Affirmed and Opinion filed December 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00640-CR and 14-98-00641-CR

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PATRICIA MCNEIL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 756,522 and 752,933

O P I N I O N

Appellant Patricia McNeill was convicted by the jury of felony injury to a child and felony interference with child custody, and sentenced to a total of ninety-five years' incarceration. On appeal, she complains of insufficiency of the evidence, error by the trial court on evidentiary rulings, and error in allowing the State to substitute an enhancement paragraph at the punishment phase of trial. We find no error and affirm.

From the day he was born, DeAngelo McNeil, the complainant, was the subject of on-going investigation by Harris County Children's Protective Services (CPS). Born in Houston on June 1, 1994, DeAngelo weighed only 3 pounds, five ounces and tested positive for

cocaine, as did appellant. Due to his low birthweight, DeAngelo remained in the hospital for several weeks, during which time appellant rarely called the hospital or visited her baby. When the child was ready to leave the hospital and appellant could not be located to claim him, CPS obtained temporary managing conservatorship of the baby and placed him in foster care.

After appellant was eventually located, she signed an affidavit relinquishing her parental rights to DeAngelo, but revoked it six months later. From March of 1995 through February of 1996, appellant was in jail. Not until December of 1996, when DeAngelo was two-and-a-half-years old, was he allowed to reside with appellant for the first time, although CPS continued to maintain managing conservatorship over the child.

DeAngelo moved in with his mother and five-year old brother, and was enrolled in The Learning Academy day care center. Three months later, in March of 1997, DeAngelo's teacher at the day care center reported seeing a very deep black and purple oval bruise on the child's arm and a rectangular bruise over the front and back of his upper leg, which looked to her as if the child had been struck with a belt. One week later, she noticed he had a deep purple black eye. CPS visited with appellant and verified the fading bruise, but appellant stated it had happened while DeAngelo was playing with his older brother. Appellant denied using any form of physical punishment on the child.

Less than a month later on April 10th, DeAngelo's teacher reported seeing new injuries to the child. This time she observed that his hair was full of dried blood stuck to his head, with little pin-like marks on his scalp. One entire side of his face was bruised, his buttocks and thighs were bruised, and his penis and scrotum were black and purple, deeply bruised. When questioned by the day care center's manager, appellant claimed DeAngelo had fallen off a grocery store cart. The day care manager did not believe this, and called CPS. Appellant was angered by this and told the manager she would be taking DeAngelo to a different day care center. The next day, Appellant informed CPS that DeAngelo had hurt himself on a carnival ride and that she was changing day care centers.

DeAngelo was brought to the new day care center, Children's World Learning Center, on April 15th. His prior teacher from the first center placed an anonymous call to the new center, urging them to watch over DeAngelo. In response, the new teacher examined the child, and noticed bruises under his eye and on his arms. Appellant was called, and she stated DeAngelo and his brother had been "rough housing." A few days later, DeAngelo showed up at the center with a knot on his forehead and a black eye. Appellant was again called, and she again blamed it on a fall. DeAngelo was last seen by the day care center on April 18th, when he went home with a fever. Appellant called a few days later, saying the child would be out for a while as he was visiting his father for a while.

In checking with the day care center on April 23rd, CPS learned of the new bruises and black eye; in checking with appellant that same day, CPS was told the child was fine. Appellant made no mention of DeAngelo being gone with his father. CPS was unaware of DeAngelo's absence until they visited appellant's home a week later, at which point she told CPS that DeAngelo would be visiting his father until May 4th. Appellant was unable to give CPS the father's home address or telephone number or any way to contact DeAngelo or the father except by a pager number which, when called by CPS, was registered to an electrician who had never heard of appellant or DeAngelo.

DeAngelo did not reappear on May 4th , and on May 9th, appellant was ordered by the court to return DeAngelo to CPS custody. Appellant did not return DeAngelo or account for his absence; he was still missing as of a year later at trial in April, 1998. DeAngelo's seven-years old brother, DeBaron, testified that when DeAngelo would "get into trouble," such as breaking a glass or knocking over a lamp, appellant would hit him with the belt she kept on her bedroom doorknob and make him cry. DeBaron testified that DeAngelo "got into trouble" a lot more than he himself did. CPS found the belt hanging exactly where the brother had described. DeBaron testified he had never seen DeAngelo's father before and did not know who he was.

Investigators attempted to track down the person appellant alleged was DeAngelo's father, and finally located him in the Dominican Republic. The alleged father testified he had not seen appellant since 1987 and could not be DeAngelo's father. He further testified that he had not been back to the United States since 1987, had never seen DeAngelo, and did not have the child.

By her first of twelve points of error, appellant argues that the evidence is insufficient to support the jury's finding that she injured DeAngelo. She argues that the only witness who actually testified to her hitting DeAngelo with the belt was seven-year old DeBaron, and that the testimony of the day care personnel was, at best, incredulous due to their inconsistency in describing the locations and severity of DeAngelo's bruises and other injuries. While one witness, she argues, testified that DeAngelo was so badly beaten that "only God was keeping him alive," another witness saw the same child less than a week later and merely testified to observing bruises under his eye and on his arms.

As appellant's argument does not distinguish between legal insufficiency and factual insufficiency of the evidence, we will address both. The standard of review for legal insufficiency is that after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements essential to prove the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In conducting this review, we will not re-evaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When reviewing the factual sufficiency of the evidence, we will review all of the evidence without the prism of "in the light most favorable to the prosecution" and will 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 v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). This review must be appropriately deferential so as to avoid substituting this court's judgment for that of the jury. *Id*. at 133.

Viewing the evidence in the light most favorable to the prosecution, we find that the evidence is legally sufficient and that a rational jury could have found that the State proved appellant's guilt beyond a reasonable doubt. Moreover, the verdict is not so contrary to the overwhelming weight of the evidence as to the be clearly wrong or unjust. That the witnesses may have had differences in their observations regarding the severity or location of DeAngelo's injuries, or that a seven year-old child may have been the only eyewitness to appellant's infliction of injuries to DeAngelo, does not lead this court to find the verdict to be clearly wrong or unjust. The evidence is legally and factually sufficient to uphold the jury's verdict that appellant intentionally, knowingly or recklessly caused bodily injury or serious bodily injury to DeAngelo, and appellant's first point of error is overruled.

By her second and third points of error, appellant argues that the trial court erred in allowing testimony that appellant had at one time relinquished her parental rights to DeAngelo, but not as to DeAngelo's brother, DeBaron. The relinquishment, she argues, was not relevant to the State's case and the prejudicial effect of such evidence greatly outweighed any probative value.

We note from the onset that when the State presented testimony through CPS caseworker Dorothy Oakes that appellant had twice expressed an interest in giving up her rights to DeAngelo, appellant raised no objection to the testimony. The State is correct in contending that this point has not been preserved for our review. In order to properly preserve an issue for appellate review, the defendant must make a timely request, objection, or motion, stating the specific grounds for the ruling he desired the trial judge to make. Tex.R.App.P. 52(a). The objection must be made at the earliest possible opportunity and the "point of error must correspond to the objection made at trial." *Martinez v. State*, 867 S.W.2d 30, 35 (Tex.Crim.App. 1993); *Turner v. State*, 805 S.W.2d 423, 431 (Tex.Cr.App.1991). Here, appellant failed to object to the State's initial evidence of appellant's decision to relinquish her rights to DeAngelo, and the objection has been waived for appellate purposes.

Moreover, another State's witness, Pat Flenniken, subsequently testified that appellant had signed an affidavit of relinquishment as to DeAngelo. Appellant did not object to the testimony. The general rule is that error regarding improperly admitted evidence is waived if that same evidence is brought in later by the State without objection. See, e.g., *Ethington v. State*, 819 S.W.2d 854, 858-60 (Tex.Crim.App.1991); *Maynard v. State*, 685 S.W.2d 60, 65 (Tex.Crim.App.1985); *Alvarez v. State*, 511 S.W.2d 493 (Tex.Crim.App.1973) (op. on reh'g). Appellant's second and third points of error are overruled.

Under her fourth and fifth points of error, appellant contends that the trial court erred in allowing evidence that DeAngelo had not been seen or heard from since the day alleged in the indictment and up to the day of trial. Appellant argues that as the criminal offense of interference with a child custody case was proved by the State's evidence that appellant did not return DeAngelo by April 29, 1997, it was immaterial and prejudicial for the State to show that DeAngelo was still missing as of the day of trial a year later.

CPS had temporary managing conservatorship of DeAngelo from June 29, 1994 through June 10, 1997, at which time CPS obtained sole managing conservatorship of the missing child. The indictment alleged that on or about April 29, 1997, appellant unlawfully took and retained DeAngelo in knowing violation of the express terms of a judgment and order of a court disposing of his custody, and refused to return him to CPS. While appellant is correct in stating that the offense was complete as of April 29, 1997 when DeAngelo was not returned, the State, too, is correct in arguing that the criminal action was on-going so long as appellant continued to fail to return the child to CPS custody.

More importantly, however, appellant did not properly preserve her argument for our review. While she argues that the State made eleven improper references to DeAngelo's absence, she acknowledges she specifically objected to only two of the references. This is insufficient to preserve error on appeal, as we discussed above under the second and third points of error. Appellant is incorrect in urging that error is preserved inasmuch as the State's eleven references violated the defense's motion and order in limine. The granting of a motion in limine preserves

no error; the subject matter of the motion in limine must be objected to when raised at trial. *Wilkerson v. State*, 881 S.W.2d 321 (Tex. Crim. App. 1994). Appellant's fourth and fifth points of error are overruled.

Appellant's sixth, seventh, eighth, ninth and tenth points of error complain that the trial court allowed into evidence at the punishment phase of trial CPS and medical records showing that twenty years ago, appellant's then one-year old child was diagnosed with battered child syndrome and was placed in foster care. This, complains appellant, was unduly prejudicial and violated TEX. CODE CRIM. PROC. ANN. Art. 37.07. The State, on the other hand, contends that appellant waived her argument by failing to object to substantially the same testimony from the physician who had examined the child. As with appellant's previous points of error, we find that any error has been waived by failure to properly and timely object to the complained-of evidence.

Regardless, TEX. CODE CRIM. PROC. ANN. Art. 37.07 Section 3(a) specifically allows the introduction of extraneous offenses or prior bad acts into evidence during the punishment phase of a case, as long as the court deems such matters relevant to sentencing. *Mitchell v. State*, 931 S.W.2d 950, 953 (Tex. Crim. App. 1996); *Williams v. State*, 958 S.W.2d 844, 845 (Tex. App.--Houston [14 Dist.] 1997, pet. ref'd). The trial court admitted evidence of the unadjudicated prior bad acts regarding the one-year old baby, and specifically charged the jury that it could not consider same for any purpose unless it found and believed "beyond a reasonable doubt" that appellant committed the act or acts.

The trial court's actions as to the admissibility of extraneous offense evidence is reviewed under an abuse of discretion standard. *Mitchell* at 953. In reviewing a trial court's relevancy decision under this standard, we will not find an abuse of discretion so long as the trial court's ruling was at least within the zone of reasonable disagreement. *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App.), *cert. denied*, __U.S.__ (1999). While appellant argues that no "bad act" was shown by appellant having sought to terminate her parental rights to the one-year old, or having had a baby with a "bad father," this ignores the facts that the baby presented at the hospital emergency room with a broken skull and numerous broken bones. The records and testimony

reflected appellant as having blamed the injuries on the one-year old's older sibling and a car seat; the physician, however, testified that appellant's explanations were not consistent with the injuries he observed.

We likewise disagree with appellant's complaint that the court erred as the evidence was too old to be relevant. The question of remoteness rests in the sole discretion of the trial court. *Davis v. State*, 545 S.W.2d 147, 150 (Tex.Crim.App.1976). In addition, objections based upon remoteness go to the weight, not the admissibility, of the testimony. *Nethery v. State*, 692 S.W.2d 686, 706 (Tex.Crim.App.), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897 (1986). Only under TEX. R. EVID. Rule 609 (b) (impeachment by evidence of criminal conviction) is there an express time limitation regarding remoteness; Rule 609(b), of course, has no bearing on the issue here. See *Barnett v. Texas*, 847 S.W.2d 678, 679-80 (Tex. App. – Texarkana 1993, no pet.). In reviewing the relevancy of the disputed evidence here, we find that it was within the zone of reasonable disagreement, and that there was no abuse of discretion. Appellant's sixth through tenth points of error are overruled.

Lastly, under her eleventh and twelfth points of error, appellant alleges the trial court erred in allowing the State to abandon and substitute one of the enhancement paragraphs in the indictment for one that was not pleaded in the indictment. Appellant does not complain that she did not receive notice of the additional enhancement paragraph, but rather, argues that the State should be bound by the enhancement paragraphs in the indictment.

Prior to commencement of the punishment phase of trial, appellant informed the State that one of its two enhancement paragraphs appearing in the indictment was void. The State moved to abandon the void paragraph and to arraign appellant on the remaining paragraph and on a prior conviction not appearing in the indictment. The State contends, and appellant does not dispute, that it gave appellant timely notice of the substituted enhancement paragraph.

Appellant concedes that in *Brooks v. State*, 957 S.W.2d 30 (Tex. Crim. App. 1997), the Texas Court of Criminal Appeals overruled prior cases holding that enhancement paragraphs must be pled in the indictment. She argues, however, that if the State *does* plead enhancement

paragraphs in the indictment, it should not be allowed to substitute enhancement paragraphs without amending the indictment, citing *Parasco v. State*, 309 S.W.2d 465 (Tex. Crim. App. 1958). We find no support for appellant's argument in *Parasco*, as that portion of the decision relied on by appellant was expressly overruled by *Bell v. State*, 504 S.W.2d 498, 500-501 (Tex. Crim. App.1974), as noted in *Brooks* at 33. We find no support for appellant's position in current case law in general, and find no error by the trial court. Appellants eleventh and twelfth points of error are overruled.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed December 16, 1999.
Panel consists of Justices Sears, Cannon and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon and D. Camille Hutson-Dunn sitting by assignment.