performing a harm analysis under Rule 44.2(b)."). Moreover, during closing arguments, the State did not emphasize the safety features on Slaughter's motorcycle, but focused on Fisher's actions. Based on the record, the complained-of testimony either did not influence the jury or had but slight effect. *See Taylor*, 268 S.W.3d at 592. We overrule issue one.

Exclusion of Texas State Trooper Andrew Papanos's Testimony

In issue two, Fisher contends that the trial court abused its discretion by excluding testimony from Texas State Trooper Andrew Papanos regarding an accident in which he was involved.

On cross-examination of Papanos, the defense sought to ask Papanos about an instance when he apparently ran a stop sign while he was driving his State vehicle and was involved in an accident with another vehicle. The State objected to this line of questioning. The defense argued that Papanos characterized Fisher's actions as reckless; thus, Papanos's accident would help the jury comprehend Papanos's understanding of "reckless" and understand that "sometimes there's just accidents." The trial court noted that "[t]here are other ways to arrive at the testimony you want[,]" sustained the State's objection, and instructed the jury to disregard.

On appeal, Fisher contends that testimony regarding Papanos's own car accident would enable the jury to differentiate between a civil matter or traffic accident and a

criminal matter or manslaughter, and would correct any false impression that all fatal accidents result in criminal charges.[3]

However, Fisher did not make an offer of proof or bill of exception at trial to show what the excluded testimony would have been. Defense counsel made statements to the effect that Papanos ran a stop sign and was involved in a car accident while driving a State vehicle, but counsel's statements do not constitute a '"reasonably specific summary of the evidence offered[.]'" *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009) (quoting *Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998)); *see* Tex. R. Evid. 103(a)(2); *see also Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999) ("Absent a showing of what such testimony would have been, or an offer of a statement concerning what the excluded evidence would show, nothing is presented for review."). Even assuming that defense counsel's statements were sufficient and the trial court erred by excluding the proffered testimony, the record indicates that exclusion of the testimony did not affect Fisher's substantial rights. *See* Tex. R. Evid. 103(a); *see also* Tex. R. App. P. 44.2(b); *Taylor*, 268 S.W.3d at 592. As previously discussed, the record contains evidence from which the jury could conclude that Fisher committed the charged offenses, including testimony from Texas State Trooper Terry Barnhill that Fisher was driving recklessly on the day of the accident. *See Nonn*, 117 S.W.3d at 883. For these reasons, we overrule issue two.

[3] To the extent Fisher's second issue raises a Sixth Amendment violation, Fisher did not object at trial on this basis. His complaint is not preserved for appellate review. *See* Tex. R. App. P. 33.1(a); *see also Wright*, 28 S.W.3d at 536.

Having overruled Fisher's two issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on April 5, 2011
Opinion Delivered April 13, 2011
Do Not Publish

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