Affirmed and Opinion filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01318-CR
NO. 14-99-01319-CR

KARIM JASEM MATRUT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause Nos. 808,825 & 808,824

O P I N I O N

This consolidated appeal stems from two separate convictions for injury to two children. Appellant, Karim Jasem Matrut, raising some of the same issues under each appeal, contends the evidence was legally and factually insufficient to support his convictions for injury to a child. Appellant also claims the trial court committed reversible error by admitting hearsay testimony. We affirm both convictions.

I. FACTUAL BACKGROUND

Appellant is the father of complainants, A.K.J. and C.K.J. On March 24, 1999, appellant's wife, Mahem Bacshan, brought the couple's children, A.K.J., an eighteen-month-old boy, and C.K.J., a four-month-old boy, to Texas Children's Hospital. Both A.K.J. and C.K.J. were examined for possible child abuse after Bacshan, through an interpreter, notified the medical staff that appellant had physically abused her and her children.

After learning of these allegations, the hospital staff called Harris County Child Protective Services ("CPS") to interview the mother about the suspected child abuse. The CPS consultant and several hospital nurses documented a similar account of the alleged abuse. At some point after the hospital staff began attending to Bacshan and her children, appellant arrived at the hospital and created a disturbance. Responding to a call from the hospital, Houston Police Officer, Detective Heidi Brodersen,[1] arrived to find that a suspect, appellant, had been detained. Detective Brodersen learned from another officer that appellant was upset that his family was at the hospital. Through Said Najmi, a patient advocate with Texas Children's Hospital who served as an Arabic-English translator, Detective Brodersen learned from Bacshan that appellant had caused the children's injuries. Detective Brodersen also observed bruising, a bite mark, scratches and blood on one or both of the children.

Appellant was charged with two counts of injury to a child.[2] He entered a plea of not guilty to both counts and elected to be tried by a jury. The State presented evidence of the children's injuries through Officer Brodersen and medical personnel from the hospital.

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[1] At the time she investigated the children's injuries, Detective Brodersen had been a police officer for six years and had been investigating physical abuse of juveniles for about four months. She testified that she had also been through several schools with the Houston Police Department ("HPD"), including interview and basic investigators school. She had also spent several years on a gang task force conducting special investigations.

[2] The indictment in A.K.J.'s case alleged that appellant unlawfully, intentionally, and knowingly caused injury to A.K.J., a child younger than fifteen years old, by (1) biting him or by (2) striking him with his hand. The indictment in C.K.J.'s case alleged that appellant unlawfully, intentionally, or knowingly caused bodily injury to C.K.J., a child younger than fifteen years old, by (1) picking C.K.J. up by the foot and shaking him; (2) grabbing C.K.J. by the arms and shaking him; or (3) striking C.K.J. with his hand.

Neither Bacshan nor the children participated in the trial. The jury convicted appellant on both counts of injury to a child and sentenced him to five years' confinement in the Institutional Division of the Texas Department of Criminal Justice for each offense. The court ordered appellant's two five-year sentences to run concurrently.

II. ISSUES FOR REVIEW

In A.K.J.'s case, appellant challenges his conviction for causing injury to A.K.J. (by biting and striking him). In C.K.J.'s case, appellant challenges his conviction for causing injury to C.K.J. (by either picking the infant up by the foot and shaking him, by picking him up by the arms and shaking him, or by striking him). In his first point of error in both appeals, appellant claims the trial court committed reversible error in admitting the hearsay testimony of Adeeba Sulaiman. In his second and third points of error in both appeals, appellant challenges the legal and factual insufficiency of the evidence to support the convictions for injury to a child because the State's case was not "credible." In C.K.J.'s case, appellant further challenges his conviction for injury to C.K.J., urging six additional points of error in which he claims the evidence is legally and factually insufficient to support his conviction for injury to a child for the State's failure to prove each of the three alternative methods by which the indictment alleged appellant committed the offense against C.K.J.

III. LEGAL AND FACTUAL SUFFICIENCY OF EVIDENCE – C.K.J.

In his fourth through ninth points of error in C.K.J.'s case, appellant argues that the evidence was legally and factually insufficient to support his conviction for injury to a child because the State failed to prove, alternatively, that appellant (1) picked up C.K.J. by the foot and shook him; (2) picked up C.K.J. by the arms and shook him; or (3) struck C.K.J. with his hand.

Jurors could find appellant guilty of one or a combination of the listed means of committing the offense alleged. *Kitchens v. State,* 823 S.W.2d 256, 258 (Tex. Crim. App. 1991). In other words, when a jury returns a general jury verdict, as it did here, on an

indictment charging alternative theories of committing the same offense, we will uphold the verdict if the evidence supports *any* of the theories charged. *Brooks v. State*, 990 S.W.2d 278, 283 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 956, 120 S. Ct. 384 (1999); *see Skillern v. State*, 890 S.W.2d 849, 876 (Tex. App.—Austin 1995, pet. ref'd) (finding sufficiency of evidence when a general verdict is returned and the evidence is sufficient to support any manner of committing the offense submitted alternatively).

At the time of the offenses, Texas Penal Code section 22.04, which outlines the manners of committing injury to a child, provided in pertinent part:

> (a) A person commits an offense if he intentionally,[3] knowingly,[4] recklessly,[5] or with criminal negligence,[6] by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:
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> (1) serious bodily injury;[7]

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[3] Texas Penal Code, section 6.03(a) provides that "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PEN. CODE ANN. § 6.03(a) (Vernon Supp. 2001).

[4] Texas Penal Code, section 6.03(b) provides that "[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

[5] Texas Penal Code, section 6.03(c) provides that "[a] person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

[6] Texas Penal Code, section 6.03(d) provides that "[a] person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

[7] Texas Penal Code, section 1.07 (46) defines "Serious Bodily Injury"as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or

(2) serious mental deficiency, impairment, or injury; or bodily injury.[8]

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992). The issue we must resolve is whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the State. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

The hospital nurses noted that C.K.J. had abrasions near his eye or on the bridge of his nose. Also, the medical staff observed a suspicious mark on C.K.J.'s chest near the tenth left rib, prompting them to x-ray his chest to determine whether there was a fracture. A medical report by Dr. Jeffrey Towbin indicates that C.K.J.'s left tenth rib had been fractured. Further, Najmi, the patient advocate who had served as an Arabic-English translator, testified that Bacshan reported that appellant had grabbed, shaken, and thrown C.K.J.

As part of her investigation, Detective Brodersen observed the demeanor of both appellant and Bacshan at the hospital and noted that appellant appeared angry and aggressive and that Bacshan appeared "fearful and afraid" when recounting how the children had been injured. Officer Brodersen also noticed scratch marks or "some type of abrasion" on C.K.J. and observed dried blood in his left ear canal, which appeared to be "a couple days old, a couple of hours to maybe a day old kind of crust." Based on her training and experience, she believed

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impairment of the function of any bodily member or organ."

[8] Texas Penal Code, section 1.07(8) defines "Bodily Injury" as "physical pain, illness, or any impairment of physical condition."

C.K.J.'s injuries came "possibly from shaking a child or a head trauma."

Viewing the foregoing evidence in a light most favorable to the State, a rational trier of fact could have found that appellant shook C.K.J. from his foot or arms or stuck C.K.J. with his hand. Thus, we find the evidence is legally sufficient to support appellant's conviction for injury to C.K.J.

When evaluating a challenge to the factual sufficiency of evidence, we view all of the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). Essentially, we compare the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). In conducting the factual sufficiency review, we review the fact-finder's weighing of evidence and can disagree with the fact-finder's determination. *Clewis*, 922 S.W.2d at 133. However, we must employ appropriate deference so that we do not merely substitute our judgment for that of the fact-finder. *See Jones*, 944 S.W.2d at 648. Our evaluation should not intrude upon the fact-finder's role as the sole judge of the weight and credibility given to any witness's testimony. *Id.*

While the injuries to A.K.J. were obvious – an adult-size bite mark on his left arm and bruises on his back that seemed to be caused by a hand – the injuries to his younger brother, C.K.J. were less apparent. The medical records show conflicting diagnoses as to the condition of C.K.J.'s rib. The final discharge summary by attending physician, Armando G. Correa, indicated that "detailed films of the chest did not reveal any fractures." Further, Dr. Jan Drutz, the examining physician and the State's medical expert, testified that there was no damage to C.K.J.'s ribs, but conceded that the medical staff was concerned about C.K.J.'s left tenth rib. Another record indicates that there was "an abnormal appearance to the posterior aspect of the left [tenth] rib consistent with a healing rib fracture . . . ." A report by Dr. Towbin, made in connection with his examination of C.K.J.'s chest x-ray, reads "left ribs are normal," but the

addendum reads "the above report is inaccurate. There is a nearly-healed fracture of the posterior left [tenth] rib."

The translator recounted Bacshan's story of appellant's recent abuse of their children. Dr. Karee's diagnosis of C.K.J.'s injuries was consistent with Bacshan's account of how C.K.J. was injured (that appellant grabbed, shook, and threw C.K.J.). Detective Brodersen believed that C.K.J.'s injuries were consistent with "shaking a child or head trauma." Although Officer Brodersen opined that blood coming from the ear can be a symptom of being shaken, she conceded on cross-examination that if a doctor found that the blood observed in C.K.J.'s ear was not caused by being shaken, she would believe it. Dr. Drutz's discharge summary of C.K.J. revealed that the blood found in his ear "was attributed to the examination."

The defense also presented two witnesses who knew appellant while he and his family were living in a Turkish refugee camp, Meriam Mouhammad Ali and Abbsjafaar Baker. Both testified that appellant was a good father who, from their observations, loved his children and had been nice to them, and that Bacshan, unlike appellant, often neglected the children. Appellant testified that it was not he, but Bacshan, who had injured the children.

Viewing all of the evidence without the prism of "in the light most favorable to the prosecution," we conclude that the jury's finding that appellant intentionally shook or struck C.K.J., causing him bodily injury, was not "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *See Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000).

Points of error four though nine are overruled.

IV. CREDIBILITY CHALLENGE TO LEGAL AND FACTUAL SUFFICIENCY

In his second of third points of error in both appeals, appellant contends that the evidence is factually and legally insufficient to support his convictions for injury to a child because the State's case was "not credible." Appellant concedes that the credibility of witnesses is not subject to review on appeal, yet argues that "at some point the credibility of

the State's case is so undermined that a reviewing court cannot have confidence in a verdict supported solely by the witnesses' testimony," and, thus, this court should reverse. *See Muniz v. State*, 851 S.W.2d 237, 246 (Tex. Crim. App. 1993).

The weight to be given to contradictory testimonial evidence is within the sole province of the jury. *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997). The jury is the sole judge of the credibility of the witnesses and may accept or reject any or all of the evidence on either side. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

Because appellant has not shown that the evidence is insufficient, but has only attacked its credibility, and because we may not consider the credibility of the evidence in reviewing legal or factual sufficiency, appellant's points of error present no grounds upon which they can be sustained. *See Facundo v. State*, 971 S.W.2d 133, 135 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (finding argument that evidence is factually insufficient simply because it is "not credible" unpersuasive and itself without credibility).

Appellant's second and third points of error in both appeals are overruled.

V. HEARSAY

In his first point of error in both appeals, appellant contends the trial court erred by admitting, over appellant's objection, the testimony of Adeeba Sulaiman regarding statements Bacshan made to her about why she moved from Houston to Georgia.

We review a trial court's decision to admit evidence for an abuse of discretion. *Santellan v. State*, 939 S.W.2d 155, 168–69 (Tex. Crim. App. 1997). Where the trial court's evidentiary ruling is within the "zone of reasonable disagreement," there is no abuse of discretion and the reviewing court will uphold the trial court's ruling. *Id.* at 169. At the outset, we note that the admission of inadmissible hearsay constitutes non-constitutional error. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Therefore, we must disregard the error unless it affected appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence

on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). However, if the fact to which the hearsay relates is sufficiently proved by other competent and unobjected to evidence, the admission of the hearsay is properly deemed harmless and does not constitute reversible error. *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000).

In response to appellant's allegations that it was Bacshan, and not appellant, who injured the children, the State presented Adeeba Sulaiman as a rebuttal witness. Sulaiman was a caseworker for the Turkish community in Atlanta, Georgia, where Bacshan and her children moved within a week after their visit to Texas Children's Hospital. Appellant complains about the following testimony:

> STATE: And were you aware of the reason that she came to Georgia?
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> SULAIMAN: Yes.
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> STATE: What was that?
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> SULAIMAN: She said that she had been abused. This is why she moved from here [Houston] to Georgia.
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> [Appellant objects, and the court overrules his objection]

Appellant, characterizing this testimony as inadmissible hearsay offered for its truth,[9] contends the trial court's admission of it affected his substantial rights, and therefore, the trial court's judgment should be reversed and a new trial granted. *See* TEX. R. APP. P. 44.2(b). Appellant contends that Sulaiman's testimony implies "that the appellant had been violent to his wife."

Even if the testimony were inadmissible hearsay, its admission was harmless error because evidence that appellant abused his wife was admitted, without objection, elsewhere during the trial. The photographs of Bacshan indicate that she had been injured. The translator

[9] Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d).

testified Bacshan told him appellant hit her in the right jaw in their Houston home. Sulaiman testified that she observed bruises on Bacshan's face.

Because the contested testimony by Sulaiman was merely cumulative of evidence admitted elsewhere without objection, any error in the admission of her testimony is harmless. *See Jones v. State*, 814 S.W.2d 801, 804 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (relying on *Anderson v. State*, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986), which stated that "inadmissible evidence can be rendered harmless if other evidence at trial is admitted without objection and it proves the same fact that the inadmissible evidence sought to prove.").

Appellant's first point of error in both cases is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 19, 2001.
Panel consists of Justices Edelman, Frost, and Senior Chief Justice Murphy.[10]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[10] Senior Chief Justice Paul C. Murphy sitting by assignment.