In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00353-CR

CLARENCE RAY LEWIS, SR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CR27613

MEMORANDUM OPINION

Clarence Ray Lewis, Sr. appeals his conviction for reckless injury to a child. In a bench trial, the trial court found Lewis guilty and sentenced him to ten years confinement. In two issues, Lewis contends the evidence is legally and factually insufficient to support his conviction, and the trial court erred by allowing the State to introduce a portion of Lewis's grand jury testimony. We affirm the trial court's judgment.

Sufficiency Issues

In issue one, Lewis argues the evidence is legally and factually insufficient to support his conviction. In a sufficiency review, we consider the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Under the *Jackson* standard, the reviewing court gives full deference to the fact-finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* In *Brooks*, the Court of Criminal Appeals concluded that there is no meaningful distinction between legal sufficiency review and factual sufficiency review. *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)). The Court held that "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id.* at 912. The fact-finder determines the weight to give the testimony of each witness, and its determination may turn on an evaluation of the credibility and demeanor of the witnesses. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997).

In Lewis's case, the State was required to prove, beyond a reasonable doubt, that Lewis recklessly caused serious bodily injury to a child, by omission. *See* Tex. Penal Code Ann. § 22.04(a)(1) (West 2011).[1] An omission that causes serious bodily injury to a child "is conduct constituting an offense" if "the actor has a legal or statutory duty to act" or "the actor has assumed care, custody, or control of a child[.]" *Id.* § 22.04(b) (West 2011). Injury to a child is a result-oriented offense requiring a mental state that relates not to the specific conduct but to the result of the conduct. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Thus, the mental state criminalized in the injury to a child statute contemplates the prohibited result, *i.e.* serious bodily injury. *Haggins v. State*, 785 S.W.2d 827, 828 (Tex. Crim. App. 1990); *Beggs v. State*, 597 S.W.2d 375, 377 (Tex. Crim. App. 1980).

A person acts recklessly with respect to his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. Tex. Penal Code Ann. § 6.03(c) (West 2011). "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." *Id.*

A defendant's culpable state of mind is almost invariably proven by circumstantial evidence. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *Lopez v.*

[1]Amended section 22.04 contains no material changes relevant to this case, therefore, we cite to the current version of the statute. *See* Tex. Penal Code Ann. § 22.04 (West 2011).

State, 630 S.W.2d 936, 942 (Tex. Crim. App. 1982). Intent can be inferred from the acts, words, and conduct of the accused. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995). In determining the accused's intent, the fact-finder may consider events occurring before, during, and after the commission of the offense. *See Pitonyak v. State*, 253 S.W.3d 834, 844 (Tex. App.—Austin 2008, pet. ref'd).

The child who was the subject of Lewis's trial was his daughter, Kiyani, who was thirteen-months old when the offense occurred. Lewis, Kiyani's custodial parent, left Kiyani with her mother, Charlse Spencer, to go to work. Spencer's parental rights had previously been terminated based in part on her drug use.[2] Kiyani died from injuries she sustained while in Spencer's care.[3] According to Lewis, he left Kiyani with Spencer because his regular babysitter left town unexpectedly and he could not find another babysitter that morning. Under these circumstances, Lewis contends that there is insufficient evidence that he acted recklessly in causing Kiyani's injury by omission.

At Lewis's trial, the State introduced testimony from the CPS custody hearing, where Lewis testified that based on his history with Spencer, she could not provide a safe home for Kiyani and that Spencer was a danger to her children. Employees of CPS testified about Spencer's CPS case, and they indicated that Kiyani was removed from

[2]Following a custody case with the Texas Department of Family and Protective Services, Lewis was named the permanent sole custodian of Kiyani. The order states that Spencer was to have no access to or visitation with Kiyani because of Spencer's drug use.

[3]This Court previously affirmed Charlse Spencer's capital murder conviction. *See Spencer v. State*, No. 09-09-00441-CR, 2010 Tex. App. LEXIS 6687 (Tex. App.—Beaumont Aug. 5, 2010, no pet.) (mem. op.).

Spencer's care shortly after she was born because Kiyani's tests indicated that she had cocaine in her system. During his trial, Lewis admitted that a court order provided that Spencer was not to have access to or visitation with her children, including Kiyani; however, in an effort to excuse his decision to leave Kiyani with Spencer, Lewis testified that he had never known Spencer to be violent with her children, and he stated that he did not think she would hurt them.

Considering all the evidence in the light most favorable to the judgment, we conclude a rational fact-finder could have found, beyond a reasonable doubt, that Lewis was aware of the risk posed to Kiyani but consciously disregarded a substantial and unjustifiable risk that she would suffer serious bodily injury if left in Spencer's care. We hold that the evidence is sufficient to support the jury finding that Lewis was guilty of recklessly causing injury to a child by omission. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 895; *see also* Tex. Penal Code Ann. § 6.03(c). We overrule Lewis's first issue.

Admission of Grand Jury Testimony

In issue two, Lewis asserts that the trial court erred by admitting an audio-video recording containing portions of his grand jury testimony. Lewis argues that his grand jury testimony was inadmissible because he did not receive the warnings provided under article 20.17 of the Texas Code of Criminal Procedure before testifying in front of the grand jury. Lewis concludes that allowing the trial court, as fact-finder, to hear his grand

jury testimony violated his privilege against self-incrimination and his rights to due process under the United States and Texas constitutions. *See* Tex. Code Crim. Proc. Ann. art. 20.17 (West 2005); *see also* U.S. Const. amend. V; Tex. Const. art. 1, § 10.

To preserve error, a party must object each time inadmissible evidence is offered unless he (1) obtains a running objection, or (2) makes an objection outside the presence of the jury to all the testimony he deems objectionable. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003); *Ethington v. State*, 819 S.W.2d 854, 858-59 (Tex. Crim. App. 1991); *see also* Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a)(1). Evidentiary error is cured when the same evidence is admitted elsewhere without objection. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *Ethington*, 819 S.W.2d at 858. When an issue is not preserved, there is nothing for an appellate court to review. *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984).

Lewis's attorney did not timely object to the State's offer of the testimony that is at issue. When the State initially offered to introduce portions of Lewis's testimony before the grand jury, Lewis's counsel objected, claiming that Lewis had not been provided the article 20.17 warnings before testifying, and stating that the admission of the proffered testimony would violate the Code of Criminal Procedure and Lewis's rights to due process. The trial court reviewed the recording in camera, and thereafter, ruled that although some of the recording was not admissible, some of Lewis's statements were admissible. The trial court advised the State to prepare a new recording containing the

admissible testimony. After the trial court announced its ruling, it asked Lewis's counsel whether there were parts of the grand jury testimony that he wanted to offer, and Lewis's counsel said, "I would have to think about that, Judge." Lewis's counsel explained that he thought the use of Lewis's grand jury testimony, under the circumstances, was "an absolute denial of due process[.]" At this point, the State had not yet created the redacted recording to comply with the trial court's rulings. The State then rested, subject to introducing the redacted recording. Lewis's counsel never requested a running objection to the admissibility of Lewis's grand jury testimony.

After Lewis testified, the State offered into evidence the redacted recording. When the trial court asked if Lewis had objections to the redacted recording, Lewis's counsel stated: "Judge, I would like to reserve my right under the rule of optional completeness." Lewis's counsel did not reurge his previous objections, or make any additional objection. Both parties rested. The next morning, the trial court asked if anything further needed to be addressed before closing arguments. Lewis's counsel said, "I believe, Judge – I was thinking last night – I believe I voiced an objection to the court's ruling on the video from the grand jury, did I not?" The trial court responded, "You objected, and your objections I said would be noted for the record." The trial court then heard the parties' closing arguments.

Preservation of error is a systemic requirement that this Court should review on its own motion. *Ford v. State*, 305 S.W.3d 530, 532-33 (Tex. Crim. App. 2009); *Jones v.*

State, 942 S.W.2d 1, 2 n.1 (Tex. Crim. App. 1997). From our review of the record, it appears that Lewis never lodged any complaints regarding self-incrimination. Moreover, when the State offered the redacted recording of Lewis's grand jury testimony, Lewis objected solely on grounds of optional completeness. Lewis failed to preserve his complaints for our review.[4] *See* Tex. R. App. P. 33.1(a); *Martinez*, 98 S.W.3d at 193; *Ethington*, 819 S.W.2d at 859-60. We overrule Lewis's second issue and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on July 14, 2011
Opinion Delivered August 24, 2011
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.

[4]We note that, in his appeal, Lewis has not asserted any claims of ineffective assistance of counsel.