# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00408-CR**

DWAYNE YOUNGER APPELLANT

V.

THE STATE OF TEXAS STATE

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FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F16-223-367

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## MEMORANDUM OPINION[1]

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Appellant Dwayne Younger appeals his felony conviction for assault against a member of his family or household.[2] In three issues, he contends that the evidence is insufficient to support his conviction, that the trial court reversibly erred by excluding evidence that blood in the victim's urine could have been

[1] *See* Tex. R. App. P. 47.4.

[2] *See* Tex. Penal Code Ann. § 22.01(a)(1), (b)(2)(A) (West Supp. 2016).

caused by a medical procedure rather than by his assault, and that the trial court abused its discretion by denying his motion for mistrial after the jury heard evidence of his extraneous bad acts. We reject each of those arguments and affirm the trial court's judgment.

**Background**

According to testimony by L.W. (Lacy),[3] in the fall of 2015, she and Younger began living together in a recreational vehicle behind the home of Younger's mother, C.Y. (Carol). Younger and Lacy fought frequently, and Lacy "stayed away from him as much as [she] could to avoid conflict."

One early morning in November 2015, Lacy became concerned about Carol's health; according to Lacy, Carol appeared to be having a "mini stroke." In the presence of Younger's cousin H.M. (Holly), Lacy shared her concern about Carol's health with Younger. Younger became angry. According to Lacy, Younger "[d]idn't want to think that he could have been the reason why [Carol] was having anxiety and [a] possible stroke."

Younger began screaming at Lacy. He then punched Lacy's face and ribs as Holly yelled for him to stop.[4] With the punching, Younger broke one of Lacy's teeth and exposed a nerve in her mouth, causing her the "worst pain [she] ever

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[3]We use aliases to protect the anonymity of individuals associated with this appeal. *See McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

[4]Holly testified and corroborated Lacy's account of Younger's assault, including Lacy's description of how Younger punched Lacy's face and ribs.

felt in [her] life." Younger eventually stopped beating Lacy, and minutes later, he told her that he was sorry. Lacy used the restroom and noticed that her urine contained blood. Later that morning, she went to a hospital and was diagnosed with kidney trauma. The same day, she went to a dentist, and the dentist removed the remainder of a cracked tooth and deadened the nerve.

Lacy met with Denton County Sheriff's Office Deputy Charles Spilman, who took her statement and photographed her injuries.[5] Deputy Spilman noticed that Lacy was visibly shaken and fearful and had injuries on her face. Holly also gave a statement about the assault. Deputy Spilman determined that Lacy's and Holly's statements were consistent. Another deputy arrested Younger. After Younger's arrest, he asked Lacy to sign a nonprosecution affidavit, to claim that she had lied in her earlier statements about the assault, and to claim that she had hit her mouth "on a f_ _ _ing door or something." The next day, another deputy interviewed Lacy and Holly about the assault. That deputy observed Lacy's injuries and, like Deputy Spilman, determined that Lacy and Holly provided consistent descriptions of what had occurred.

A grand jury indicted Younger for assaulting Lacy, a member of his family or household, by striking her with his hand. The indictment alleged that Younger had been previously convicted of assault against a member of his family or

[5]The jury saw these photographs at trial along with other photographs of Lacy's injuries.

household. The trial court conducted a jury trial.[6] Younger pled not guilty to assaulting Lacy but admitted that he had a prior conviction for assault against a member of his family or household and conceded that he had two prior felony convictions. After the jury received the parties' evidence and arguments, it convicted Younger. The jury then heard more evidence (including details of his prior convictions) and arguments concerning his punishment, found sentence-enhancement allegations true (based on his pleas of true to those allegations), and assessed forty years' confinement. Younger brought this appeal.

**Evidentiary Sufficiency**

In his first issue, Younger contends that the evidence is insufficient to support his conviction. He contends that no rational jury could have convicted him because several of the State's witnesses "had questionable character." To that end, he argues that the evidence presented at trial was "too unreliable." He also asserts that "the medical records introduced at trial did not prove that [he] caused [Lacy's] injuries." We reject these contentions.

In our due-process review of the sufficiency of the evidence to support a conviction, we view all the evidence in the light most favorable to the verdict to

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[6]Younger eventually attended his trial, but the jury received evidence that he had failed to appear at an earlier-scheduled trial date. "Evidence of flight is . . . a circumstance from which an inference of guilt may be drawn." *Burks v. State*, 876 S.W.2d 877, 903 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1114 (1995); *Jones v. State*, No. 01-04-00181-CR, 2005 WL 1252201, at *4 (Tex. App.—Houston [1st Dist.] May 26, 2005, pet. ref'd) (mem. op., not designated for publication).

determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

To obtain Younger's conviction, the State was required to prove, in relevant part, that he intentionally, knowingly, or recklessly caused bodily injury—physical pain, illness, or any impairment of physical condition—to Lacy. *See*

Tex. Penal Code Ann. § 22.01(a)(1); *see also id.* § 1.07(a)(8) (West Supp. 2016) (defining "bodily injury"). Lacy and Holly each told the police and later testified that Younger punched Lacy's face and ribs and caused her pain, therefore proving the requirements of section 22.01(a)(1).

Younger acknowledges that the jury was the sole judge of witnesses' credibility. *See Bottenfield v. State*, 77 S.W.3d 349, 355 (Tex. App.—Fort Worth 2002, pet. ref'd) ("The jury is free to believe or disbelieve the testimony of any witness, to reconcile conflicts in the testimony, and to accept or reject any or all of the evidence of either side."), *cert. denied*, 539 U.S. 916 (2003). Nonetheless, he argues that "[n]o reasonable jury could have believed the testimony of [Lacy] because . . . [she] had financial motivations to accuse [Younger] . . . and her character for truthfulness was . . . questionable."

Lacy admitted at trial that she has a criminal history, including theft convictions. She also conceded that she had spent time in a mental hospital and had abused prescription drugs and other controlled substances. Lacy also testified that she had sought a crime stoppers award for reporting Younger's assault.[7] Finally, she admitted that she had filled out an application for compensation as a crime victim and had included her children's names on that

[7]Deputy Spilman testified that Lacy sought the crime stopper's award for turning Younger in for outstanding warrants.

application even though they were not living with her when the assault occurred.[8] C.Y. (Candice), Younger's sister, testified on Younger's behalf that before he allegedly assaulted Lacy, she had told Lacy to leave Carol's property because Lacy created "drama" and used drugs there.[9]

From this evidence, Younger argues that Lacy's motives were suspect and that the jury should not have believed her account of the assault. But we cannot act as a thirteenth juror concerning the credibility of Lacy's testimony—the jury's verdict implies that it found Lacy's account of the assault credible, and we must defer to that finding. *See Slagle v. State*, No. 02-14-00335-CR, 2015 WL 4692422, at *5 (Tex. App.—Fort Worth Aug. 6, 2015, pet. ref'd) (mem. op., not designated for publication) ("The jury, as the factfinder, apparently believed the testimony of Ann and Betty over Slagle and Diane, and on appeal we must defer to such credibility determinations.").

Similarly, Younger challenges Holly's credibility based on her history of using drugs and on her alleged close relationship with Lacy. During Holly's testimony, she denied using methamphetamine with Lacy, and she testified that

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[8]At the time of trial, Lacy had not received any compensation as a crime victim. At trial, she testified that she did not fully understand the questions asked on the application for compensation as a crime victim.

[9]We note, however, that when the State asked Candice whether she had any reason to doubt that Younger had hit Lacy, she replied, "Doubt? No. I helped her get her tooth fixed."

she had been closer with Younger than with Lacy. But Candice testified that Holly had a close relationship with Lacy and explained,

> [Holly] pretty much had lost everything and ended up at my mom's. And [Lacy's] family disowned her, for whatever reason, and ended up at my mom's, my mom and dad's. So they became close into going out, the methamphetamine, they had that in common. Just a lot of talking on the porch, just they became real good friends, [Holly] and [Lacy].

For the reasons explained above, the jury had the sole authority to resolve any conflicting inferences presented by this evidence and to determine that Holly's testimony concerning Younger's assault of Lacy was credible. *See Blea*, 483 S.W.3d at 33; *Slagle*, 2015 WL 4692422, at *5. The jury's verdict indicates that it resolved the conflicting inferences in favor of accepting Holly's testimony. We defer to that resolution. *See Slagle*, 2015 WL 4692422, at *5.

Finally, Younger argues that the "business records presented at trial were insufficient to prove that [Younger] caused [Lacy] any injuries." But again, Lacy testified that Younger's punch to her mouth broke her tooth, exposed a nerve, and caused the worst pain she had ever felt. The jury also saw photographs of Lacy's injuries. This evidence, which the jury was free to rely on, is sufficient to establish Lacy's bodily injury, and the jury could have rejected any competing inferences. *See* Tex. Penal Code Ann § 1.07(a)(8); *Laster v. State*, 275 S.W.3d 512, 524 (Tex. Crim. App. 2009) ("Direct evidence that a victim suffered pain is sufficient to show bodily injury.").

For these reasons, viewing the evidence in the light most favorable to the jury's verdict, we conclude that the evidence is sufficient to support Younger's conviction for assaulting Lacy. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599. We overrule his first issue.

**Exclusion of Evidence**

In his second issue, Younger argues that the trial court reversibly erred by excluding evidence that blood in Lacy's urine may have been caused by the removal of a birth-control device rather than by his punches to her ribs. During Younger's cross-examination of Lacy, the following exchange occurred:

> Q. . . . Did you ever go to the hospital or a doctor's office within the week prior of November 16th of 2015?
>
> A. I believe I went to see -- I don't know if it was within the week, I am not sure.
>
> Q. I am sorry?
>
> A. I don't know if it was within the week, I am not sure. I don't know if it was before or after.
>
> Q. Do you recall going to the doctor with [Holly] regarding a birth control device?
>
> A. With [Holly]?
>
> Q. Yes, ma'am?
>
> A. No, I don't.
>
> Q. Do you recall going to the doctor for the removal of a birth control device prior to the November 16, 2015 incident?
>
> [THE STATE]: Object to relevance.
>
> [DEFENSE COUNSEL]: Your Honor, may we approach.

THE COURT: Go ahead.

(Conference held at the bench out of the hearing of the jury and the court reporter.)

THE COURT: The objection is sustained.

[DEFENSE COUNSEL]: Pass the witness.

Younger contends that the trial court abused its discretion by sustaining the State's relevance objection. He also asserts that the trial court's error amounts to a violation of his constitutional right to present a meaningful defense. *See James v. State*, 356 S.W.3d 728, 734 (Tex. App.—Fort Worth 2011, pet. ref'd) (explaining that an evidentiary ruling denies a defendant the right to present a meaningful defense when the ruling is clearly erroneous and excludes otherwise relevant evidence that forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense).

Error in excluding evidence, whether classified as constitutional or nonconstitutional in character, must be harmful to be reversible. *See* Tex. R. App. P. 44.2(a)–(b). If the error is constitutional, we apply rule 44.2(a) and reverse unless we determine beyond a reasonable doubt that the error did not contribute to Younger's conviction or punishment. Tex. R. App. P. 44.2(a). Otherwise, we apply rule 44.2(b) and disregard the error if it did not affect his substantial rights. Tex. R. App. P. 44.2(b); *see Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999).

Without reaching the merits of the trial court's ruling on relevance, we conclude that the ruling cannot be harmful and therefore cannot be reversible. On appeal, Younger contends that the evidence concerning the removal of Lacy's birth-control device was "pivotal [to] whether [he] caused bodily injury to [her]." He argues that the "exclusion of evidence related to the birth control device rose to the level of a constitutional violation because the trial court clearly and erroneously excluded evidence that formed a vital portion of [his] defense, namely that [he] did not cause [Lacy's] injuries."

The jury, however, received a plethora of evidence concerning Lacy's injuries that did not depend on the presence of blood in her urine. Lacy testified that Younger punched her face, broke her tooth, and caused the worst pain she had ever felt. She also testified that her back hurt after the assault. She testified that a dentist removed the rest of her tooth, which was "hanging," that afternoon. Deputy Spilman testified that when he met with Lacy that night, Lacy was "visibly shaken," fearful, and injured on her face. Deputy Spilman described how photos he took of Lacy that night showed, among other depictions, bruising, a cut inside her mouth, and the place in her mouth where her tooth was missing. Holly testified that when Younger punched Lacy's face, she heard a "clank" that sounded "[l]ike teeth hitting each other really hard." She also testified that she saw Lacy's broken tooth and knew that Lacy was in a lot of pain. Candice testified that she did not doubt that Younger had hit Lacy because she helped

Lacy "get her tooth fixed." The jury received the photos showing Lacy's injuries and medical records describing her fractured tooth and her abrasions.

Based on this evidence and other evidence in the record, we cannot conclude that the exclusion of evidence relating to an alternative explanation for blood in Lacy's urine harmed Younger in the sense of affecting the jury's determination of whether Lacy sustained a bodily injury, as he argues. *See* Tex. R. App. P. 44.2(a)–(b); *Mosley*, 983 S.W.2d at 259; *see also McKinney v. State*, 59 S.W.3d 304, 312–13 (Tex. App.—Fort Worth 2001, pet. ref'd) (holding that in a case where the defendant was charged with intentionally or knowingly causing bodily injury to a child, the trial court's exclusion of testimony from the child that the defendant did not intend to cause the injury was harmless because there was other testimony about the child's burns being caused by forced immersion in hot water), *cert. denied*, 536 U.S. 968 (2002). We overrule Younger's second issue.

**Denial of Mistrial**

In his third issue, Younger contends that the trial court erred by denying his motion for mistrial after Lacy testified about his extraneous bad acts. *See* Tex. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). Before trial, Younger filed a motion in limine in which he asked the trial court to instruct witnesses to refrain from referring to his extraneous crimes or bad acts. The trial court granted the motion in limine and ordered witnesses to refrain from "making any direct or

indirect mention . . . at trial . . . of any extraneous crimes or misconduct allegedly committed by" Younger.

At trial, during Lacy's cross-examination by Younger's counsel, the following exchange occurred:

> Q. Now, you stated that you were afraid of [Younger] and that you were trying to get away from him; is that correct?
>
> A. Yes.
>
> Q. Since that -- since this particular case, have you actually gone and tried to meet with [Younger]?
>
> A. No, [I] -- went to [Candice] to try to get my father's thousand dollar ring back, which apparently [Younger] sold for drugs.
>
> [DEFENSE COUNSEL]: Your Honor, at this particular time I would ask the Court to strike that testimony and ask the jury to disregard that testimony.
>
> THE COURT: Ladies and gentlemen, you will disregard the last statement of the witness, not consider it for any purpose. Ma'am, you are instructed to answer the questions that the attorneys ask you directly without volunteering additional information. Do you understand me?
>
> THE WITNESS: Yes, sir.
>
> [DEFENSE COUNSEL]: Your Honor, at this time I would ask for a mistrial based on that statement.
>
> THE COURT: Request is denied.

We have explained that when a trial court sustains an objection and instructs the jury to disregard but denies a motion for mistrial,

> the issue is whether the trial court abused its discretion in denying the mistrial. Only in extreme circumstances, when the harm caused by the improper remark is incurable, that is, "so prejudicial that expenditure of further time and expense would be wasteful and

> futile," will a mistrial be required. In determining whether the trial court abused its discretion by denying the mistrial, we balance three factors: (1) the severity of the misconduct or prejudicial effect, (2) curative measures, and (3) the certainty of the conviction absent the misconduct.

*Reed v. State*, 497 S.W.3d 633, 639 (Tex. App.—Fort Worth 2016, no pet.) (footnotes omitted); *see Harper v. State*, 508 S.W.3d 461, 470 (Tex. App.—Fort Worth 2015, pet. ref'd).

Younger contends that the trial court abused its discretion by denying his motion for mistrial because instructing the jury to disregard Lacy's comment was not a sufficient remedy to ensure that he received a fair trial. We generally presume that a jury follows a trial court's instruction to disregard. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010), *cert. denied*, 564 U.S. 1020 (2011). And on many occasions, Texas courts have held that a trial court's prompt instruction to disregard a single, unsolicited, nonresponsive reference to a defendant's extraneous bad act will cure any harm. *See, e.g.*, *Whitaker v. State*, 977 S.W.2d 595, 600 (Tex. Crim. App. 1998) (holding that two references to extraneous bad acts committed by the defendant were harmless in light of a trial court's instruction to disregard), *cert. denied*, 525 U.S. 1108 (1999); *Sullens v. State*, No. 02-13-00364-CR, 2015 WL 3523143, at *2 (Tex. App.—Fort Worth June 4, 2015, pet. ref'd) (mem. op., not designated for publication) (holding that even if a witness's reference to an extraneous bad act violated a motion in limine, "an instruction to disregard the comment would have been sufficient to cure the harm"); *Hill v. State*, No. 02-06-00357-CR, 2007 WL 2792863, at *6 (Tex. App.—

Fort Worth Sept. 27, 2007, pet. ref'd) (mem. op., not designated for publication) (holding that a police officer's nonresponsive reference to the defendant's "previous burglaries," although violating a motion in limine, was harmless in light of an immediate instruction to disregard).[10]

Younger's argument does not persuade us to depart from the reasoning in these cases. We hold that the trial court's instruction to disregard Lacy's statement cured any harm and that the trial court did not abuse its discretion by denying Younger's motion for mistrial. *See Reed*, 497 S.W.3d at 639; *Dozal*, 2015 WL 120491, at *3–4. We overrule Younger's third issue.

**Conclusion**

Having overruled all of Younger's issues, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER, KERR, and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: November 9, 2017

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[10]These decisions defeat Younger's assertion that the "jury instruction was incapable of curing the error because human nature makes it impossible for someone to disregard information that they know."