Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-01050-CR

———————————

TYSON MONROW MASON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 734,526

O P I N I O N

Appellant was charged by indictment with the offense of intentional injury to a child alleged to have occurred on or about July 15, 1997. The indictment alleged the complainant's injury was caused either by being thrown to the ground or by manner or means unknown to the Grand Jury. The jury convicted appellant of the lesser offense of reckless injury to a child. TEX. PENAL CODE ANN. § 22.04 (Vernon 1994). The trial court assessed punishment at twenty years confinement in the Texas Department of Criminal Justice—Institutional Division. TEX. PENAL CODE ANN. § 22.04(E); 12.33 (Vernon 1994). Appellant raises nine points of error. We affirm.

I. Sufficiency Challenges

A. Factual Summary

Six of appellant's points of error contend the evidence is legally and factually insufficient to sustain the conviction. Therefore, a comprehensive review of the facts is necessary. The complainant was born on April 1, 1996, at 25 weeks gestation, weighing one pound, nine ounces. He was immediately transferred to a neonatal nursery, which was equipped to handle the critical condition of a premature infant. After intensive treatment, the complainant gained strength and weight and was released on June 21, 1996, in good health to his parents, appellant and his girlfriend, Stephanie Ruby.

Terry Yarborough, appellant's neighbor, testified that on the morning of July 15, 1996, he overheard an argument between appellant and Ruby. While he did not know them personally, he had seen them and their children around the apartment complex. Yarborough heard appellant yelling at Ruby on the balcony outside their apartment. Yarborough noticed a small infant in a baby carrier also on the balcony. Yarborough testified that he heard appellant yell at Ruby to do something with the "damn baby." Appellant then leaned down, grabbed the baby carrier, and threw the carrier, which still contained the complainant, into the apartment through the open patio doors. Yarborough then heard the baby crying intensely and screaming. Yarborough took no action as a result of this incident.

On July 15, 1996, the complainant and his brother were dropped off at the home of Ruth Taylor, the babysitter. She noticed two small bruises on the complainant's older brother, but none on the complainant. She testified the complainant seemed fine and was a happy healthy baby. Taylor's daughter, who sometimes assisted with the babysitting duties, also testified that the complainant appeared fine on July 15, 1996, although she was in and out during their stay at Taylor's home. On July 19, 1996, the complainant was again with his babysitter. The complainant refused to eat, drink, or sleep, and was trembling.

The following day, July 20, the complainant was taken to the emergency room at Columbia Bayshore Hospital by his parents . After the complainant's situation was assessed, he was transported by ambulance to Texas Children's Hospital and admitted. Dr. Taylynn Hanissian, a pediatrician, was the attending physician on call at the hospital the night the complainant was admitted. Although typically when on call Hanissian would handle most problems over the telephone, she was asked to personally examine

the complainant. Hanissian testified that after examining the complainant, she noticed no external bruises, but noticed the baby had a bulging fontanel, the soft spot, which was abnormal. At the time of Hanissian's examination, the complainant was attached to a respirator and was unable to function neurologically. The complainant was also exhibiting a stiffening of his muscle tone, which signifies neurological disorder. The CAT scan and blood work, which had been done, showed abnormal retinal findings. The CAT scan showed extensive old and new hemorrhages in the complainant's brain. A new injury was dated anywhere from between a few hours to twenty-four hours before the CAT scan was completed. The older injury was from four to six days old, placing it between July 14 - 16, 1996. The diagnosis was extensive retinal hemorrhages and intracranial hemorrhages secondary to Shaken Baby Syndrome. Hanissian testified the older injury, while it may or may not have been life threatening, was a "serious injury." Hanissian further testified that the hemorrhages were the result of an injury. Appellant told Hanissian that if the complainant had neurological problems, he did not want the baby back. The complainant stayed in the hospital until August 13, 1996, when he was discharged to the care of his maternal grandparents.

Several days later, after the complainant had been admitted to the hospital, the police spoke with Yarborough, who told the officers what he had seen. Yarborough also testified he told an employee in the apartment manager's office, whom he thought was Marisa Vanegas, about what he had seen. Vanegas, however, testified Yarborough never told her of the incident and, if he had, she would have immediately contacted the police. Vanegas stated it was possible Yarborough told another office worker and she (Vanegas) might not have heard. However, Vanegas never heard anyone in the office talk about the incident described by Yarborough.

Appellant testified that Yarborough's testimony was untrue and that the complainant had been sick the night before he was brought to the hospital. The complainant had refused to drink his milk and suffered from colic. Appellant took the complainant to the hospital to see why he would not drink, and if perhaps, it was the formula he was drinking. Once at the hospital, after some initial tests were run, it was determined that the complainant's condition was much more serious. Although appellant had wanted the complainant transferred to the hospital where he was born, he was transferred to the Texas Children's Hospital. Appellant testified that neither he nor Ruby ever shook or abused the complainant.

B. Standard of Review

We must next determine the appropriate standard of appellate review for resolving these points of error. When we are asked to determine whether the evidence is *legally* sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

When we determine whether the evidence is *factually* sufficient we employ the standard announced in *Clewis v. State* and view all of the evidence without the prism of "in the light most favorable to the prosecution" and reverse the conviction only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The *Clewis* standard was thoroughly discussed in *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997), which stressed the importance of the three principles that must guide a court of appeals when conducting a factual sufficiency review. The first principle is deference to the jury. A court of appeals may not reverse a jury's decision simply because it disagrees with the result. Rather the court of appeals must defer to the jury and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *Id*. at 407. The second principle requires the court of appeals to provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the conviction is manifestly unjust, shocks the conscience or clearly demonstrates bias. *Id*. at 407. The court should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *Id*. at 407. The third principle requires the court of appeals to review all of the evidence. The court must consider the evidence as a whole, not viewing it in the light most favorable to either party. *Id*. at 408.

C. Points of Error

With these standards in mind, we now turn to appellant's specific allegations. As noted earlier, appellant was convicted of the lesser offense of reckless injury to a child. The elements of that offense are that a person: (1) recklessly; (2) by act or omission; (3) causes; (4) serious bodily injury; (5) to a child, namely a person 14 years of age or younger. TEX. PENAL CODE ANN. § 22.04 (Vernon 1994). Appellant contends the evidence is legally and factually insufficient to support the conviction for that offense for the following six reasons:

1. The evidence was legally insufficient to prove that appellant caused serious bodily injury;
2. The evidence was legally insufficient to prove that appellant caused serious bodily injury by throwing the complainant to the ground;
3. The evidence was legally insufficient to prove that appellant caused serious bodily injury by manner or means unknown to the grand jury.
4. The evidence was factually insufficient to prove that appellant caused serious bodily injury;
5. The evidence was factually insufficient to prove that appellant caused serious bodily injury by throwing the complainant to the ground; and
6. The evidence was factually insufficient to prove appellant caused serious bodily injury by manner or means unknown to the grand jury.

D. Legal Sufficiency Analysis

We will first consider the legal sufficiency challenges. Dr. Hanissian testified that the complainant sustained a serious injury sometime between July 14, 1996, and July 16, 1996. This time frame coincides with the date Yarborough saw appellant grab the baby carrier, with the complainant inside, and throw the carrier into the apartment through the open patio doors. Although a critical injury occurred within 24 hours prior to the CAT scan on July 21, 1999, the CAT scan also showed a severe injury from an earlier event. We hold the evidence is sufficient enough for a rational trier of fact to find the complainant's injuries resulted from appellant throwing the baby carrier.

The culpable mental state of reckless is satisfied by evidence indicating that the accused "consciously disregarded a known substantial and unjustifiable risk that serious bodily injury would occur; a risk that if disregarded constitutes a gross deviation from the standard of care an ordinary person would exercise under the same circumstances." *Johnson v. State*, 915 S.W.2d 653, 658 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); (citing *Hayes v. State*, 728 S.W.2d 804, 809 (Tex. Crim. App.1987)(opinion on reh'g)). The culpable mental state may be inferred from circumstantial evidence, including evidence of the accused's acts, words, and conduct. *See Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996); *McWhorter v. State*, 957 S.W.2d 928, 930 (Tex. App.—Beaumont 1997, no pet.). In viewing the evidence in the light most favorable to the verdict, we hold a rational trier

of fact could have found appellant to have been aware of, but to have consciously disregarded, the substantial risk that throwing the baby carrier would result in serious bodily injury. Points of error numbers one and two are overruled.

In *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 922 (1993), the Court of Criminal Appeals held that when the jury returns a general verdict finding the defendant guilty and the evidence is sufficient to support a finding of guilt under any of the allegations submitted, the verdict will be upheld. Thus, having found the evidence sufficient to establish appellant caused the injury by throwing the complainant to the ground, we need not determine whether the evidence was sufficient to prove appellant caused the injury by manner or means unknown to the grand jury. Consequently, the third point of error is moot and, therefore, overruled.

E. Factual Sufficiency Analysis

We now turn to the factual sufficiency challenges. *Clewis* directs us to set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 129. When performing this review, the appellate court must be "appropriately deferential" to avoid substituting its judgment for the fact finder's. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis*, 922 S.W.2d at 133. This requirement was reiterated in *Cain*'s instruction for us to defer to the jury. 958 S.W.2d at 407.

Appellant contends he never harmed his child, and any medical problems the complainant suffers from are due to his premature birth. Additionally, appellant contends the testimony of Yarborough is not worthy of belief. For example, appellant claims that due to the small size of the complainant, Yarborough would not have been able to see a portion of the complainant sticking out over the end of the baby carrier. In this connection, we recall the testimony of Marisa Vanegas that Yarborough never told her of the baby carrier incident. Vanegas, however, stated it was possible Yarborough told another office worker of the incident. Additionally, we have the testimony of Ruth Taylor, the babysitter, who testified the complainant seemed fine and in good health on July 15. And we have the testimony of appellant that Yarborough's testimony was untrue.

While this may not be considered overwhelming evidence of appellant's guilt, that is not the test. Instead the test is whether the jury finding of guilt was "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at 129. Under this standard, we cannot conclude that in light of the foregoing evidence, the finding of guilt was clearly wrong or unjust. The evidence is factually sufficient to support the jury's verdict. Appellant's points of error five, six and seven are overruled.

II. Fatal Variance

In point of error four, appellant contends there is a fatal variance between the indictment and the evidence presented at trial. A variance between the indictment and the evidence at trial may be fatal to a conviction because due process guarantees the defendant notice of the charges against him. *Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App.1995). The indictment alleges appellant injured the complainant by throwing him "to the ground." The testimony at trial established that the complainant was thrown to the "floor." The word "ground," in the absence of a special definition, can be read in context and can be construed according to the rules of common usage. *See* TEX. GOV'T CODE ANN. § 311.011 (Vernon 1998). *See also* TEX. PENAL CODE ANN. § 1.05(b) (Vernon 1994) (Section 311.011 of Code Construction Act applies to Penal Code). In *Webster's New World College Dictionary* 596 (3d Ed 1996), "ground" is defined as the lowest part, base, or bottom of anything. In this context, "floor" and "ground" are synonymous. Consequently, we hold there is no variance in the instant case.

Additionally, we note that not every variance between the evidence at trial and the indictment is fatal; only a material variance is fatal. *See Stevens*, 891 S.W.2d at 650. A variance between the charging instrument and the proof at trial is material only if it operated to the defendant's surprise or prejudiced his rights. *Id*.; *Human v. State*, 749 S.W.2d 832, 837 (Tex. Crim. App.1988). Here, appellant has not demonstrated surprise or prejudice by the allegation of "ground" and the proof of "floor." Appellant's fourth point of error is overruled.

III. Jury Instructions

Appellant's eighth point of error contends the trial judge erred by submitting a jury instruction on paragraph two of the indictment, allowing a finding of guilt by manner and means unknown to the grand jury. The charge offered the alternative theories that the injury was caused by either throwing the complainant to the ground or by manners and means unknown to the grand jury. The State can alternately plead differing methods of committing one offense. *See Marquez v. State*, 725 S.W.2d 217, 239 (Tex. Crim. App.1987), *cert. denied,* 484 U.S. 872 (1987); *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980), *cert. denied,* 449 U.S. 893 (1980); *Jurek v. State*, 522 S.W.2d 934, 941 (Tex. Crim. App. 1975), *affirmed,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

When an indictment alleges that the manner and means used to commit a crime are unknown to the grand jury, the State must prove that the grand jury attempted to determine the exact means used in the offense, but was unable to do so. *See Mack v. State*, 772 S.W.2d 162, 167 (Tex. App.—Dallas 1989, no pet.) (citing *Pike v. State*, 758 S.W.2d 357, 367 (Tex. App.—Waco 1988, no pet.)). This must be proven just as any other allegation in the indictment. *Mack*, 772 S.W.2d at 167. (citing *Edlund v. State*, 677 S.W.2d 204, 209 (Tex. App.—Houston [1st Dist.] 1984, no pet.)).

However, if a jury charge contains alternate theories of committing an offense and the jury returns a general verdict, we affirm if the evidence is sufficient to support a guilty verdict under any of theories submitted. *See Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied,* 504 U.S. 958 (1992). Appellant contends this paragraph in the charge prejudiced him by failing to confine the jury's considerations to the acts alleged. The charge correctly set out the charged conduct and the law. The charge was not erroneous and the verdict is supported by sufficient evidence. Appellant's eighth point of error is overruled.

IV. Oral Statements

The ninth point of error contends the trial court erred by failing to suppress an oral statement allegedly made by appellant. Detective Bonsal testified he went to appellant's job to investigate the instant offense. Bonsal arrested appellant on a warrant for outstanding parking tickets. Bonsal testified appellant was not free to leave and the statement in question was made before appellant was given his statutory warnings. *See* TEX. CODE CRIM. PROC. arts. 38.22 & 38.23; *Miranda v. Arizona*, 384 U.S. 436,

444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Statements made by an accused after being placed in custody and prior to his rights being read to him are inadmissible as a matter of law. *See Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977); *Melton v. State*, 790 S.W.2d 322, 325 (Tex. Crim. App.1990); *Wicker v. State*, 740 S.W.2d 779, 786 (Tex. Crim. App.1987), *cert. denied*, 485 U.S. 938 (1988).

The statement at issue was used against appellant in the State's rebuttal. Appellant had testified during cross examination that he told Bonsal he only held his son a few times. On rebuttal, Bonsal testified appellant stated that he had never held his child at all. When the State first attempted to offer the statements against appellant, Bonsal was questioned outside the presence of the jury regarding when appellant's rights were read to him. The trial court determined appellant was in custody when he was first questioned by Bonsal. At that time, the trial court sustained appellant's objection and found "that the defendant was under arrest and in custody the moment that he was approached by this detective . . . and, therefore, any oral statement made by him from then on would be inadmissible and I so find." However, in rebuttal, the trial court admitted the statements previously found inadmissible.

Article 38.22, section 5 of the Texas Code of Criminal Procedure expressly excludes from the purview of the statute, "a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness[.]" The State argues that because appellant's statement was admitted as a prior inconsistent statement, it was admissible to rebut appellant's contention on cross-examination that he had only held his son a few times. Unwarned statements may be introduced to impeach the testimony of a defendant. *Lykins v. State*, 784 S.W.2d 32, 36 (Tex. Crim. App. 1989). A defendant's statement that is not voluntary, however, may not be used to impeach him. *Mincey v. Arizona*, 437 U.S. 385, 397-98, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978); *Lykins*, 784 S.W.2d at 36. Therefore, resolution of appellant's ninth point of error requires a determination concerning the voluntariness of his statement.

Voluntariness is decided by considering the totality of the circumstances under which the statement was obtained. *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). A statement is voluntary if it is freely made, without coercion, duress, pressure, threats or promises. *Garrett*

v. State, 682 S.W.2d 301, 307 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1009, 105 S.Ct. 1876, 85 L.Ed.2d 168 (1985).

At the time appellant made his statement, Detective Bonsal had explained to appellant that he was investigating injuries to the child. Appellant's statement was in response to Detective Bonsal's inquiry as to whether appellant knew anything about the injuries. At that time, the trial court determined that appellant was in custody and his statement was not admissible. Had appellant refused to answer Detective Bonsal and walked away, Detective Bonsal testified he would have arrested appellant on an outstanding traffic warrant. Appellant's statement was not made freely without duress or pressure. The statement was not admissible and, therefore, the trial court erred in permitting its use before the jury.

Having found error, however, does not end our inquiry. A harm analysis must be conducted and we must reverse for constitutional error unless we determine beyond a reasonable doubt that the erroneous admission of the statement did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a). We must examine the following factors:

1. the source of the error;
2. the nature of the error;
3. whether or to what extent it was emphasized by the State;
4. its probable collateral implications;
5. how much weight a juror would probably place on the error; and
6. whether declaring the error harmless would encourage the State to repeat it with impunity.

See Cooper v. State, 961 S.W.2d 222, 227 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

An examination of these factors establishes that the State was the source of the error. Second, the nature of the error is prejudicial to appellant generally but not inculpatory regarding the instant offense. While the statement Bonsal attributes to appellant is negative, there were previous negative characterizations regarding appellant's approach to fatherhood, specifically that he stated he did not want to keep the complainant if there were serious medical problems. The State emphasized the statement only once in its closing argument. Fourth, its collateral impact is negligible in light of the other evidence

presented at trial. Finally, we have no reason to conclude the State would attempt to repeat such an error with impunity. Accordingly, we hold the erroneous admission of the statement was harmless beyond a reasonable doubt. Appellant's ninth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Yates, Amidei, and Baird.[1]

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

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