

Affirmed and Opinion filed May 24, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00295-CR

CYNTHIA SUZANNE CASH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 777,134**

O P I N I O N

Appellant, Cynthia Suzanne Cash, was convicted by a jury of the felony offense of injury to a child. The jury sentenced appellant to eight years in the Institutional Division of the Texas Department of Criminal Justice. In three issues, appellant challenges the factual sufficiency of the evidence and two of the trial court's evidentiary decisions. We affirm.

Appellant ran a day care facility for children in her home. Appellant provided childcare for the victim, a four month old baby girl, and her older brother. On February 17, 1998, the victim's father took her to the doctor for her four month check-up which included routine immunizations. The victim's father then went to appellant's home and left the victim in her

care at approximately 11:00 a.m. At approximately 4:25 p.m., appellant called the victim's mother to inform her there was something wrong with the victim and she was being transported by ambulance to Texas Children's Hospital. The victim was pronounced dead at 12:30 p.m. on February 19, 1998, by Dr. Larry Jefferson. Dr. Jefferson attributed the cause of death to shaken baby syndrome. Dr. Patricia Moore, an associate medical examiner at the Harris County Medical Examiner's Office, performed an autopsy on the victim's body. As a result of the autopsy, Dr. Moore concluded that the victim died from craniocerebral injuries. Dr. Moore determined that the victim's death was a shaken baby homicide. Appellant was subsequently charged by indictment with the offense of injury to a child. Appellant pleaded not guilty to the charge, and the case was tried to a jury.

In her first issue, appellant avers that there is factually insufficient evidence to sustain appellant's conviction. The State alleged, in the indictment, that appellant unlawfully, intentionally, and knowingly caused the victim serious bodily injury by an unknown manner and means and, also, by shaking her. Appellant contends (1) there is no direct evidence that she injured the victim, (2) there is evidence that she did not injure the victim, and (3) she provided a valid alternative theory regarding how the victim received her injuries. The State, while conceding the lack of "direct" evidence, responds by asserting that the record clearly evinces that the victim suffered a fatal shaken baby injury while in appellant's care.

When determining the validity of a factual sufficiency challenge, we must view the evidence in a neutral light, and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson v. State*, 23 S.W.3d 1, 6-7 (Tex. Crim. App. 2000). We must review the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compare it with the evidence that tends to disprove that fact. *Id.* at 7. When reviewing the evidence, we are authorized to disagree with the fact finder's determination, but we must employ appropriate deference to insure that we are not substituting our judgment for that of the fact finder. *Id.* Furthermore, our review should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to witness testimony. *Id.*

The State presented the testimony of four physicians who all testified that the victim suffered severe injuries from being deliberately shaken. The State established that the victim was in appellant's sole care when the injury occurred. At trial, appellant presented the testimony of a neurosurgeon, Dr. Hirschberg, who testified that upon reviewing the victim's medical records, he found no evidence that she had been shaken. He further testified that he believed that the victim's death was the result of severe anaphylaxis caused by the immunizations she received that morning. Appellant presented no other evidence to support Dr. Hirschberg's assertion that the victim's death was the result of an anaphylactic reaction. At the conclusion of Dr. Hirschberg's testimony, the State called a rebuttal witness, a professor of pediatrics at the Baylor College of Medicine, who contradicted and disagreed with much of Dr. Hirschberg's testimony. The only other evidence presented by appellant was her testimony that she did not injure the victim.

Apparently, the jury chose to disbelieve Dr. Hirschberg's theory concerning the cause of the victim's injuries and appellant's denial of wrongdoing. The State presented ample evidence to support its assertion that the victim suffered a serious bodily injury that was intentionally inflicted upon her while she was in the sole care of appellant. Thus, the evidence was factually sufficient to sustain appellant's conviction. Appellant's first issue is overruled.

In her second issue, appellant contends the trial court erred in excluding relevant evidence concerning the existence of the National Vaccine Injury Compensation Program. The trial court determined that the existence of the program was irrelevant to the case and instructed appellant's witness Dr. Hirschberg to refrain from mentioning the program in front of the jury. The trial court also refused to allow appellant's counsel to question the State's rebuttal witness about the program. Evidence is relevant when it has 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. We apply an abuse of discretion standard when reviewing a trial court's decision to admit or exclude evidence. *Schielack v. State*, 992 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). We will not intercede unless the trial court's decision was outside the "zone of reasonable

disagreement.” *Id.* The National Vaccine Injury Compensation Program Act is a remedy devised by the federal government to compensate parents whose children suffer adverse side effects upon receiving mandatory vaccinations. Appellant contends that it is the act’s recognition of the causal link between immunization and anaphylaxis that was the basis of the act’s relevancy. However, there was never any issue as to whether an anaphylactic reaction was capable of causing death; rather, the issue was whether an anaphylactic reaction actually caused the victim’s death. Thus, the existence of the National Vaccine Injury Compensation Program had little or no relevance. Accordingly, the trial court did not abuse its discretion in refusing to allow any testimony before the jury concerning the existence of the program. Appellant’s second issue is overruled.

In her third issue, appellant contends the trial court erred in allowing the admission of evidence regarding sanctions imposed against her by the Texas Board of Medical Examiners. During the State’s cross-examination of appellant, appellant claimed to have “an excellent nursing background.” The State then sought to introduce the Texas Board of Medical Examiner’s file which contained evidence of prior offenses and bad acts committed by appellant which led to the suspension, revocation, and, ultimately, the rescission of her nursing license. Appellant’s trial counsel objected to the evidence, arguing that appellant’s claim that she had an excellent nursing background did not create a false impression and did not open the door to the State’s evidence.

Evidence of extraneous offenses or bad acts is inadmissible to show conforming conduct. TEX. R. EVID. 404(b). We review the trial court’s determination of admissibility of evidence of prior bad acts or offenses for purposes other than character conformity under an abuse of discretion standard. *Harvey v. State*, 3 S.W.3d 170, 175 (Tex. App.—Houston [14th Dist.] 1999, pet. ref’d). However, when a defendant voluntarily testifies concerning extraneous matters on cross examination, the State may impeach that testimony and correct any false impression presented by such answer with evidence of extraneous offenses. *Martinez v. State*, 728 S.W.2d 360, 361-62 (Tex. Crim. App. 1987). During the State’s cross examination of appellant, appellant testified that she had a nursing license, framed and hanging

on the wall of her home. She further volunteered that she had “an excellent nursing background.” Appellant’s nursing file affirmatively establishes that she did not have an excellent nursing background, and the trial court properly allowed the State to rebut the false impression created by appellant’s volunteered statement by admitting the file into evidence.

Appellant further complains that the prejudicial evidence contained in her nursing file constituted improper impeachment evidence pursuant to rules 608 and 609 of the Texas Rules of Evidence. However, because appellant failed to make a specific and timely objection on this ground during trial, she has waived the complaint on appeal. Accordingly, appellant’s third issue is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 24, 2001.

Panel consists of Senior Chief Justice Murphy, Former Justice Amidei, and Justice Hudson.*

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* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.