In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00074-CR

LEON HOWELL COUVILLION, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 16-313454

MEMORANDUM OPINION

Appellant Leon Howell Couvillion appeals his conviction for assault bodily injury family violence. In four issues on appeal, Couvillion complains that the trial court erred by admitting extraneous offense evidence and inadmissible hearsay statements and failing to conduct a competency hearing. We affirm the trial court's judgment.

BACKGROUND

Deputy Magdalena Strong of the Montgomery County Sheriff's Office testified that in March 2016, she responded to a 9-1-1 call at the home of Couvillion and C.G. According to Strong, C.G. called 9-1-1 and reported that Couvillion had pushed C.G. on the chest, and Strong observed red marks on C.G.'s neck. Strong testified that C.G. was highly upset and initially resisted giving a statement because C.G. did not want Couvillion to get in trouble. Strong explained that Deputy Kevin Douglas took a statement from Couvillion's and C.G.'s seven-year-old daughter, K.C., who witnessed the incident.

Strong testified that she took Couvillion's written statement and that Couvillion reported that he was upset with C.G. because after Couvillion had put their daughter to bed, C.G. entered the bedroom and started yelling at their daughter. Strong testified that Couvillion reported that when C.G. slapped him on the face, Couvillion acted in self-defense by putting his hands above C.G.'s chest and pushing C.G. against the wall in an attempt to get C.G. out of the bedroom. According to Strong, Couvillion claimed that C.G. pushed him, causing Couvillion and C.G. to fall down and C.G. to hit her head. Strong testified that based on her investigation, she believed that Couvillion had pushed C.G. and caused C.G. to fall and hit her head.

Deputy Kevin Douglas of the Montgomery County Sheriff's Office testified that he responded to the call at Couvillion's home and spoke with Couvillion and K.C. Douglas explained that when he spoke with K.C., she was scared and excited from the incident she had witnessed. According to Douglas, K.C. reported that Couvillion and C.G. were arguing in K.C.'s bedroom. Douglas testified that K.C. reported that Couvillion put his hands around C.G.'s throat, pushed C.G., and caused C.G. to fall against the wall. Douglas testified that K.C. also reported that when C.G. pushed back, Couvillion fell. Douglas explained that he observed a small hole in the wall of K.C.'s bedroom and a splinter from the bedpost.

C.G. testified that she and Couvillion are informally married and have two daughters. C.G. explained that she called 9-1-1 because she and Couvillion had gotten into an argument after C.G. disciplined K.C. According to C.G., Couvillion did not like C.G.'s tone of voice, so Couvillion came into K.C.'s bedroom and tried to push C.G. out of the room. C.G. testified that Couvillion put his hand around C.G.'s neck and choked her, and C.G. scratched Couvillion when she tried to defend herself. C.G. explained that after Couvillion choked her against the wall, C.G. fell and hit the back of her head.

K.C. testified that Couvillion and C.G. got into a fight in K.C.'s bedroom. K.C. testified that she did not remember "who walked towards who." According to

K.C., Couvillion pushed C.G. on the chest and choked C.G. K.C. testified that she thought C.G. ended up hitting Couvillion on the face.

Couvillion testified in his defense, claiming that C.G. has a history of abusing pain pills, and that over the past few years, C.G. had been attacking Couvillion. Couvillion explained that before the incident occurred, K.C. reported that C.G. had pushed K.C., causing K.C. to fall and injure her arm. Couvillion testified that as he was putting K.C. to bed, C.G. began screaming at K.C. and lunged at K.C. in a threatening manner. Couvillion testified that he put his hand on C.G.'s chest and tried to walk C.G. out of the room, but C.G. began hitting Couvillion. Couvillion explained that he restrained C.G. by putting her against the wall, so C.G. could not strike his face. According to Couvillion, it was at that point that K.C. thought Couvillion had choked C.G. Couvillion testified that when C.G. finally stopped hitting him, C.G. grabbed Couvillion's arm and tried to pull him on top of her, causing both of them to fall and resulting in C.G. hitting her head on the bed. According to Couvillion, C.G. was the aggressor, and he was trying to protect K.C. from C.G. and defend himself against C.G.'s attack.

A jury convicted Couvillion of assault bodily injury family violence. After a punishment hearing, during which Couvillion testified, the trial court assessed Couvillion's punishment at one year in county jail.

ANALYSIS

In issue one, Couvillion complains that the trial court erred by admitting extraneous offense evidence before evidence of self-defense was presented to the jury. According to Couvillion, he did not claim self-defense in his opening statement, and defense counsel's cross-examination of Deputy Strong did not open the door to the admission of extraneous offense testimony. Couvillion contends that he only presented the theory of mutual combat. Couvillion argues that the extraneous offense evidence is not admissible under article 38.371 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 38.371 (West Supp. 2017).

We review the trial court's ruling to admit extraneous offense evidence under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). The trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). We will not disturb a trial court's evidentiary ruling if it is correct on any applicable theory of law, even if the trial court gave the wrong reason for its ruling. *De La Paz*, 279 S.W.3d at 344.

Generally, during the guilt-innocence stage of trial, extraneous offense evidence is not admissible to prove that the defendant committed the charged offense in conformity with bad character. *See* Tex. R. Evid. 404(b)(1); *Devoe v. State*, 354

S.W.3d 457, 469 (Tex. Crim. App. 2011). However, extraneous offense evidence may be admissible if it has relevance apart from character conformity. *Devoe*, 354 S.W.3d at 469. Article 38.371of the Texas Code of Criminal Procedure provides in relevant part:

> (b) In the prosecution of an offense described in Subsection (a), subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.
>
> (c) This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.

Tex. Code Crim. Proc. Ann. art. 38.371(b), (c).

A defendant's opening statement could open the door to the admission of extraneous offense evidence to rebut a defensive theory, allowing the State to rebut the anticipated defensive evidence in its case-in-chief. *Dabney v. State*, 492 S.W.3d 309, 316-17 (Tex. Crim. App. 2016). A defensive theory may also be raised through voir dire and the cross-examination of a State's witness. *See id.* at 318; *Ransom v. State*, 920 S.W.2d 288, 301 (Tex. Crim. App. 1994). Although Couvillion contends that he did not open the door to the admission of extraneous offense evidence, the

record shows that he raised the theory of self-defense during opening statements, voir dire, and cross-examination.

During voir dire, defense counsel asked the venire about the factors they would consider in determining whether self-defense is appropriate. Defense counsel showed the venire the legal definition of self-defense and inquired as to which members of the venire believed that a male should never use force against a female under any circumstances, even if the male was justified in using force in self-defense. Defense counsel also discussed the defense of a third person.

During opening statements, defense counsel stated that C.G. was the aggressor, and that C.G. hit Couvillion first. Defense counsel explained that prior to the incident, K.C. told Couvillion that C.G. hit K.C., and while Couvillion was putting K.C. to bed, C.G. burst in the bedroom and wanted to discipline K.C. Defense counsel stated that Couvillion stood between K.C. and C.G., and C.G. hit Couvillion on the face several times. Defense counsel explained that Couvillion put up his arm to hold C.G. at a distance, and C.G. fell and hit her head when C.G. tried to grab Couvillion and pull him on top of her. Defense counsel stated that the jury would hear testimony from Couvillion and other witnesses about the best course of action to take when being struck by a woman.

During the cross-examination of Strong, defense counsel asked Strong if the law of self-defense takes gender and size into consideration. Defense counsel asked Strong if her investigation indicated that Couvillion was standing between C.G. and K.C. when the incident occurred. Defense counsel also asked Strong about Strong's failure to follow up on Couvillion's accusation that C.G. had threatened Couvillion with a baseball bat.

After defense counsel cross-examined Strong, the State represented to the trial court that during opening statements, defense counsel had insinuated that Couvillion was going to claim self-defense, and the State maintained that defense counsel had sufficiently cross-examined Strong on the issue of self-defense. The State argued that it should be allowed to introduce evidence of prior incidents between Couvillion and C.G. to rebut self-defense, as well as to show motive and the nature of the relationship. Defense counsel argued that the defense had not made any assertions concerning self-defense, and that article 38.371 prevented the admission of extraneous offenses as character evidence. Defense counsel also argued that the extraneous offenses were irrelevant, prejudicial, and would confuse the jury.

The trial court overruled Couvillion's objections and allowed evidence of prior incidents to be admitted under article 38.371 and Rule 404(b) for the purposes of showing motive, to explain the relationship, and to rebut self-defense. According

to the trial court, the facts surrounding the prior incidents were relevant to assist the jury in determining whether Couvillion committed the offense at issue. The trial court also found that the probative value of the prior incidents outweighed any prejudicial effect. The trial court allowed Strong and C.G. to testify about prior incidents between Couvillion and C.G.

On this record, we conclude that the trial court did not abuse its discretion by finding that the extraneous offense evidence was admissible to rebut Couvillion's claim of self-defense. *See Gonzalez v. State*, 541 S.W.3d 306, 312-13 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Banks v. State*, 494 S.W.3d 883, 892-93 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). We overrule issue one.

In issue two, Couvillion argues that the trial court erred by failing to conduct a competency hearing after his trial began when the issue of Couvillion's competency was brought to the trial court's attention. According to Couvillion, his defensive theory and request to have noteworthy people subpoenaed clearly showed that he could not assist his counsel at trial and that another competency hearing was required.

The record shows that the trial court conducted three pre-trial hearings, during which the trial court inquired about Couvillion's mental competency. Couvillion represented to the trial court that he had no history of psychological issues and that

he was "fully competent." Couvillion explained that he had been evaluated three times in the past year and had been found competent to accept a plea agreement in another criminal case. The trial court appointed Dr. Massey to conduct a psychological evaluation for competency and mitigation purposes in preparation for trial. Because Massey's preliminary evaluation suggested that Couvillion may be incompetent to stand trial, the trial court ordered Couvillion to submit to a full competency evaluation.

Couvillion explained to the trial court that he understood the charges against him, and he maintained that C.G. had lied about the incident. Couvillion explained to the trial court that he was a trustee for his family's estate and had been operating as a confidential informant for the federal government, and the President had issued a gag order regarding Couvillion's estate issues. Couvillion requested that the trial court subpoena the attorney for his trust, because Couvillion's representations to Massey concerning his estate issues had raised questions of his competency. Massey issued a competency report finding that Couvillion was competent to stand trial, and the trial court ordered Massey's report to be sealed.

During the trial, the trial court inquired about Couvillion's understanding of the proceedings and the State's charge against him. At that point, Couvillion complained that the State had commingled his confidential trust issues, which could

not be verified, to question Couvillion's sanity by claiming that he was paranoid and delusional. Couvillion explained that he had discussed the conflict with defense counsel, and argued that he had a right to subpoena witnesses to verify his trust estate and establish his credibility. At that point, defense counsel presented a motion to have Couvillion re-examined for competency, stating that Couvillion may be suffering from a mental disease or defect that possibly renders him incompetent to the extent that he is unable to understand the nature and consequences of the proceeding against him or unable to assist with his defense. Defense counsel argued that Couvillion was unable to assist with his defense, because he could not "un-mingle" his trust estate with the assault charge.

The trial court found that based on Massey's competency report, Couvillion was competent to stand trial. The trial court explained that Massey's competency evaluation had addressed the trust and estate issues about which Couvillion was complaining during trial. The trial court denied defense counsel's motion to have Couvillion re-examined for competency. The trial court also denied Couvillion's request to have Governor Greg Abbott, two Fox News analysts, and two prominent businessmen subpoenaed as character witnesses, because the requests were untimely.

We review the trial court's decision regarding whether to conduct a competency hearing under an abuse of discretion standard of review. *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999). A defendant's competence to stand trial is presumed. Tex. Code Crim. Proc. Ann. art. 46B.003(b) (West 2018). A defendant is incompetent to stand trial if he does not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, or if he does not have a rational, as well as factual, understanding of the proceedings against him. *Id.* art. 46B.003(a) (West 2018). Any suggestion that the defendant may be incompetent to stand trial requires that the trial court determine by informal inquiry whether there is some evidence that would support a finding that the defendant may be incompetent. *Id.* art. 46B.004(b), (c) (West 2018). A trial court's first-hand factual assessment of a defendant's competency is entitled to great deference. *See Ross v. State*, 133 S.W.3d 618, 627 (Tex. Crim. App. 2004).

A defendant's history of mental illness and bizarre behavior does not mandate a competency hearing absent evidence raising a bona fide doubt as to the defendant's present ability to communicate or understand the proceedings. *Ashley v. State*, 404 S.W.3d 672, 678 (Tex. App.—El Paso 2013, no pet.). A bona fide doubt is a real doubt in the trial judge's mind as to whether the defendant is competent. *Id.* The trial court is not required to revisit the issue of competency absent a material change of

circumstances suggesting that the defendant's mental status has deteriorated. *Turner v. State*, 422 S.W.3d 676, 693 (Tex. Crim. App. 2013). Thus, to justify a second competency hearing, defense counsel must offer new evidence of a change in the defendant's mental condition since the first competency hearing and evaluation. *Ashley*, 404 S.W.3d at 678; *see Learning v. State*, 227 S.W.3d 245, 250 (Tex. App.—San Antonio 2007, no pet.).

The record shows that Couvillion had been formally examined and found competent to stand trial by Massey. Because Couvillion was found competent prior to trial, we will conclude that the trial court abused its discretion by failing to conduct an additional competency inquiry only if there was evidence suggesting that Couvillion's condition had deteriorated after the trial court's initial finding of competency. *See Turner*, 422 S.W.3d at 693; *Ashley*, 404 S.W.3d at 678. While the record shows that defense counsel filed a motion suggesting that she believed that Couvillion's competency should be re-examined because he was unable to assist in his defense, defense counsel did not offer any new evidence showing that Couvillion's mental condition had changed since being found competent. *See Turner*, 422 S.W.3d at 693 *Ashley*, 404 S.W.3d at 678.

Although defense counsel's opinion that Couvillion should be re-examined for competency was based on Couvillion's conduct after he underwent his initial

competency examination, the record indicates that Couvillion's conduct during trial did not significantly differ from his conduct prior to be being examined. *See Lasiter v. State*, 283 S.W.3d 909, 922-23 (Tex. App.—Beaumont 2009, pet. ref'd). The record shows that both before and during trial, Couvillion requested that defense counsel subpoena witnesses to verify his trust estate and establish his credibility. Because Massey considered Couvillion's representations regarding the trust and estate issues when he determined that Couvillion was competent to stand trial, the trial court could have reasonably concluded that Couvillion's conduct did not create a bona fide doubt as to his competency. *See Ashley*, 404 S.W.3d at 678; *Lasiter*, 283 S.W.3d at 923.

Defense counsel does not explain and the record does not reveal how Couvillion's conduct represents a change in his mental condition since being found competent. Based on this record, we hold that Couvillion did not meet his burden of showing that his mental status had deteriorated after the trial court found him competent to stand trial. *See Turner*, 422 S.W.3d at 693. We therefore conclude that the trial court did not abuse its discretion by failing to conduct a second competency hearing. *See Ashley*, 404 S.W.3d at 678; *Learning*, 227 S.W.3d at 250. We overrule issue two.

In issues three and four, Couvillion argues that the trial court erred by admitting a video recording containing the hearsay statements of K.C. and C.G. The State argues that both statements qualified as an excited utterance. We review a trial court's decision to admit an out-of-court-statement under a hearsay exception for an abuse of discretion. *See King. v. State*, 953 S.W.2d 266, 269 n.4 (Tex. Crim. App. 1997) (citing *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994)). Hearsay, a declarant's out-of-court statement offered in evidence to prove the truth of the matter asserted, is inadmissible. Tex. R. Evid. 801(d)(2); Tex. R. Evid. 802. Exceptions to the hearsay rule include an excited utterance. Tex. R. Evid. 803(2). An excited utterance is a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." *Id.* This exception is based on the assumption that, at the time of the statement, the declarant is not capable of the kind of reflection that would enable him to fabricate information. *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005).

Whether a statement qualifies as an excited utterance depends on whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time the statement was made. *Id.* at 186-87. Factors influencing the determination include the length of time between the occurrence and the statement, the nature of the declarant, whether the statement was made in response

to a question, and whether the statement is self-serving. *Id.* at 187. It is not dispositive that the statement was in response to a question or that it was separated by a period of time from the startling event. *Zuliani v. State,* 97 S.W.3d 589, 596 (Tex. Crim. App. 2003). The critical determination is whether the declarant was still dominated by the emotion, excitement, fear, or pain of the incident when the statement was made, thereby losing the capacity for reflection necessary for fabrication. *Id.* at 596.

In issue three, Couvillion complains about the trial court's admission of a statement K.C. made while being interviewed by Douglas. Couvillion objected that K.C.'s statement did not qualify as an excited utterance, because K.C. was not excited or in fear, and because K.C.'s statement was not made immediately following the incident. The trial court overruled Couvillion's objection.

The record shows that prior to the trial court allowing the State to play the recording containing K.C.'s out-of-court statement for the jury, Douglas testified that when he spoke with K.C. about the incident, K.C. was "very scared." Douglas explained that K.C. was holding a blanket close to her neck and was still felt fear and excitement from the incident she had witnessed. Based on Douglas's testimony, the trial court could have reasonably concluded that K.C. was still dominated by her emotions, excitement, or fear when she made the complained-of statement. *See*

Apolinar, 155 S.W.3d at 186-87. The trial court did not abuse its discretion by admitting K.C.'s statement pursuant to the excited utterance exception to the hearsay rule. *See King*, 953 S.W.2d at 269 n.4. We overrule issue three.

In issue four, Couvillion complains that the trial court erred by admitting a hearsay statement C.G. made to Douglas without requiring the State to lay a predicate showing that the statement fell within an exception to the hearsay rule. The record shows that the trial court overruled Couvillion's hearsay objection without requiring the State to identify an applicable exception to the hearsay rule. The State argues on appeal that Douglas's subsequent testimony shows that C.G.'s statement was admissible as an excited utterance, and that the trial court's premature ruling was harmless under Rule 44.2(b) of the Texas Rules of Appellate Procedure because the evidence was cumulative of C.G.'s testimony. *See* Tex. R. App. P. 44.2(b).

The record shows that after the trial court admitted C.G.'s hearsay statement, Douglas testified that C.G. was very upset and crying when she made the statement. Douglas explained that C.G.'s voice was high-pitched and a little raspy, and he observed that C.G. was very emotional when "she was . . . trying to get her story out." Douglas further testified that C.G. reported that Couvillion had grabbed her by the throat and pushed her against the wall.

The record also shows that prior to the trial court admitting C.G.'s hearsay statement, C.G. testified that Couvillion had put his hand around her neck and choked her against the wall, causing her to fall and hit her head. Strong had also previously testified that she and the other officers arrived on scene within ten minutes of the 9-1-1 call being made. Strong explained that when she spoke with C.G., she "seemed highly upset the whole time."

Even if the trial court erred by prematurely admitting C.G.'s hearsay statement before the State laid the proper predicate, the record shows that C.G.'s statement was shown to be admissible under the excited utterance exception to the hearsay rule. *See* Tex. R. Evid. 803(2). The record also shows that C.G.'s statement is cumulative of other evidence admitted at trial without objection. *See Cordero v. State*, 444 S.W.3d 812, 820 (Tex. App.—Beaumont 2014, pet. ref'd) (stating that improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial); *see also Garcia v. State*, 246 S.W.3d 121, 135 (Tex. App.—San Antonio 2007, pet. ref'd). For these reasons, we conclude that the trial court's admission of C.G.'s statement was harmless. *See* Tex. R. App. P. 44.2(b); *Cordero*, 444 S.W.3d at 820. We overrule issue four. Having overruled all of Couvillion's issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on March 29, 2018
Opinion Delivered May 16, 2018
Do Not Publish

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