Affirmed and Opinion filed December 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00584-CR

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MARVIN RUSSELL MUNSON, SR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 95CR0949

O P I N I O N

Appellant was charged by indictment with the offense of murder and a jury convicted appellant of that offense. Following the punishment hearing, the jury found appellant committed the offense in the course of sudden passion and assessed punishment at twenty years confinement in the Texas Department of Criminal Justice—Institutional Division. Appellant raises four points of error. We affirm.

I. Prior Sexual Abuse

In the first point of error, appellant contends the trial court erred by refusing to permit appellant to introduce testimony regarding the decedent's prior violence or reputation for violence. Specifically,

appellant argues the trial court erred in excluding the testimony of two of appellant's sons regarding sexual and physical abuse by the decedent.

In a hearing outside the presence of the jury, appellant presented testimony by Marvin Russell Munson, Jr. and Phillip Munson regarding instances of physical and sexual abuse the decedent, their step-mother, had committed against them, approximately twenty-five years earlier. The trial court excluded the evidence and sustained the State's objection that "the Rule" had been violated when defense counsel interviewed the witnesses in each other's presence the preceding night. The State and appellant subsequently came to an agreement that appellant could present testimony of the decedent's alleged prior acts of physical abuse, but not sexual abuse. The trial court accepted this agreement.

On the subject of this agreement, the record reveals the following:

[The State]: Your Honor, if it please the court at 10:20 on Monday, April 14, there were two witnesses that testified outside the presence of the jury, Russell Marvin, Marvin Russell Munson Jr. who is known as Rusty and Phillip Munson testified outside the presence of the jury. The state made a motion after there was evidence of the violation of the rule that the court placed the witnesses under, generally all of the witnesses in this case under, as a result of the State's request to disqualify the jurors the court disqualified both jurors, disqualified the witnesses. The State disqualified both of the witnesses. Both of those witnesses are outside the courtroom at this time, Judge. They are present, both Philip Munson and Marvin Russell Munson Jr. are outside. I am going to, we have an agreement and we have agreed that if the State withdrew its motion to disqualify these two witnesses for violating the rule that they could put the witnesses on, the defense could put these two witnesses on if they chose and the witnesses could testify as to the physical acts of [the decedent] direct towards them, your Honor, but that the witnesses will not testify to any sexual, any sexual allegations whatever in reference to [the decedent]. Is that the agreement, Mr. Moore?

[Defense Counsel]: So agreed. Then, your Honor, we would like you to lead us through it. In all honesty with your permission I am going to put Marvin Russell Munson Jr. on the stand. I am not going to take a chance on that Phillip because he looks unstable and we don't want to have a mistrial, but if you would, your Honor, *we request we have such an agreement that I will not ask*

any question couched in terms to elicit any response other than her aggressiveness, the beatings, the sitting in the floor, but if you would help admonish them, your Honor. You seem to have a unique way of getting across to folks that the boy is not to mention under any circumstances about any sexual proclivities with his mother or anybody else or with him and I'll do my best but we would both appreciate it with in mind that I'm going to have you admonish both of them but I am not going to put but Rusty on. That Phillip, no telling what he's liable to say and mess up our trial. Would you do that for us, Judge?

[The Court]: Well, sir, I am not at all sure that disciplining children so far back is pertinent to any issue in this case either but if the State agrees to it, well, I'll certainly let y'all put that on.

[The State]: Let me tell you what my concerns are, Judge. There is a case that talks in terms of the rule of remoteness not being applicable to these situations.

[The Court]: I am not talking about remoteness. I am talking about disciplining children which is I understand is what they're going to get into. I am saying if you want to agree to it I'll certainly let y'all proceed with that agreement. However, I will not stand for Mr. Munson breaking down like he did, and I don't believe it was a true breaking. I think he was acting. And if he starts that I am going to stop it right there. Do you understand? He testified the next day he had no problem whatsoever keeping himself in control and being calm. So I don't want to see any of that going on. If he starts doing that I'm going to stop it right then.

[Defense Counsel]: I'll caution him, Judge. I do think it's real. I admit it's no place for it in the court. If you will let me have a little longer break to caution him or we'll take a break before we put him on. I have no objection. I agree, it's not the place but since we are going to go close to the line I want to make sure this boy understands to be careful.

[The State]: Just for the record you have consulted with your client, Mr. Moore, about this and he has agreed to go forward?

[Defense Counsel]: Yes. Do you understand what we are doing, Mr. Munson?

[Appellant]: Yes.

[The Court]: *Does it meet with your agreement*?

[Appellant]: *Yes.*

[Defense Counsel]: *Do you have any objections*?

[Appellant]: *None.*

(emphasis added). Marvin Munson Jr. and his brother, Phillip Munson, subsequently testified before the jury regarding the decedent's acts of physical abuse against them when they were adolescents, and the decedent's volatile and aggressive behavior.

For the following reasons, we believe appellant waived error, if any, on this point when he entered into the agreement with the State to admit testimony of physical abuse by the decedent. Where a defendant complains regarding the exclusion of evidence, the error is preserved by making a bill of exception or an offer of proof unless the excluded evidence is clear from the record. *See Tatum v. State*, 798 S.W.2d 569, 571 (Tex. Crim. App. 1990); *Stanley v. State*, 866 S.W.2d 306, 308 (Tex. App.—Houston [14th Dist.] 1993, no pet.); *Valdez v. State*, 826 S.W.2d 778, 782 (Tex. App.—Houston [14th Dist.] 1992, no pet.); TEX. R. APP. P. 33.1; TEX. R. EVID. 103(a)(2). However, even when error has been preserved, a defendant may waive the error by his subsequent conduct. *See Duncan v. State*, 146 S.W.2d 749, 750 (Tex. Crim. App. 1940) (defendant waived error where trial court excluded testimony and defendant properly excepted; the court subsequently permitted defendant to present testimony, but defendant failed to do so); *Jarrell v. State*, 137 S.W.2d 774, 775 (Tex. Crim. App. 1940) (same); *McCoy v. State*, 134 S.W.2d 273 (Tex. Crim. App. 1939) (same); and *Flores v. State*, 920 S.W.2d 347, 352 (Tex. App.—San Antonio 1996, pet. ref'd) (defendant waived error regarding failure to permit bill of exception in question and answer form where court gave option, but

defendant failed to insist on question and answer).

Although appellant adequately preserved the error, if any, when the trial court initially refused to permit the sons to testify about the prior physical and sexual abuse inflicted on them by the decedent, appellant subsequently waived the error by reaching an agreement with the State to admit testimony of physical abuse, but failing to reserve the objection regarding the sexual abuse. Instead, the record demonstrates that both defense counsel and appellant specifically agreed to proceed without reserving any objection to the exclusion of sexual abuse testimony. Accordingly, we hold appellant waived error, if any. The first point of error is overruled.

II. Admissibility of Photographs

The second point of error contends the trial court erred in admitting, over appellant's objections, several crime scene photographs, State's exhibits 7-11, depicting the decedent lying in a pool of blood.

Rule 403 of the Texas Rules of Evidence permits relevant evidence to be excluded where its probative value is substantially outweighed by danger of unfair prejudice, confuses the issues at trial, is misleading to the jury, causes undue delay, or is unnecessarily cumulative. A trial court's decision regarding the admission of evidence under Rule 403 is reviewed on appeal under an abuse of discretion standard. *See Montgomery v. State*, 810 S.W.2d 372, 392 (Tex. Crim. App. 1991); *Rankin v. State*, 995 S.W.2d 210, 214 (Tex. App.—Houston [14th Dist. 1999, no pet.); *Willis v. State*, 932 S.W.2d 690, 696 (Tex. App.—Houston [14th Dist. 1996, no pet.). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997); *Mongtomery* 810 S.W.2d at 391; *Verbois v. State*, 909 S.W.2d 140, 142 (Tex. App.—Houston [14th Dist.] 1995, no pet.).

The admissibility of a photograph is within the sound discretion of the trial judge. *See Santellan*, 939 S.W.2d at 179 (citing *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995)); *Schielack v. State*, 992 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Generally, a photograph is admissible if verbal testimony of the matters depicted in the photographs is also admissible. *See Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997) (citing *Long v.*

State, 823 S.W.2d 259, 271-72 n. 18 (Tex. Crim. App. 1991)); *Schielack*, 992 S.W.2d at 641.

Testimony, and thus photographs, of the crime scene may aid the jury in determining many things regarding the offense, including the manner and means of the decedent's death, the force used, and sometimes even the identity of the perpetrator. *See Williams*, 958 S.W.2d at 195. A photograph is admissible under Rule 403 if it has some probative value and its probative value is not substantially outweighed by its inflammatory nature. *See Santellan,* 939 S.W.2d at 169; *Schielack*, 992 S.W.2d at 641; *see also Green v. State*, 682 S.W.2d 271, 292 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1034 (1985) (a trial court abuses its discretion by admitting a photograph only when the probative value of a photograph is very slight and its prejudicial value very high). In making this determination, we consider a number of factors including: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up shots, whether the body is naked or clothed, the availability of other means of proof, and other circumstances unique to the individual case. *See Santellan*, 939 S.W.2d at 169.

State's exhibits 7-11 were small color photographs (although the appellate record contains poor quality black and white photocopies), taken from a moderate distance, depicting the decedent lying on the floor with a pool of blood emanating from the area of her head. The body is clothed and there is was no indication the body had been tampered with to increase the gruesomeness of the scene; rather, the photos displayed the position of the decedent and the layout of the crime scene as first observed by the police. Although some of the photographs are arguably duplicative, there is nothing particularly inflammatory about them. The photos depict the aftermath of the offense and are not "so horrifying or appalling that a juror of normal sensitivity would necessarily encounter difficulty rationally deciding the critical issues of this case after viewing them." *Fuller v. State*, 829 S.W.2d 191, 206 (Tex. Crim. App. 1992), *cert. denied,* 508 U.S. 941 (1993). The pictorial depiction of a decedent's body is generally admissible even if the photograph displays blood or is otherwise unpleasant or even "gruesome." *See Sonnier*, 913 S.W.2d at 518. Therefore, we hold the trial court did not abuse its discretion in holding the possibility of unfair prejudice did not substantially outweigh the probative value of admitting the photographs in this case. The second point of error is overruled.

III. Motion for Instructed Verdict

The third point of error contends the trial court erred by failing to grant appellant's motion for an instructed verdict at the conclusion of the State's case-in-chief. A complaint regarding the denial of an instructed verdict is treated on appeal as a challenge to the sufficiency of the evidence. *See Dunn v. State*, 951 S.W.2d 478, 480 (Tex. Crim. App. 1997); *Griffin v. State*, 936 S.W.2d 353, 356 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *Arizmendez v. State*, 807 S.W.2d 436, 437 (Tex. App.—Houston [14th Dist.] 1991, no pet.). In applying the proper standard of review, a court must view the evidence in a light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the alleged offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-2789 (1979); *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991). The court's role is to determine if any rational trier of fact could have found, based on the evidence admitted at trial, the essential elements of the offense beyond a reasonable doubt. *See Labarbera v. State*, 835 S.W.2d 775, 779 (Tex. App.—Houston [14th Dist.] 1992, no pet.). It is proper for the trial court to deny a motion for an instructed verdict if the State introduced any evidence to support each element of the offense because such evidence raises a fact issue within the province of the jury to decide. *See Bustillos v. State*, 832 S.W.2d 668, 676 (Tex. App.—El Paso, 1992, pet. ref'd); *Harris v. State*, 790 S.W.2d 778, 779 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd); *Ellis v. State*, 714 S.W.2d 465, 471 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). We need not determine whether the State presented sufficient evidence to rebut an affirmative defense raised by the defendant. *See Saxton v. State*, 804 S.W.2d 910, 913-914 (Tex. Crim. App. 1991).

A. Factual Summary

Briefly stated, the evidence in the light most favorable to the verdict establishes the following: Appellant and his wife, the decedent, separated in December of 1994, and were in the process of a divorce at the time of the offense. Christine Frederick, one of appellant's neighbors, testified that in the Spring of 1995, appellant, when commenting on the divorce proceedings, stated that he would "just have to shoot [the decedent's] ass" if she did not do what he wanted regarding the division of the marital estate.

Appellant testified that in the early afternoon on July 6, 1995, he went to the home of his daughter

and son-in-law, Pam and David Novark, in Friendswood, to see his newborn granddaughter. The decedent was at the home cooking a meal and baby-sitting the Novarks' two-year-old son while the Novarks were at the hospital with the newborn. Appellant testified he helped the decedent set up a baby bed. Appellant then sat down to update an account ledger from his business. While appellant worked on the ledger, the decedent removed a .38 caliber revolver from appellant's briefcase and stated she was going to shoot appellant. When appellant heard the gun click, he grabbed the decedent's hand and they began to struggle over control of the gun. During the struggle, the gun discharged, but appellant did not remember how many times. Appellant stated the gun was in the decedent's hands and he denied firing the gun. Appellant took the gun from the decedent's hands and put it on the kitchen counter. Shortly thereafter, appellant's in-laws, Dorothy Novark, and Belinda Cantu arrived at the house. Appellant went outside and told them not to come in because there had been a shooting. At Dorothy Novark's request, appellant retrieved his sleeping grandson and gave him to Dorothy Novark. A Galveston County constable soon arrived and appellant told him he had been involved in a shooting. Appellant was then arrested.

Dorothy Novark and Belinda Cantu testified they went to the house in the late afternoon on July 6th to see the new baby. When they arrived, they observed appellant standing in front of the house. Appellant told Dorothy, "Ya'll cannot come into the house. I have killed [the decedent]." Dorothy Novark thought appellant was joking, but he then said to her, "Sure enough, I have shot her." Appellant appeared calm when explaining what had happened. Dorothy asked appellant to go into the house and bring his grandson out to them. Appellant complied and Dorothy drove to a nearby convenience store to report the incident.

Galveston County Constable Daniel Cooper was on duty when he overheard a Friendswood Police Department radio dispatch about the incident. Cooper, who was in the vicinity, responded to the call, and as he arrived, he observed appellant standing in the driveway holding a small dog. Cooper asked if there was a problem, and appellant replied, "I shot her, I killed her." Cooper arrested appellant and placed him in the patrol car. While in the car, appellant said to Cooper, "I know I have done something wrong, I am going to jail."

Friendswood Police Officer Scott Wilson arrived at the Novark residence and observed Cooper

yelling at appellant, who was standing in the driveway holding a dog. He heard appellant tell Cooper, "I shot her and the dog don't bite." Wilson went into the house and observed the decedent lying on the kitchen floor.

Dwayne Rouse, another Friendswood Police officer, arrived shortly after Wilson. He entered the house and observed a .38 caliber revolver on a dining table. Rouse found two spent bullets in the house: one in the kitchen wall and the other on the carpet in the living room.

Officer Bradley Worley testified he investigated the crime scene as the lead case agent. He observed the gun on the breakfast table in the kitchen. He ordered a gun shot residue test conducted of the decedent's hands and sent the results to the crime lab.[1] He testified there did not appear to be a struggle in the kitchen.

Detective Jay Lewis received the revolver from one of the officers. The revolver contained two fired shell casings and one which was "dimpled," meaning the firing pin had struck the primer on the shell casing, but the bullet had not fired. Ron Richardson, a ballistics expert, testified that a test conducted on the bullets recovered from the crime scene indicated they were fired from the gun recovered from the crime scene.

Norma Munson, appellant's daughter-in-law, testified appellant was upset about the divorce. Appellant had stated in Norma's presence around the time the divorce proceedings commenced that, "He would kill [the decedent] before he would give her more than fifty percent" of the property. Norma later heard appellant state he would rather go to jail "than to give [the decedent] more than fifty percent."

The autopsy of the decedent revealed two gunshot wounds: one entering through the right side of the decedent's head in a downward trajectory and exiting her back and the second wound was through her left temple/cheek, passing though her brain and exiting behind her right ear. Both shots went entirely through the body. The wound to the face was categorized as a "loose contact wound," meaning the gun's

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[1] A chemist for the Texas Department of Public Safety subsequently analyzed the swabs taken from both the decedent's and appellant's hands. The chemist did not detect residue on either the decedent's or appellant's hands.

barrel was touching the decedent's left temple. The pathologist could not determine the position of the shooter at the time the shots were fired, but believed it was "very unlikely" the decedent was holding the gun with her finger on the trigger at the time the shots were fired.

B. Analysis

Reviewing the evidence in the light most favorable to the verdict, we find the State carried its burden in proving each element of the offense beyond a reasonable doubt. Appellant's several statements about having shot the decedent play a strong part in our conclusion. Although an extrajudicial confession is not, in itself, sufficient to prove beyond a reasonable doubt that a defendant has committed the offense, a defendant's extrajudicial confession corroborated by independent evidence of the *corpus delicti* of the offense may be sufficient. *See Williams v. State*, 958 S.W.2d 186, 190 (Tex. Crim. App. 1997) (citing *Chambers v. State*, 866 S.W.2d 9, 15 (Tex. Crim. App. 1993)). The *corpus delicti* of murder is the identity of the deceased and proof that the death resulted from a criminal act. *See Dunn v. State*, 721 S.W.2d 325, 333 (Tex. Crim. App. 1986); *Hammond v. State*, 942 S.W.2d 703, 706 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *Cox v. State*, 644 S.W.2d 26, 30 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd). In the instant case, appellant made several statements in which he admitted shooting the decedent. The evidence indicated that the decedent was killed by two gunshot wounds, and that it was unlikely they had been self-inflicted. The State presented evidence of several statements made by appellant both prior to, and following the offense that he would shoot the decedent over a dispute in the dissolution of the marital estate. Although motive is not an element of the offense, we may consider the presence or absence of a motive when reviewing the sufficiency of the evidence. *See Gordon v. State*, 735 S.W.2d 510, 517 (Tex. App.—Houston [1st Dist] 1987, no pet.).

Having found the evidence sufficient to prove beyond a reasonable doubt that appellant committed the offense charged, we hold the trial court did not err in denying appellant's motion for instructed verdict. The third point of error is overruled.

IV. Cross-Examination

In the fourth point of error, appellant contends the trial court erred by refusing to permit appellant

to cross-examine his daughter-in-law, Norma Munson, regarding certain business transactions.

The Sixth Amendment right to confrontation guarantees a defendant the right to cross-examine a witness to challenge the witness's perception of the facts and to expose the witness's motivation in testifying. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S.Ct. 1108, 1110 (1974); *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996). The scope of cross-examination in Texas is broad, and extends to any fact that may affect the witness's credibility. *See Carroll*, 916 S.W.2d at 497; *Recer v. State*, 821 S.W.2d 715, 717 (Tex. App.— Houston [14th Dist.] 1991, no pet.); TEX.R.EVID 611(b). This includes any civil suit between the witness and the defendant. *See Shelby v. State*, 819 S.W.2d 544, 545 (Tex. Crim. App. 1991); *Cox v. State*, 523 S.W.2d 695, 700 (Tex. Crim. App. 1975); *Blake v. State*, 365 S.W.2d 795, 796 (Tex. Crim. App. 1965). *But see Hoyos v. State*, 982 S.W.2d 419, 421-422 (Tex. Crim. App. 1998) (in robbery prosecution, trial court did not err in preventing cross-examination of complainant regarding civil suit against apartment complex where robbery occurred). Nevertheless, a trial court may reasonably limit cross-examination when it is cumulative, repetitive, marginally relevant and confuses the issues. *See Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435; *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998); *Lagrone v. State*, 942 S.W.2d 602, 613 (Tex. Crim. App. 1997); *Recer*, 821 S.W.2d at 717.

During trial, appellant cross-examined his daughter-in-law, Norma Munson, about a civil law suit in Louisiana over the proceeds from the sale of a fishing barge used in a joint business venture between appellant and his son, James Munson. Norma Munson admitted that she and her husband were suing appellant at the time of his trial. The trial court sustained the State's objection to the admission of Defendant's Exhibit 20, which purported to be a title to the fishing barge, which was the subject of the law suit.[2] However, immediately thereafter Norma Munson admitted that she and her husband did not have legal title to the barge. Defense counsel subsequently attempted to question Norma Munson regarding appellant's having co-signed bank notes for other boats owned by her husband. The State objected on

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[2] Although the excluded document is not in the record, it is evident from the record the nature of the excluded document.

the grounds of relevance, and following an unrecorded bench conference, appellant dropped the line of questioning.[3]

During Appellant's case-in-chief, defense counsel re-called Norma Munson and again attempted to demonstrate her bias toward appellant resulting from the business arrangement between appellant and his son, James. Counsel attempted to introduce two documents, Defense Exhibits 27 and 28, to which the State objected. The trial court admitted Defense Exhibit 27, but sustained the objection to Defense Exhibit 28.[4] Finally, the trial court sustained the State's objection to defense counsel's questions to Norma Munson regarding appellant's co-ownership with his son of any other boat in addition to the one that was the subject of the lawsuit.

Reviewing the entirety of appellant's cross-examination of Norma Munson, we find the trial court did not err by excluding the complained of documents, or preventing counsel's repeated questioning of the witness regarding the co-ownership of one or more boats by appellant and his son. Although the court excluded Defense Exhibit 20, purportedly a title to the boat that appellant sold, Norma Munson later admitted that she and her husband did not have legal title to the boat. Therefore, appellant was able to establish the fact that he sought to establish through the exhibit.

Although we are unable to determine the contents of Defense Exhibit 28, giving appellant the benefit

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[3] Appellant did not object to the court's unrecorded ruling, if any. The record reveals the following:

[Defense counsel]: Well, anyway, Mrs. Munson actually I guess you didn't have the title to these other boats in your name and you didn't do the banking. That was your husband Jim?

[Witness]: Yes.

[Defense counsel]: And so he would have more information on that than you would, wouldn't he?

[Witness]: I guess you would have to ask him.

[4] Defense Exhibit 27 is a hand written letter, apparently from Norma Munson to appellant, in which she informs appellant that he is being sent a payment book on a boat, which appellant co-signed with his son, and requesting appellant to help in selling the boat. The record does not indicate the contents of Defense Exhibit 28.

of the doubt, we hold the trial court did not err by excluding it, nor did the trial court err by excluding defense counsel's questioning about the co-ownership of one or more boats. A trial court may, consistent with the right to cross-examination, reasonably limit a defendant's cross-examination where it is cumulative, repetitive, marginally relevant, or confuses the issues at trial. *See Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435; *Carpenter v. State*, 979 S.W.2d at 634. Through his cross-examination, appellant amply established the fact that, at the time of this trial, appellant was engaged in contentious litigation with his son and daughter-in-law over the ownership of one or more boats in Louisiana, and that the litigation may have been the reason for Norma Munson's alleged change of attitude toward appellant and motivated her testimony against appellant. In light of the entire cross-examination, the specific facts that appellant sought to elicit from Norma Munson were cumulative, marginally relevant, and threatened to confuse the issues at trial. Accordingly, we hold the trial court did not deny appellant his right to cross-examination by excluding the complained of testimony. The fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed December 30, 1999.

Panel consists of Justices Yates, Frost, and Baird.[5]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[5] Former Judge Charles F. Baird sitting by assignment.