Juvenile Law Case Summaries

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No evidence of extrensic fraud in bill of review proceedings when complainant recanted her testimony [In re M.P.A.] (03-1-10).

On December 19, 2002, the Austin Court of Appeals held that the juvenile petitioner had not made a claim for relief in bill of review proceedings since there was no evidence of prosecutorial involvement in any false testimony presented by the complainant in the underlying juvenile proceedings.

03-1-10. In the Matter of M.P.A., S.W.3d , No. 03-02-00068-CV, 2002 WL 31835744, 2002 Tex.App.Lexis __ (Tex.App.-Austin 12/19/02) Texas Juvenile Law (5th Ed. 2000).

Facts: On October 13, 1999, appellant M.P.A., a juvenile at the time, was adjudicated delinquent on two counts of aggravated sexual assault of a child. The juvenile court sentenced him to a determinate sentence of twenty years and remanded him to the custody of the Texas Youth Commission. This Court affirmed the adjudication on November 30, 2000. In re M.P.A., No. 03 00 00211 CV (Tex.App. Austin Nov. 30, 2000, no pet.) (not designated for publication). Claiming to have discovered new, expansive, and convincing evidence, unavailable at the time of the adjudication trial, that establishes appellant's innocence beyond a reasonable doubt, appellant filed with the trial court a petition for bill of review. Following a bench trial, the trial court denied appellant's bill of review. By twelve issues, appellant challenges the trial court's judgment denying the bill of review. We hold that M.P.A. has not met the requirements to obtain relief by bill of review.

Held: Affirmed.

Opinion Text: BILLS OF REVIEW

A bill of review is an equitable proceeding by a party to a former action who seeks to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial. Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 926 27 (Tex.1999). A bill of review plaintiff must prove three elements: (1) a meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim, (2) which he or she was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, which is (3) unmixed with the fault or negligence of the plaintiff. Hanks v. Rosser, 378 S.W.2d 31, 34 35 (Tex.1964); Alexander v. Hagedorn, 226 S.W.2d 996, 998 (Tex.1950). Bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies. Herrera, 11 S.W.3d at 927. If legal remedies were available but ignored, relief by bill of review is unavailable. Id. Although a bill of review is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. Id.

The procedure for conducting a bill of review proceeding is set out in Baker v. Goldsmith, 582 S.W.2d 404 (Tex.1979). First, the bill of review plaintiff must file a petition alleging with particularity the facts establishing the three elements of a bill of review. Id. at 408. The plaintiff must then present, as a pretrial matter, prima facie proof to support the meritorious defense alleged in the petition. Id. 408 09. If the court determines that the plaintiff has presented a prima facie meritorious defense, the court may then conduct a trial, during which the plaintiff must prove, by a preponderance of the evidence: (1) whether the he was prevented from asserting the meritorious defense due to fraud, accident, or wrongful conduct by the opposing party or by official mistake (2) unmixed with the fault or negligence of the plaintiff. Id. If the plaintiff satisfies this burden, the underlying controversy between the parties is retried. Id. The district court may try these remaining two elements in conjunction with the retrial of the underlying case or may conduct a separate trial on the elements. Id.; Martin v. Martin, 840 S.W.2d 586, 591 (Tex.App. Tyler 1992, writ denied). The plaintiff may demand a jury trial on the two remaining elements. Martin, 840 S.W.2d at 592.

BACKGROUND

The State alleged in two counts that on or about May 1, 1997, appellant, who was fourteen at the time, committed aggravated sexual assault of S.A., his seven year old cousin. Appellant's brother was accused of similar conduct involving the same victim; he, however, pleaded true to the allegations, received a five year determinate sentence, and was not a part of appellant's trial. S.A. testified at appellant's trial and was subjected to cross examination by appellant's counsel. Her testimony was consistent with the allegations made against appellant. Following the trial, the jury found that appellant had committed aggravated sexual assault and affixed punishment at twenty years. Appellant appealed the judgment to this Court, and we affirmed.

Subsequently, appellant filed a petition for bill of review in the trial court, based on "expansive, striking, persuasive and convincing epiphany of new evidence." This evidence, according to appellant, consisted of the complaining witness's recantation of her previous allegations, along with other evidence suggesting that S.A. was influenced by her mother when she accused appellant of aggravated sexual assault. The trial court conducted an evidentiary hearing, providing appellant with an opportunity to present prima facie proof of a meritorious defense. During this hearing, S.A. testified that appellant had never "molested" her and that she had testified otherwise only because her mother put her up to it. At the conclusion of this hearing, the trial court determined that appellant had presented prima facie evidence of a meritorious defense and proceeded to conduct a full trial on the merits of appellant's bill of review.

During the trial, appellant presented evidence and testimony from a number of witnesses, many of whom had testified during appellant's initial adjudication trial. Throughout the trial, appellant maintained his theory that S.A. had accused him of sexual assault because her mother had put her up to it. Appellant posited that S.A.'s parents were going through a divorce, and S.A.'s mother convinced S.A. to fabricate the allegations against appellant in order to gain an advantage in pending custody proceedings. Following a trial to the court, the court denied appellant's bill of review. The court filed findings of fact and conclusions of law, in which it found that S.A. was subjected to manipulation by both her mother and her father, and concluded that appellant had failed to sustain his burden of establishing that the State's extrinsic fraud prevented appellant from asserting his meritorious defense. This appeal followed.

DISCUSSION
Third Amended Petition

By his first issue, appellant asserts that the trial court erred in refusing to consider his third amended petition. Appellant filed his second amended petition for bill of review and application for writ of habeas corpus on July 20, 2001; appellant, however, informed the trial court that he had no intention of pursuing the writ of habeas corpus, and that he had inadvertently kept it in the heading. The trial court held a hearing on appellant's second amended petition on July 31 and August 1. The proceedings were then postponed until October 31. In the interim, appellant filed a third amended petition for bill of review on August 29. This third amended petition removed the writ of habeas corpus language from the title of the pleading. It also added that S.A. had testified in open court that she was not assaulted by appellant and that S.A. and her mother had committed extrinsic or intrinsic fraud by lying to the police and lying at appellant's adjudication trial. The trial court struck appellant's third amended petition as being filed untimely.

Rule 63 of the Texas Rules of Civil Procedure provides that parties may amend their pleadings, provided that pleadings offered for filing within seven days of the date of trial or thereafter, "shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party." Tex.R. Civ. P. 63. And rule 66 allows parties to amend their pleadings during a trial if "the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits." Tex.R. Civ. P. 66. An amendment may be allowed even after the verdict but before judgment. Chambless v. Barry Robinson Farm Supply, Inc., 667 S.W.2d 598, 601 (Tex.App. Dallas 1984, writ ref'd n.r.e.). Appellant argues that his third amended petition did not surprise or prejudice the State.

The party complaining of the trial court's refusal to consider an amended pleading has the burden to show an abuse of discretion. European Crossroads' Shopping Ctr., Ltd. v. Criswell, 910 S.W.2d 45, 53 (Tex.App. Dallas 1995, writ denied) (citing Hardin v. Hardin, 597 S.W.2d 347, 349 (Tex.1980); Clade v. Larsen, 838 S.W.2d 277, 280 (Tex.App. Dallas 1992, writ denied)). We will not disturb the trial court's ruling unless the complaining party shows an abuse of discretion. Id. (citing Hardin, 597 S.W.2d at 349 50; Clade, 838 S.W.2d at 280).

Parties may amend their pleadings only with the trial court's permission within seven days of a trial date or afterward. Tex.R. Civ. P. 63. The trial court has no discretion to refuse an amended pleading unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment presents a substantive change that would alter the nature of the trial and is thus prejudicial on its face. Chapin & Chapin, Inc. v. Texas Sand & Gravel Co., 844 S.W.2d 664, 665 (Tex.1992) (quoting Greenhalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 939 (Tex.1990)).

The trial court stated that it was striking appellant's third amended petition because it was untimely filed. Because an amendment to a pleading may be allowed even after the verdict, we conclude it was error for the trial court to strike the third amended petition on this

basis. See Chambless, 667 S.W.2d at 601. Moreover, because the State offered no showing of surprise or prejudice, the trial court had no discretion to refuse the amended pleading on this basis either.

Our review of the record, however, also reveals that appellant failed to request leave of the trial court before filing his third amended petition, after the hearing on the bill of review had already begun. A trial court does not abuse its discretion in striking an amended petition that is filed without leave of court. Forest Lane Porsche Audi Assocs. v. G & K Servs., Inc., 717 S.W.2d 470, 473 (Tex.App. Fort Worth 1986, no writ).

Even if appellant had sought leave of the court before filing his third amended petition, appellant has shown no harm as a result of the trial court's refusal to consider the third amended petition. See Tex.R.App. P. 44.1(a); Chambless, 667 S.W.2d at 601. Through his third amended pleading, appellant sought to delete the writ of habeas corpus language from the heading, but appellant had already informed the court that he was abandoning the writ action, and the trial court had acquiesced. Furthermore, as appellant concedes, his third amended petition added only an additional manner and means by which fraud was committed S.A. and her mother lied to the police about the sexual assault allegations against appellant and S.A. lied during appellant's adjudication trial. Although the trial court struck the amended pleading, the trial court heard S.A. testify that she had lied to the police about appellant sexually assaulting her and had lied during his adjudication trial. And although S.A.'s mother was not a witness during the bill of review trial, evidence of her dishonesty was before the court. Indeed, in its findings of fact and conclusions of law, the trial court found that S.A. had been manipulated by her mother. Nevertheless, the trial court concluded that appellant failed to establish that the State committed extrinsic fraud, which prevented appellant from asserting his meritorious defense during his adjudication trial. We conclude that if the trial court erred in striking appellant's third amended petition, appellant has failed to show how this error probably caused the rendition of an improper judgment. Appellant's first issue is overruled.

Motion for Discovery

By his second issue, appellant argues that the trial court committed error by ruling that a discovery order requiring the State to disclose witnesses applied only if the bill of review were granted and the petition for delinquent conduct (the underlying case) were retried, but did not apply to the preliminary portion of the bill of review proceedings. Appellant filed a motion for discovery in his bill of review action on March 6, 2000, requesting among other things, a "list of the names and addresses of all witnesses the prosecution intends to call at trial." The trial court held a pretrial hearing on the discovery motion on July 19, 2001. During the hearing, the State objected to appellant's request. Initially, the court appeared confused as to which witnesses appellant was requesting be disclosed. The court inquired as to whether appellant sought a list of witnesses the State intended to call during a retrial of the underlying juvenile case should the bill of review be granted, or whether appellant sought a list of all witnesses the State intended to call during the entire bill of review proceeding. Appellant answered that he requested a list of all witnesses that the State intended to call both during the bill of review portion of the proceeding and the retrial of the juvenile case should the bill of review be granted. The court then ruled: "All right, [the State's] objections's [sic] denied. You're granted the list of witnesses."

Later, after appellant presented prima facie evidence of his meritorious defense, the State asked the court for leave to present rebuttal evidence. Appellant objected, arguing that a bill of review defendant is not allowed to present rebuttal evidence during the meritorious defense portion of the bill of review proceeding and furthermore that the State failed to identify any witnesses that it intended to call during the bill of review proceeding. The trial court apparently failed to remember its prior ruling and responded to appellant's objections as follows: "No, sir. You continue to mischaracterize what The Court has ordered [the State] to do, Mr. Lavin. Your Motion for Discovery asked for a list of witnesses at the trial of this case. You did not say at the bill of review. And as I understand it, [the State] provided you with a list of witnesses that he would anticipate that he would have to recall if this case was re tried." The trial court nevertheless denied the State's request to present rebuttal evidence and found that appellant made a prima facie showing of a meritorious defense.

Afterwards, when the trial court was attempting to gauge the amount of time needed by the parties to conduct the bill of review trial, the State informed the court that it intended to call three witnesses during the presentation of its defense. Appellant once again objected based on the State's failure to list any witnesses. The trial court again recollected that it had ruled that the State only had to provide a witness list if the bill of review were granted and the underlying juvenile case were retried. The court explained that appellant's request for discovery was not very specific, and that it was "not going to penalize, did not, have not and will not penalize The State for the lack of specificity in your request for discovery."

Later, after appellant concluded his presentation of evidence during the bill of review proceeding, the State called two witnesses. Appellant reurged his objection to the State presenting any witnesses because it had failed to list them in response to discovery requests. The trial court overruled appellant's objection, again stating that its understanding of its prior ruling was that the State would only have to provide a list of witnesses it intended to call during the retrial of the juvenile case should the bill of review be granted. The State then called two witnesses.

Under Texas Rule of Civil Procedure 193.6, if a party fails to make a discovery response in a timely manner, that party may not

introduce in evidence the information that was not disclosed or offer the testimony of a witness who was not properly identified. Tex.R. Civ. P. 193.6. The sanction is automatic. See Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex.1989). The exception is when the party seeking to introduce the evidence shows good cause for the failure to timely respond and that the failure to timely respond will not unfairly surprise or prejudice the other party. Tex.R. Civ. P. 193.6. Determination of good cause is within the sound discretion of the trial court. Morrow v. H.E.B., Inc., 714 S.W.2d 297, 297 98 (Tex.1986). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles, or equivalently, whether under all the circumstances of the particular case the trial court's action was arbitrary or unreasonable. Koslow's v. Mackie, 796 S.W.2d 700, 704 (Tex.1990); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 42 (Tex.1985).

The record reflects that the trial court ordered the State to produce a list of all witnesses it intended to call during the entire bill of review proceeding and did not limit the list to those witnesses that would be called only during a retrial of the juvenile case. There is no indication in the record that the State attempted to show good cause for its failure to respond to the discovery request. Thus, the trial court erred in admitting the testimony of the undisclosed witnesses.

When a trial court errs by allowing the testimony of an undisclosed witness without a showing of good cause, we must determine whether the trial court's action constituted reversible error. Tex.R.App. P. 44.1; Gee, 765 S.W.2d at 396. To obtain reversal of a judgment based upon error of the trial court in admitting or excluding evidence, appellant 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 rendition of an improper judgment. Tex.R.App. P. 44.1; Gee, 765 S.W.2d at 396. The erroneous admission of testimony that is merely cumulative of other testimony and is not controlling on a material issue dispositive of the case is harmless error. Gee, 765 S.W.2d at 396. We will review the entire record to determine whether the judgment was controlled by the testimony that should have been excluded. Id.

While the failure to designate witnesses can undoubtedly prejudice a party, for example when there are a great number of possible witnesses, the State in this case called only two witnesses. The first of those two witnesses was Erika Jordan, a police officer with the City of Harker Heights. Officer Jordan was the investigating officer in the underlying juvenile case against appellant. Through this witness, the State offered and the trial court admitted the written confession of appellant's brother, who admitted to the delinquent conduct for which he was charged. It appears from the record that appellant had intended to call Officer Jordan as a witness during his case in chief, but chose not to. Officer Jordan's testimony neither confirmed nor disputed the existence of extrinsic fraud that prevented appellant from asserting his meritorious defense. Ultimately, it was appellant's failure to establish extrinsic fraud that resulted in the trial court's denial of his bill of review. Because Officer Jordan's testimony was not controlling on this material issue, which was dispositive of the case, we conclude that the erroneous admission of her testimony was harmless.

The second witness called by the State was Loretta Lewis Matthews, an evidence researcher hired by S.A.'s father. It appears from the record that appellant intended to call Matthews as a witness during his case in chief as well, but chose not to. Matthews administered a "scan questionnaire" to S.A. in an effort to determine S.A.'s truthfulness regarding the sexual assault allegations she made against appellant. It was after the administration of this scan questionnaire that S.A. first confided that she had lied about the sexual assault allegations. Before Matthews was called to testify on behalf of the State, S.A.'s father, Stephen Arena, had already testified without objection about this exact same evidence when he was cross examined by the State. Improper admission of evidence does not constitute reversible error when the same evidence is already in the record. Because Matthews's testimony was merely cumulative of other evidence in the record, we hold the trial court's erroneous admission of her testimony constituted harmless error. We overrule appellant's second issue.

Arlene Stoddard's Testimony

By his third issue, appellant claims the trial court committed error by sustaining a hearsay objection to the testimony of a licensed professional counselor concerning S.A.'s statements to the counselor refuting a sexual assault allegation. Appellant called Arlene Stoddard, a licensed professional counselor, to testify about her counseling of S.A.. When appellant asked, "Did [S.A.] tell you anything about her mom, as it relates to her testimony," the State objected based on hearsay. The trial court sustained the objection.

When appellant again attempted to elicit the same information from the witness, the trial court sustained an objection based on privilege. In response, appellant recalled S.A. to the witness stand, and S.A. waived any testimonial privilege. The State then withdrew its assertion of privilege, and appellant again asked Stoddard: "Can you tell The Court, ... what it is that [S.A.] told you about her mom her mom's involvement in her testimony?" The State once again raised a hearsay objection, which the trial court sustained. Appellant then perfected a bill of exception, during which Stoddard testified: "[S.A.] said that her mother influenced her in what she said about the abuse." Appellant claims this statement fell within two exceptions to the hearsay rule: it was a statement for medical diagnosis or treatment, see Tex.R. Evid. 803(4), and it was a statement made against interest, see id. 803(24).

This Court has recognized that a child's statements to a physician or other health care professional describing sexually abusive acts or the abuser can be admissible under the medical diagnosis or treatment exception. Fleming v. State, 819 S.W.2d 237, 247 (Tex.App. Austin 1991, pet. ref'd); see also Moore v. State, 82 S.W.3d 399, 403 05 (Tex.App. Austin 2002, pet. ref'd). Appellant has not

established that Stockard is a physician or other health care professional, or that the excluded out of court statement satisfies the pertinency requirement. United States v. Renville, 779 F.2d 430, 436 (8th Cir.1985) ("[T]he content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis."). The medical diagnosis or treatment exception does not encompass every statement made by a child victim of sexual abuse to a therapist, or support the blanket conclusion that all statements made to a therapist by a victim of sexual abuse are admissible as having been made for the purposes of treatment. Jones v. State, No. 03 02 00022 CR, slip op. at __, 2002 Tex.App. LEXIS 8545, at *9 10 (Tex.App. Austin December 5, 2002, no pet. h.); Moore, 82 S.W.3d at 413 (Patterson, J., concurring).

Likewise, appellant has not established that the statement was sufficiently against his interest to qualify for the exception provided by rule 803(24). That rule creates an exception to the hearsay rule for a statement that at the time of its making so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless she believed it to be true. Tex.R. Evid. 803(24). All hearsay exceptions require a showing of trustworthiness. Robinson v. Harkins & Co., 711 S.W.2d 619, 621 (Tex.1986). The rule is founded on the principle that the ramifications of making a statement is so contrary to the declarant's interest that she would not make the statement unless it were true. Id. Appellant suggests that S.A.'s statements to Stoddard subjected her to criminal liability for perjury, thus making the statement trustworthy. We disagree. According to Stoddard, S.A. stated that "her mother influenced her in what she said about the abuse." This statement is not one that so far tended to subject S.A. to criminal liability so as to render it trustworthy. She merely stated that she was influenced by her mother, not that she lied while under oath. See Tex. Pen.Code Ann. § 37.02 (West 1994).

Even if the proffered statement fell within an exception to the hearsay rule, any error in excluding it would not be harmful because the same information had already been admitted into evidence. Before Stoddard was called to the witness stand, S.A. herself had already testified that her mother told her to lie at appellant's adjudication trial. Ordinarily this Court will not reverse a judgment because a trial court erroneously excluded evidence that is cumulative of other evidence admitted in the record. Texas Dep't of Transp. v. Able, 35 S.W.3d 608, 617 (Tex.2000). We overrule appellant's third issue.

Report of Dr. Charles Pierce

By his fourth issue, appellant argues that the trial court erred by refusing to admit a psychological report on the basis of confidentiality/privilege. Dr. Charles Pierce, a psychologist, testified on behalf of appellant. Dr. Pierce examined S.A.'s mother and prepared a report at the direction of a Bell County trial court during the 1994 divorce and custody proceedings involving S.A.'s mother. Appellant sought to introduce the report to demonstrate that S.A.'s mother had a history of making false allegations of sexual misconduct in custody disputes. The State objected to the introduction of the report based on relevance, hearsay, and privilege. The trial court sustained the State's privilege assertion.

Texas Rule of Evidence 510 addresses the confidentiality of mental health records. It defines a confidential communication as one that is

not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

Tex.R. Evid. 510(a)(4). The general rule of privilege provides that communications between a patient and a professional or records of a patient maintained by a professional shall not be disclosed during civil cases. Id. 510(b)(1).

The report was prepared for the 1994 divorce case and was included in that file. The file had been sealed; however, the file could be viewed by other judges. Appellant claimed he obtained the report from the Department of Protective and Regulatory Services and not from the sealed divorce file. Assuming that this report was not intended to be disclosed to third persons and was indeed confidential, rule 510 provides that only two people may claim the confidentiality privilege: (1) the patient or the patient's representative and (2) the professional, who may claim the privilege on behalf of the patient. Id. 510(c). In this case, Dr. Pierce did not claim the privilege, and the patient, S.A.'s mother, was not available to claim the privilege. The privilege was asserted by the State. It appears that the trial court erred in relying on the State's claim of privilege to deny admission of Dr. Pierce's report.

Notwithstanding the court's erroneous reliance on the State's claim of privilege, it appears that the exclusion of the report was harmless. See Tex.R.App. P. 44.1. After the trial court sustained the State's objection, appellant perfected a bill of exception containing the following exchange between appellant's counsel and Dr. Pierce:

Q Now, it [the report] does indicate that Mrs. Arena [S.A.'s mother] accused Danny Profett [Mrs. Arena's former husband] of sexual assault, is that correct?
A No.

Q Of some type of sexual misconduct.
A No.
Q Let me see it, sir.
A The only information that I had was that Mr. Profett had been accused of some type of sexual misconduct. If I remember correctly, I did not know that that had been that that had originated with Mrs. Profett or Mrs. Arena, excuse me.
Q Page Three of the report says as far as you can tell, it's been reported to you as having been officially dismissed as unsubstantiated, is that right?
A That entire sentence is "Allegations of sexual and/or physical abuse have been made against Mr. Profett in the state of California, and though [sic] them as having been resolved, officially resolved, that's unsubstantiated. I have no formal knowledge of the allegations or their disposition."

According to Dr. Pierce's testimony, the report did not include the information for which appellant sought its admission into evidence, that S.A.'s mother had accused her former husband of sexual abuse. Moreover, according to Dr. Pierce, it is not clear from the report that the allegations of abuse, wherever they came from, were false. The statements in the report are ambiguous; they appear to indicate that the allegations had been resolved but the resolution was unsubstantiated. The beneficial character this report may have had, if any, is minimal. Thus, we cannot say that the judgment turns on this particular evidence, which was excluded. We hold that any error in excluding the report was harmless. Appellant's fourth issue is overruled.

Copy of Divorce File

By his fifth issue, appellant claims the trial court committed error by refusing to admit a certified copy of a divorce file on the basis of relevance. Appellant offered into evidence a certified copy of a district court file relating to a divorce action between S.A.'s parents. The divorce had been filed before S.A.'s allegations of sexual assault. The State objected on the basis of relevancy. Appellant argued to the trial court that the file would reflect that S.A.'s mother was involved in a custody dispute with S.A.'s father at about the same time that S.A. accused appellant of sexual misconduct. Appellant further alleged that S.A.'s mother was ordered to submit to a psychological evaluation, but failed to do so. He argued that the timing of the custody dispute, coupled with the order for a psychological evaluation, bore some relevance to S.A.'s allegations of sexual misconduct by appellant. Appellant offered the file into evidence two more times during the proceeding, and the trial court sustained the State's relevancy objection both times.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex.R. Evid. 401. All relevant evidence is admissible unless prohibited by the Constitution, statute, or rules. Id. 402. The trial court determines preliminary questions about admitting or excluding evidence. Id. 104(a). To obtain reversal of a judgment based upon error of the trial court in exclusion of evidence, the following must be shown: (1) that the trial court did in fact commit error; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Tex.R.App. P. 44.1(a)(1); City of Brownsville v. Alvarado, 897 S.W.2d 750, 753 (Tex.1995). A trial court has broad discretion in determining the admissibility of evidence, and its ruling should not be reversed absent an abuse of discretion. Alvarado, 897 S.W.2d at 753; Gee, 765 S.W.2d at 396. A trial court abuses its discretion when it acts without regard to any guiding rules or principles. Downer, 701 S.W.2d at 241 42. Whether a trial court abused its discretion in making an evidentiary ruling is a question of law. Jackson v. Van Winkle, 660 S.W.2d 807, 810 (Tex.1983).

The file that appellant sought to admit into evidence did not include any allegation of sexual assault or abuse against anyone. Its only relevance, according to appellant, was the fact that S.A.'s parents were going through a divorce at about the same time that S.A. accused appellant of molesting her. We cannot say that the trial court acted without regard to any guiding rules or principles in deciding to exclude this evidence based on its lack of relevance to the bill of review proceeding.

Even if we were to agree that the file had some relevance to the bill of review proceeding and the trial court erred in excluding it, appellant has not established that this error was harmful. The fact that S.A.'s parents were divorcing when S.A. accused appellant had been presented to the court. For example, appellant called Vicky O'Dell to testify during his case in chief. O'Dell was an acquaintance of both of S.A.'s parents. During direct examination of O'Dell, appellant asked, without objection: "Do you know whether or not she [S.A.'s mother] was in the process of getting a divorce at that time?" Over the State's objection, O'Dell testified that S.A.'s mother told O'Dell that "her and Stevie were Stephen, was getting divorced, getting separated, and she was mad about that." The divorce file, therefore, was merely cumulative of other evidence in the record, and any error in excluding it was harmless. Appellant's fifth issue is overruled.

Brother's Confession

By his sixth issue, appellant argues that the trial court committed error by admitting the contents of a court file involving his brother, including his brother's written confession and other irrelevant hearsay evidence. After appellant rested, the State requested that the trial court take judicial notice of the contents of the court file relating to appellant's brother who had pleaded true to the allegation of aggravated sexual assault on S.A. and was committed to the Texas Youth Commission. Appellant objected based on relevance; the

trial court overruled appellant's objection and took judicial notice of the file. In the file was a written statement by appellant's brother in which he admitted to committing the offense, but denied that appellant was guilty of the same charge.

Appellant's theory throughout the bill of review hearing was that S.A. fabricated the sexual assault charge she made against appellant and his brother at the behest of her vindictive mother, who sought to punish her former husband's family members and gain an advantage in a custody dispute. Indeed, S.A. testified during the bill of review hearing that neither appellant nor his brother ever hurt her. She testified that the reason she recanted her story was because "it's not right that they're behind bars for something they didn't do."

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. Tex.R. Evid. 401. The fact that appellant's brother confessed to having sexually assaulted S.A. bears some relevance to whether S.A. fabricated the sexual assault allegations made against appellant and his brother. We cannot say that the trial court's admission of this evidence constituted an abuse of discretion. We therefore hold that the trial court did not err in taking judicial notice of the file, and we overrule appellant's sixth issue.

Carolyn Martin's Report

By his seventh issue, appellant claims the trial court committed error by excluding testimony from witness Carolyn Martin and by threatening to choke appellant's counsel. [FN2] Carolyn Martin is a child protective service worker employed by the Texas Department of Protective and Regulatory Services. Through this witness, appellant offered into evidence Martin's summary disposition report, and the trial court admitted it. Appellant then offered into evidence a report that was identical to the one the trial court had already admitted, except that the second report included handwritten notes on it. Appellant offered the second document, not "to prove the truth of the matter asserted," but to show that there "is some question about the credibility of [the Department of Protective and Regulatory Services'] record keeping because the record that they sent to us did not have those specific notations." The State objected based on hearsay, and the trial court sustained the objection. Later in the hearing, however, appellant reoffered the same document, and the trial court admitted it without objection. Thus, any error alleged by appellant was rendered moot and harmless when the trial court admitted the document into evidence. We overrule the seventh issue.

FN2. We discuss the portion of appellant's seventh issue regarding the trial court's threat to choke appellant's counsel under our discussion of appellant's eighth issue.

Judicial Misconduct

By his eighth issue, appellant alleges that the trial court threatened appellant's counsel using intimidating tactics and embarrassed appellant's counsel in open court. By his eleventh issue, appellant alleges that the "trial court committed error by making rulings indicating a pattern that calls into question the court's fairness and impartiality." [FN3] The portion of the record cited to us by appellant reveals a disagreement between the trial court and appellant's counsel concerning the manner in which appellant's counsel was questioning his witness, Martin. When appellant's counsel offered the second document into evidence, the trial court sustained the State's hearsay objection. The disagreement ensued when appellant's counsel attempted to "prove up" the document, with the court's permission:

FN3. Appellant fails to cite any authority in support of his eleventh issue. Nevertheless, we will consider it along with his eighth issue.

Q All right. Do you notice the distinction between that paper and this paper (indicating)?
A Yes.
Q And what is the distinction?
A The distinction is this (indicating) has notes at the bottom and this one (indicating) does not.
Q Can you explain why there would be notes on a copy that my client had in his possession and no notes on this one (indicating)?

(Emphasis added.) Before this exchange occurred, there had been no evidence that the document at issue had been in appellant's possession. The trial court, apparently incensed by the reference to facts not yet in evidence, scolded appellant's counsel:

THE COURT: If you don't stay within the record in this trial I'm going to choke you, instead of hold you in contempt. There is no evidence about what your client has in his possession and you've just asked her a question to testify under oath based upon supposedly something that your client has in his possession.
Now, stay within the record, Mr. Lavin. Do you understand my ruling? And do you understand my admonishment, yes or no?
MR. LAVIN: Yes, sir.
THE COURT: Last warning.
MR. LAVIN: Yes, sir.
Q [by Lavin] Would you please finish your answer, ma'am?

THE COURT: Mr. Lavin, your question is improper
MR. LAVIN: I'll ask another one, judge.
THE COURT: because it was based on a premise of a fact that is outside the record as it currently exists in this proceeding. Now, if you want to rephrase your question or ask another question, do so.
MR. LAVIN: Yes, sir.
THE COURT: But I'm instructing this witness not to attempt to answer the question that you just asked because The Court finds that it's an improper question.

Appellant's counsel continued questioning Martin about the distinction between the two documents, and during the course of the questioning, the trial court became confused in attempting to follow along:

Q Let's start again, ma'am. Do you see a distinction between those two pages?
A Yes, I do.
Q And do you have an explanation
THE COURT: What two pages, Mr. Lavin?
MR. LAVIN: Judge, she understood my question.
THE COURT: I don't understand your question and I'm the one that has to make the decision, Mr. Lavin.
MR. LAVIN: Yes, sir. The page that she's referring to in her document that she's already identified and the document that I have marked as Plaintiff's Exhibit 21. And I apologize if The Court didn't understand the question. The witness did and I'm sorry.
THE COURT: Well, I'll tell you what, Mr. Lavin, since I'm the one that ultimately has to make a decision, if I don't understand it it's not going to do you much good if it comes into evidence, is it?
MR. LAVIN: Judge
THE COURT: No, Mr. Lavin, I don't want any response from my remark. I just want to know what you're talking about.
MR. LAVIN: Judge, you may have to hold me in contempt.
THE COURT: I'm fixing to.
MR. LAVIN: I'm a Christian and I'm a professional and I'm a gentleman and I am going to continue to be a Christian and a professional and a gentleman, no matter what you say.
Now, I would like an opportunity to examine this witness in my own way and if you don't like the way I'm doing it you can tell me so, but there's no reason to be discourteous. I'm begging The Court to please allow me to get this trial underway.
THE COURT: Mr. Lavin, if you'd like to stay within the rules we will proceed much faster.
MR. LAVIN: Yes, sir. I am trying to stay in the rules, judge, and if I don't
THE COURT: Well, you're not being very successful at it in my opinion.

Appellant directs this Court to other similar exchanges in the record, in which appellant's counsel and the trial court disagreed about the manner in which the evidence should be presented.

To reverse a judgment on the ground of judicial misconduct, we must find judicial impropriety, i.e., error coupled with probable prejudice to the complaining party. Silcott v. Oglesby, 721 S.W.2d 290, 293 (Tex.1986); Erskine v. Baker, 22 S.W.3d 537, 539 (Tex.App. El Paso 2000, pet. denied); Pitt v. Bradford Farms, 843 S.W.2d 705, 706 (Tex.App. Corpus Christi 1992, no writ). The trial judge is responsible for the general conduct of the trial and has considerable discretion in expressing himself while he controls the trial; however, he should refrain from verbally confronting or displaying displeasure towards counsel. Food Source, Inc. v. Zurich Ins. Co., 751 S.W.2d 596, 600 (Tex.App. Dallas 1988, writ denied). We examine the record as a whole to determine whether the trial court's impropriety harmed appellant. Brown v. Russell, 703 S.W.2d 843, 847 (Tex.App. Fort Worth 1986, no writ).

Our review of the record reveals that while it was inappropriate for the trial judge to suggest that he would choke appellant's counsel if he failed to stay within the rules, the comment was not prejudicial to the outcome of the trial. The threat to counsel was clearly ill advised and inappropriate. It apparently arose from the court's frustration because the trial judge was forced repeatedly to admonish appellant's counsel to stay within the record. Nevertheless, the judge should have restrained himself. While we do not sanction the judge's comments, because the trial judge was the trier of fact in this case, it was not an abuse of discretion for him to ensure that he understood the testimony and evidence that appellant's counsel was attempting to elicit.

As further evidence of judicial misconduct, appellant directs this Court to two separate exchanges between his counsel and the trial judge. In both instances, appellant's counsel asked a witness a question that called for hearsay, and the court initially sustained the State's objection. In both instances, appellant's counsel argued to the trial court that the testimony fell within an exception to the hearsay rule, but would not disclose to the trial court which exception he believed applied. Appellant's counsel argued, on both occasions, that the trial judge should first listen to the proffered testimony, and then appellant's counsel would identify the appropriate hearsay exception for the trial court to consider. In both instances, the trial judge suggested to appellant's counsel that he identify the applicable hearsay exception first because the trial judge is "not required to guess." Ultimately, the proffered testimony was admitted into evidence in both instances.

These two instances do not exhibit judicial impropriety. Rather, they reflect the manner in which appellant's counsel proceeded throughout the trial. The record reveals a number of occasions in which the trial judge announced his ruling, and appellant's counsel continued to reurge the same arguments; in doing so, he sometimes strayed from the record and injected facts not yet in evidence. On those occasions, unlike the earlier threat to counsel, the court's admonishments were appropriate and no stronger than necessary.

Moreover, appellant has failed to show how he was prejudiced by the trial judge's conduct. Throughout the bill of review proceeding, the trial judge appears to have made thoughtful and impartial rulings and, in most instances, explained the reasoning behind his rulings to the parties. This was not a jury trial; the judge was the sole fact finder. The trial judge's comments were heard only by the parties and their counsel. We overrule appellant's eighth issue.

Testimony of Loretta Lewis Matthews

By his ninth issue, appellant combines numerous complaints regarding Loretta Lewis Matthews's testimony. He alleges that the trial court committed error by admitting the testimony of Loretta Lewis Matthews and by finding that she was not an "expert" [FN4] and that she was involved in a conspiracy to manipulate S.A. into recanting her testimony. Appellant's issue is multifarious. If a court concludes that argument under an issue is multifarious, the court can refuse to review the issue, or it may consider the arguments if it can determine, with reasonable certainty, the basis of the alleged error. Shull v. United Parcel Serv., 4 S.W.3d 46, 51 (Tex.App. San Antonio 1999, pet. denied); Bell v. Texas Dep't of Crim. Justice Inst'l Div., 962 S.W.2d 156, 157 n. 1 (Tex.App. Houston [14th Dist.] 1998, pet. denied).

FN4. We note that neither appellant nor the State offered Matthews as an expert witness.

Moreover, although appellant included references to facts in the record, he failed to cite any authority showing his burden of proof or the standard of review to be applied on appeal. Although courts generally construe the briefing rules liberally, an issue unsupported by citation to authority presents nothing for this Court to review. Raitano v. Texas Dep't of Pub. Safety, 860 S.W.2d 549, 554 (Tex.App. Houston [1st Dist.] 1993, writ denied); BLS Limousine Serv., Inc. v. Buslease, Inc., 680 S.W.2d 543, 547 (Tex.App. Dallas 1984, writ denied). This Court has no duty to search for pertinent authority. Raitano, 860 S.W.2d at 554. Thus, appellant has waived the alleged error.

Extrinsic Fraud

By his tenth issue, appellant contends the trial court committed error by concluding that the fraud committed by S.A. and her mother constituted intrinsic fraud. The conclusion of law about which appellant complains states: "S.A.'s recantation of her prior testimony, standing alone and if now believed, constitutes 'intrinsic fraud' only." We review a trial court's conclusions of law de novo. Anderson v. City of Sever Points, 806 S.W.2d 791, 794 (Tex.1991); Black v. City of Killeen, 78 S.W.3d 686, 691 (Tex.App. Austin 2002, pet. denied).

In order to prevail on his bill of review, appellant had to establish (1) a meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim, (2) which he was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, and (3) unmixed with the fault or negligence of the complainant. Hanks, 378 S.W.2d at 34 35; Alexander, 226 S.W.2d at 998. The opposing party in appellant's underlying juvenile case was the State. Thus, appellant's burden was to establish that the State, as the opposing party, committed the fraud that prevented appellant from asserting his meritorious defense. Whether S.A. committed fraud is of no consequence.

Appellant did not establish the existence of extrinsic fraud. Extrinsic fraud is fraud that denies the party an opportunity to know about his rights or defenses or to present them at trial. Alexander, 226 S.W.2d at 1001. Intrinsic fraud, on the other hand, includes matters that were actually presented to and considered by the trial court in rendering its judgment, such as perjured testimony. Id. Thus, if S.A. committed fraud by fabricating the sexual assault allegations, the fraud was intrinsic fraud. S.A.'s credibility was an issue before the court during the juvenile adjudication trial. The trial court committed no error in concluding that S.A. had committed intrinsic fraud.

By his final issue appellant urges a similar complaint, that the "trial court committed error by denying appellant the relief of a new trial based on newly discovered evidence and sufficient proof to sustain the bill of review." Appellant challenges the court's failure to find that the State's fraud prevented him from asserting a meritorious defense: "That Plaintiff failed to prove that he was prevented from making a meritorious defense at time of trial based upon any act, attributable to the State, of fraud, accident, wrongful act or official mistake." The court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them, under the same standard we review jury findings. Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex.1994). In considering legal sufficiency, we consider all of the evidence in the light most favorable to the prevailing party, indulging every inference in that party's favor. Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 285 86 (Tex.1998). In reviewing factual sufficiency, we consider all of the evidence and uphold the finding unless the evidence is too weak to support it or the finding is so against the overwhelming weight of the

evidence as to be manifestly unjust. Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex.App. Austin 1992, no writ).

We need not review the trial court's findings of fact here because even if we were to agree with appellant's argument and determine that S.A. had indeed lied about the sexual assault allegations during appellant's juvenile adjudication trial, S.A.'s conduct constitutes intrinsic fraud only, not extrinsic fraud. Moreover, S.A. was not the opposing party in the juvenile case, and so her conduct is not relevant to establish appellant's right to bill of review relief. Appellant presented no evidence indicating that the State had committed extrinsic fraud, which prevented him from asserting his meritorious defense during the underlying juvenile adjudication trial. Accordingly, we hold that the trial court did not err in denying appellant's bill of review, as appellant failed to produce sufficient facts to sustain his bill of review burden. We overrule issues ten and twelve.

CONCLUSION

Having overruled all of appellant's issues on appeal, we affirm the trial court's denial of the bill of review.

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