Case No.: 05-20-00733-CV

In the Fifth Court of Appeals for the State of Texas

JEROME PORTER
Appellant
V.
MARTHA REYES PORTER,
***Appellee*.**

On Direct Appeal from the trial court in cause number DF-19-07439, 255th Judicial District Court, the Honorable Kim Cooks, presiding.

Appellee's Response Brief

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1. IDENTITY OF PARTIES, COUNSEL, AND JUDGES

In accord with Rule 38.1 of the Texas Rules of Appellate Procedure, Appellee provides this Court with this complete list of all interested parties.

Trial Court:	255TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
Trial Court Judge:	THE HONORABLE KIM COOKS
Appellant:	JEROME PORTER
Trial and Appellate Attorney:	**Andrea Nation** 4925 Greenville, Suite 200 Dallas, Texas 75206 **John D. Nation** 4925 Greenville, Suite 200 Dallas, Texas 75206
Appellee:	MARTHA REYES PORTER
Trial and Appellate Counsel:	**Niles Illich (appeal only)** **David P. Housel, Jr.** Scott H. Palmer, PC 15455 Dallas Parkway, Suite 540, Dallas, Texas 75001 Email: Niles@scottpalmerlaw.com David@scottpalmerlaw.com
Non-Party Attorney:	**Kristen Zerega** Shackelford, Bowen, McKinley & Norton, LLP 9201 N. Central Expressway Fourth Floor Dallas, Texas 75231

2. CITATION TO THE RECORD

The reporter's record is cited to as: [RR 23] this hypothetical citation would be to page 23 of the one-volume reporter's record. The clerk's record is cited to as: [CR 23] this hypothetical citation would be to page 23 of the one-volume clerk's record.

3. STATEMENT CONCERNING ORAL ARGUMENT

Appellant has not requested oral argument. Appellee believes that the arguments presented in Appellant's brief are readily resolvable and will not be facilitated through oral argument.

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In the Fifth Court of Appeals for the State of Texas

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v.
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To the Honorable Judges of the Fifth Court of Appeals:

Martha Reyes Porter files this Appellee's Brief.

6. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

Appellant's brief does not include a statement of facts and is thus deficient. [Appellant's brief, 8].

Appellant, a serially abusive husband,[1] and Appellee married in 1993. [RR 7]. Appellant left in 2012. [RR 7]. Appellant attacked Appellee many times during their marriage and Appellee pressed charges against Appellant at least three times. [RR

[1] It is important to recognize that Appellant was a serially abusive husband as this is a factor that goes to showing that Appellant did not meet the requirements to show error. TEX. R. APP. P. 44.1(a).

9-10]. Appellant admitted to beating Appellee with a belt and going to prison for this assault. [RR 37]. During the trial for divorce the following exchange occurred:

> Q. Okay. And obviously it was your claim that he had struck you?
>
> A. He always did.
>
> Q. Well, I'm not interested in what he's always said [*sic*], I'm just interested in what happened during that incident?
>
> A. There was so many times, I don't remember.
>
> MR. NATION: Objection, Your Honor, nonresponsive.
>
> THE COURT: Sustained.
>
> Q. (BY MR. NATION) Okay. And by the way, what's funny to you about this?
>
> A. There's so many–
>
> Q. I didn't–I asked you–
>
> A. There's so many times that I lost track of how many times he hit me.
>
> MR. NATION: Objection, Your Honor, nonresponsive, and not admissible under Rule 404B.
>
> THE COURT: Well, she answered your question. I guess that's what she thinks is funny.
>
> Q. (BY MR. NATION) All right.
>
> MR. NATION: So my objection is overruled?

THE COURT: Yes.

MR. NATION: Thank you.

[RR 10-11].

At the conclusion of the trial, counsel for the serially abusive husband sought a bill of exception. [RR 52]. The trial court allowed the attorney to make the bill. [RR 52-56]. During the testimony in support of the bill of exceptions, Appellee admitted to having an adulterous affair. [RR 53]. The attorney for the serially abusive husband sought the name of the man with whom Appellee had had the affair. [RR 53]. The trial court sustained an objection to this testimony. [RR 53]. And—critically—counsel for Appellant stated, "[w]ell, I'll move on, Your Honor." [RR 54]. A similar exchange occurred when counsel for Appellant sought to know the number of times that Appellee had sexual intercourse in her adulterous affair. [RR 55]. Then counsel for Appellant rested.

The district court granted the divorce. [RR 51].

7. SUMMARY OF THE ARGUMENT

In her first argument, Appellee establishes that the trial court did not err by overruling Appellant's objection to a responsive answer to Appellant's own question on cross examination. Appellant cannot object to a responsive answer to Appellant's own question. Even if Appellant could object to this answer, the objection would have been improper, and the court did not err by overruling it.

In her second argument, Appellee establishes that the trial court did not err by exercising its discretion in limiting Appellant's bill of exception, alternatively, this error was harmless. Appellant's proposed testimony was clear in the context of the questions asked, and the Court had discretion to decide not to hear the evidence.

8. RESPONSIVE ARGUMENTS

FIRST RESPONSIVE ARGUMENT

Appellant first contends that "[t]he trial court reversibly erred in overruling Appellant's objection to Appellee's answer to a cross-examination question, which answer [*sic*.]." [Appellant's Brief, 9].

I. Standard of Review for Exclusion of Testimony

Appellant complains on appeal that the court erred in overruling his objection to an answer to his own question. Appellant's Brief 9-10. Evidentiary rulings are committed to the trial court's sound discretion. *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex.2007) (per curiam). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, or acts without reference to any guiding rules or principles. *Simon v. York Crane & Rigging Co*., 739 S.W.2d 793, 795 (Tex. 1987); *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985); *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex.1998). Even if the trial court abused its discretion in admitting certain evidence, reversal is only appropriate if the error was harmful, i.e., it probably resulted in an improper judgment. *See* TEX. R. APP. P. 44.1; *Waldrip*, 380 S.W.3d at132.

II. Law

To preserve an error, the error must be raised in the trial court and the objection ruled upon. TEX. R. APP. P. 33.1(a); *Booker v. Blow*, 05-07-00256-CV, 2008 WL 152226, at *1 (Tex. App.—Dallas Jan. 17, 2008, no pet.) ("Under Texas Rule of Appellate Procedure 33 .1, in order to preserve the issue for appeal, Booker was required to make his complaint and secure a ruling.").

The doctrine of invited error provides that a party cannot complain of an error which he has invited. *Berry v. Segall*, 315 S.W.3d 141, 143 (Tex. App.—El Paso 2010, no pet.). If a party moves to admit evidence, that party cannot complain on appeal that the evidence was improperly admitted. *Sanchez v. Balderrama*, 546 S.W.3d 230, 235 (Tex. App.—El Paso 2017, no pet.); *Pouncy v. Garner*, 626 S.W.2d 337, 340 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

This Court reviews the overruling of an objection to exclude testimony on the basis of Texas Rule of Evidence 404 for an abuse of discretion. *Sandoval v. State*, 409 S.W.3d 259, 297 (Tex. App.—Austin 2013, no pet.); *Butler v. Hopkins*, 05-99-01132-CV, 2000 WL 1210981, at *3 (Tex. App.—Dallas Aug. 28, 2000, no pet.). A trial court abuses its discretion only if it admits evidence when doing so lies outside the zone of reasonable disagreement. *Id.*

Rule 404(b) provides that 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. [emphasis added]. Evidence of an offense or transaction is admissible if it is relevant to a material issue of the case.

III. Facts

Appellant regularly physically abused Appellee. Appellant and Appellee's marriage finally came to an end after a trial for divorce. [RR, generally]. During the trial, while on cross examination, Appellee became mildly affected by emotion and chuckled nervously. [RR 11]. Appellant's counsel pounced and asked Appellee what was "so funny." [RR 11]. Appellee answered truthfully that she was laughing because—incredibly—she could not remember how many times Appellant had physically abused her. [RR 11]. Appellant's counsel then objected that Appellee had responded to his question, and the trial court overruled the objection, stating that Appellee had provided a responsive answer. [RR 11].

The specific testimony that Appellant objects to is:

> Q. Okay. And obviously it was your claim that he had struck you?
>
> A. He always did.
>
> Q. Well, I'm not interested in what he's always said [*sic*], I'm just interested in what happened during that incident?
>
> A. There was so many times, I don't remember.
>
> MR. NATION: Objection, Your Honor, nonresponsive.

THE COURT: Sustained.

Q. (BY MR. NATION) Okay. And by the way, what's funny to you about this?

A. There's so many–

Q. I didn't–I asked you–

A. There's so many times that I lost track of how many times he hit me.

MR. NATION: Objection, Your Honor, nonresponsive, and not admissible under Rule 404B.

THE COURT: Well, she answered your question. I guess that's what she thinks is funny.

Q. (BY MR. NATION) All right.

MR. NATION: So my objection is overruled?

THE COURT: Yes.

MR. NATION: Thank you.

[RR 10-11].

IV. Application of Law to Fact

As a preliminary matter, this issue has not been preserved for appellate review. Specifically, counsel for Appellant secured a ruling on the objection that the answer was not responsive, but he did not secure a ruling on the objection under Rule 404(b).

Therefore the issues is not preserved for appellate review. [RR 10-11]. TEX. R. APP. P. 33.1(a); *Booker*, 2008 WL 152226, at *1. ("Under Texas Rule of Appellate Procedure 33 .1, in order to preserve the issue for appeal, Booker was required to make his complaint and secure a ruling."). Accordingly, this issue has not been preserved. *Id*.

The second legally important fact is that Appellant's objection was to his own question. [RR 10-11]. Here, Appellant's counsel asked Appellee what why she was laughing, and Appellee responded by testifying about why she was laughing. [RR 10-11]. The court overruled Appellant's objection, affirming that the answer responded to Appellant's question. [RR 11]. If Appellant did not want the answer to this question to be made part of the evidence or record of this case, then counsel for Appellant could have ignored Appellee's "chuckle." [RR 11]. Regardless of the relevance of the question or admissibility of the responsive answer, Appellant lost any ability to object to a responsive answer by introducing the question due to the doctrine of invited error. Appellant did object that the answer to was nonresponsive, but the trial court overruled that objection. [RR 10-11]. Understandably, Appellant has not challenged that ruling on appeal. Instead, Appellant contends that the answer to the question that *his* counsel asked violated Texas Rule of Evidence 404(b). To hold that a party may object to a responsive answer to his own question tortures logic and reason. *Berry*, 315 S.W.3d at 143. Without addressing whether this question

violated Rule 404(b), this Court should dismiss this point of error because, even if the testimony proffered were inadmissible for the reason asserted by Appellant, Appellant invited this testimony into the record by asking the question. *Id*.

Finally, if this Court believes that the issue was preserved and withstands an attack for objecting to an answer to a question that the party's attorney asked, then the truthful if sad answer did not violate Rule 404(b). TEX. R. EVID. 404(b). Texas Rule of Evidence 404(b) provides "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.*" (emphasis added). *Id*. In other words, evidence of a crime committed in the past cannot be used to show that a defendant committed a different crime. *Id*. This rule does not, however, prevent testimony of a past crime or bad act from being admitted when relevant for other purposes. *Id*.

This evidence was not offered to show that Appellant committed some act in conformity with committing other acts (i.e. that he committed some later act of abuse). Rather, in a divorce case, the fact that a party physically abused their spouse will support granting a divorce on cruelty grounds as well as a disproportionate division of the marital estate in favor of the victim of cruelty. *Newberry v. Newberry*, 351 S.W.3d 552, 557 (Tex. App.—El Paso 2011, no pet.). The accumulation of several acts of cruelty may support a divorce on those grounds. *Hester v. Hester*, 413

S.W.2d 448, 450 (Tex. Civ. App.—Tyler 1967, no writ). Appellee's testimony, therefore, was not used to suggest that Appellant had committed some other unrelated act of family violence, but was direct evidence of an issue relevant to this case, specifically whether Appellant had committed cruelty.

Finally, Rule 44.1 establishes that No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1(a).

Appellant cannot possibly meet this standard. The evidence shows that Appellant serially abused his wife (Appellee), that Appellant was a convicted felon, and that Appellant provided scant support to his wife during their marriage. Moreover, Appellant wanted this divorce.

Appellant has not established that he suffered harm under Rule 44.1(a) of the Texas Rules of Appellate Procedure.

V. Conclusion

Accordingly, the district court did not err when it allowed Appellee to make a responsive answer to Appellant's question. Even if Appellant could have objected to the responsive answer to Appellant's own question, Tex. R. Evid. 404(b) does not exclude Appellee's testimony because the testimony was not offered to prove that

Appellant had committed some other bad act. Appellant's first point of error should be overruled.

Second Responsive Argument

Appellant next contends that the trial court reversibly erred in restricting Appellant's bill of exception. [Appellant's Brief, 29].

I. Law for Offer of Proof

An appellate court does not reach the question of the propriety of the trial court's evidentiary ruling unless the complaint has been preserved for review. *In re Estate of Miller*, 243 S.W.3d 831, 837 (Tex.App.—Dallas 2008, no pet.). To challenge on appeal the trial court's ruling excluding evidence, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception. *Id*. An offer of proof informs the trial court of the substance of the excluded evidence. *See* TEX. R. EVID. 103(a)(2); *Miller*, 243 S.W.3d at 837. It must be made as soon as possible after the ruling, but before the court's charge is read to the jury. *See* TEX. R. EVID. 103(b); *Miller*, 243 S.W.3d at 837. To adequately preserve error, the offer of proof must be specific. *See Watts v. Oliver*, 396 S.W.3d 124, 129 (Tex.App.—Houston [14th Dist.] 2013, no pet.). If no offer of proof is made before the trial court, then the complaining party must introduce the excluded evidence into the record by a formal bill of exception. *Miller*, 243 S.W.3d at 837. Texas Rule of Appellate Procedure 33.2 sets forth the requirements for a formal bill of exception. TEX. R. APP. P. 33.2; *Miller*, 243 S.W.3d at 837.

When the contents of proposed testimony are ascertainable from the record, the Court restricting the making of an offer of proof is not reversible error. *Ledisco Fin. Services, Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. Civ. App.—Texarkana 1976, no writ).

Appellant relies on *In re Goodwin*, a case from 1978 that uses Rule 372 of the Texas Rules of Civil Procedure. *Matter of Marriage of Goodwin*, 562 S.W.2d 532, 534 (Tex. Civ. App.—Texarkana 1978, no writ). Currently there is no Rule 372 in the Texas Rules of Civil Procedure. And the Rules of Civil Procedure only mention "bill of exception" five times but do not have a rule on "bills of exception." The Rules of Civil Procedure do not mention an "offer of proof."

Rule 372 read, in part: "If either party during the progress of a cause is dissatisfied with any ruling, . . . or other action of the court, he may except thereto at the time said ruling is made, . . . and at his request time shall be given to embody such exceptions in a written bill. . . . (1) Anything occurring in open court or in chambers that is reported and so certified by the court reporter may be included in the statement of facts rather than in a bill of exception ; . . .". *Id*.

Currently Rule 33.2 of the Texas Rules of Appellate Procedure reads:

> To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.
>
> (a) Form. No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling

complained of, must be stated with sufficient specificity to make the trial court aware of the complaint.

(b) Evidence. When the appellate record contains the evidence needed to explain a bill of exception, the bill itself need not repeat the evidence, and a party may attach and incorporate a transcription of the evidence certified by the court reporter.

(c) Procedure.

> (1) The complaining party must first present a formal bill of exception to the trial court.
>
> (2) If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the trial court clerk. If the parties do not agree on the contents of the bill, the trial judge must--after notice and hearing--do one of the following things:
>
> > (A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;
> >
> > (B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or
> >
> > (C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.

> (3) If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), the party may file with the trial court clerk the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

TEX. R. APP. P. 33.2(a)-(c).

II. Facts

Appellant filed an original petition for divorce on April 12, 2019. This petition did not allege that any adultery had occurred in the marriage. [RR 51]. Appellant did not amend his pleadings to raise this legal theory at any point in the divorce or otherwise put Appellee on notice that Appellant would be proceeding on that legal theory at trial. [CR, generally]. Appellant attempted to ask questions to elicit testimony about alleged affairs, and the Court sustained objections to this testimony and counsel for Appellant agreed to "move on." [RR 54; 55]. Appellant made no effort to file a formal written bill of exception. [CR, generally].

At the conclusion of the trial, counsel for the serially abusive husband sought a bill of exception. [RR 52]. The trial court allowed the attorney to make the bill. [RR 52-56]. During the testimony in support of the bill of exceptions, Appellee

admitted to having an adulterous affair. [RR 53]. The attorney for the serially abusive husband sought the name of the man with whom Appellee had the affair. [RR 53]. The trial court sustained an objection to this testimony. [RR 53]. And—critically—counsel for Appellant stated, "[w]ell, I'll move on, Your Honor." [RR 54]. A similar exchange occurred when counsel for Appellant sought to know the number of times that Appellee had sexual intercourse in her adulterous affair. [RR 55]. Then counsel for Appellant rested.

III. Application of Law to Fact

As a preliminary matter, Appellant waived this issue by agreeing to "move on." [RR 54; 55]. In agreeing to "move on," Appellant agreed with the trial court and consented to move forward under the trial court's ruling. Therefore nothing has been preserved for appellate review. [RR 54; 55].

Further, it is clear from the context of Appellant's questioning that Appellant intended to introduce testimony that Appellee had committed adultery—but Appellee admitted to this during her testimony. [RR 53]. The only things that Appellant sought that he did not receive in the bill of exception were 1) the name of the man in the adulterous affair and 2) the number of times the two engaged in a sexual activity. But there is no evidence to suggest that, if Appellee had answered Appellant's questions that the Court's final judgment would have been different. Assuming that this was error, Appellant has not (and cannot) show that these issues

were "controlling on a material issue dispositive to the case." *Matter of Marriage of Harrison*, 557 S.W.3d 99, 126 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). Absent such a showing (which Appellant has not made), Appellant cannot prevail.

Further, Appellant could have sought to make the contents of this testimony a part of the Court's record by filing a formal written bill of exceptions under Texas Rule of Civil Procedure 33.2. *Id*. Appellant made no such filing. A failure to make a formal bill of exception after not making an offer of proof waives error. *Id*.; *In Interest of J.R.P.*, 526 S.W.3d 770, 780 (Tex. App.—Houston [14th Dist.] 2017, no pet.) Even if the Court erred in restricting this offer of proof, Appellant failed to preserve this error by not submitting a formal bill of exceptions.

And Appellant has not met the burden to show that the result of the trial would have been different had he been allowed to get the name of the person with whom Appellant was having the affair and the number of times the two had sexual contact. Appellant secured testimony that Appellee had an adulterous affair, and had a heavy burden to establish that the name of the partner and the number of times the had sexual contact would have changed the result of the trial. Tex. R. App. P. 44.1(a). Accordingly, Appellant has not shown reversible error. *Id*.

Appellant relies on *In the Matter of the Marriage of Goodwin* and *Smith v. State* in a frail effort to show reversible error. (Appellant's brief, 14). *Goodwin* relies

on a Rule of Civil Procedure that has been removed and *Smith* is a criminal case. Accordingly, these cases provide no authority to grant Appellant his requested relief.

IV. Conclusion

For these reasons, Appellee contends that Appellant has not carried its burden and Appellant's second point of error should be overruled.

Conclusion and Prayer

For these reasons, Appellee asks this Court to affirm the trial court's verdict, to award Appellee costs, attorneys' fees, and any other relief to which Appellee is justly entitled.

Respectfully Submitted,

/s/ Niles Illich and David Housel
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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.4 of the Texas Rules of Appellate Procedure because it is computer generated and includes 4,724 words as counted by the word count feature included with Microsoft Word. This brief also complies with the typeface requirements because it has been prepared in a

proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich and David Housel
Niles Illich and David Housel

CERTIFICATE OF SERVICE

This is to certify that on June 2, 2021 that a true and correct copy of this brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service and electronic mail as follows:

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