Opinion filed May 11, 2017

In The

Eleventh Court of Appeals

No. 11-15-00109-CR

JESUS JOSE HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 161st District Court
Ector County, Texas
Trial Court Cause No. B-43,213

M E M O R A N D U M O P I N I O N

Jesus Jose Hernandez appeals his jury conviction for the felony offense of injury to a child. *See* TEX. PENAL CODE ANN. § 22.04 (West Supp. 2016). The jury assessed Appellant's punishment at confinement for one year in the State Jail Division of the Texas Department of Criminal Justice and a fine of $5,000. In a

single issue, Appellant asserts that the evidence was insufficient to establish that he committed the act of injury to a child as alleged in the indictment. We affirm.

Background Facts

Appellant and his wife, Margaret, have three children together, including the victim, J.H., who was seven at the time of trial. Appellant, Margaret, and the three children were living together in Odessa at the time of the incident. Margaret testified that on November 17, 2013, Appellant arrived home around 5:00 p.m. and was intoxicated. Appellant was upset that Margaret had not cooked for him. After arguing with Margaret, Appellant then left the house.

Appellant returned home around 8:00 p.m. and began arguing with Margaret again. Margaret and the children went to the children's room in order to get away from Appellant. Margaret shut the door to the room and told her oldest daughter, A.H., to call 911 if Appellant entered the room. Appellant forced the door open and began punching Margaret and grabbing her by the hair. Appellant then dragged Margaret by her hair out of the children's room and down the hallway toward the living room. Margaret stated that J.H. was "stuck between" her and Appellant and that J.H. was trying to help her get away. Appellant continued hitting Margaret. Margaret stated that J.H. was trying to defend her when she saw Appellant backhand J.H. in the face, knocking him to the ground. She did not see J.H. hit the doorframe or his head.

J.H. testified that he was holding onto his mother's arm during the altercation and that he hit his head on the door when Appellant was dragging her down the hallway. J.H. testified that his head hurt after it hit the door. On cross-examination, J.H. testified that he grabbed onto his mother and that his head was hit while Appellant was pulling his mother by her hair. J.H. also testified on cross-examination that his head hit "the place where the door was supposed to be, but there

is no door there." J.H. also stated that Appellant never touched him. J.H. denied that he accidently hit the doorframe.

J.H.'s ten-year-old sister, A.H., testified that she saw Appellant push J.H. when J.H. was trying to get Appellant away from their mother. A.H. said that J.H. fell but that she could not remember how he fell.

Officer Larrisa Hernandez responded to the family disturbance call at the home. She testified that Appellant was intoxicated when she spoke with him at the scene. Officer Hernandez stated that J.H. had a bump and redness on his forehead. She said that it was unclear how J.H. was injured but that eventually Margaret told her that J.H. had hit his head on a wall. Based on her investigation, Officer Hernandez found that Appellant caused J.H. to hit his head on the wall and injure himself.

Analysis

We review a challenge to the sufficiency of the evidence, regardless of whether it is denominated as a legal or factual sufficiency challenge, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard

accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

Appellant was charged by indictment with recklessly causing bodily injury to his son, J.H., a child younger than fourteen years of age, by causing him to hit his head on a doorframe. A person commits the offense of injury to a child if he recklessly causes bodily injury to a child. PENAL § 22.04(a)(3). "'Bodily injury' means physical pain, illness, or any impairment of physical condition." PENAL § 1.07(a)(8). "A person acts recklessly . . . when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.* § 6.03(c) (West 2011). The risk created "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.* "Recklessness" requires that the defendant actually foresee the risk involved and consciously decide to ignore it. *Williams v. State*, 235 S.W.3d 742, 751 (Tex. Crim. App. 2007). To determine whether an act or omission involves a substantial and unjustifiable risk, we must examine the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight. *Id.* at 753. "[M]ere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be," does not rise to the level of criminal recklessness. *Id.* at 751 (quoting *People v. Carlson*, 26 N.Y.S.2d 1003, 1005 (N.Y. Cnty. Ct. 1941)).

Appellant contends that the evidence was insufficient to prove that he injured J.H. because witnesses did not testify that J.H. hit his head on a doorframe as alleged in the indictment. Appellant essentially argues that the evidence offered at trial varied from the facts alleged in the indictment. We disagree that there was no evidence that J.H.'s head struck a doorframe. As previously noted, J.H. testified on cross-examination that his head hit "the place where the door was supposed to be, but there is no door there." A rational jury could have concluded that this testimony referenced the doorframe. Afterwards, defense counsel asked J.H., "[D]id you hit the door frame because you didn't see it?" J.H. testified that he "did see it," meaning the doorframe, and that he struck the doorframe because Appellant was pulling J.H.'s mother while J.H. was holding onto her. Furthermore, during his testimony, J.H. was shown a picture of the doorway, and he pointed to the spot where his head hit.

Moreover, evidence is only legally insufficient if the variance between the allegations in the indictment and the facts proven at trial are material. *See Johnson v. State*, 364 S.W.3d 292, 294–95 (Tex. Crim. App. 2012); *Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002). A variance is material when it deprives the defendant of notice of the charges against him or subjects him to the risk of being prosecuted later for the same offense. *Fuller*, 73 S.W.3d at 253; *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001). Here, the variance was immaterial because the indictment provided Appellant notice that he was being charged with committing injury to a child. What caused the injury to J.H. is not the focus of the offense, the focus of the offense is that J.H. was injured. *See Johnson*, 364 S.W.3d at 298. The Court of Criminal Appeals has held that, in an injury-to-a-child case, "a jury [does] not necessarily have to agree on what underlying acts caused the child's injuries." *Id*. at 296 (citing *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App.

2007)). The jury was only required to agree that Appellant caused bodily injury to J.H. *See Stuhler*, 218 S.W.3d at 717.

The witnesses at trial testified that J.H. was injured while trying to help his mother during the physical altercation between her and Appellant. The details of each of their accounts of the altercation varied. J.H. testified that he hit his head when he was holding onto his mother's arm as Appellant was dragging her down the hall. Margaret testified that she saw Appellant backhand J.H. A.H. testified that J.H. fell down during the altercation.

Irrespective of the conflicting details of the witnesses' accounts, they all testified that J.H. was injured as a result of the altercation between Appellant and Margaret. The jury had the opportunity to hear the testimony at trial, and it was the jury's duty to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. We defer to the jury's determination and presume that the jury resolved the inconsistencies in the testimony in favor of the verdict. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. We find that there was sufficient evidence for the jury to conclude that Appellant caused bodily injury to J.H.

Additionally, Appellant asserts that the evidence did not establish that he acted recklessly because it did not show that Appellant was aware J.H. was holding onto Margaret during the altercation. He argues that, because he was not aware of J.H.'s location, he could not consciously disregard the risk that J.H. would be injured. We disagree. At a minimum, the evidence establishes that Appellant was dragging Margaret by her hair down a hall while J.H. was holding onto her in an effort to stop Appellant. Based upon this evidence, a rational jury could have concluded that Appellant was aware of J.H.'s presence and that he consciously disregarded the foreseeable risk of injury to J.H. created by Appellant's conduct.

See Williams, 235 S.W.3d at 751. Furthermore, "[m]ental states are almost always inferred from acts and words." *Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998). Appellant's intent "was a matter for the jury to decide as a question of fact, taking into account all of the evidence and the credibility of the witnesses." *Isassi*, 330 S.W.3d at 643. "In a sufficiency review, we afford the jury's inference of culpable intent as much deference as we do to the evidence supporting proof of culpable conduct." *Id.* The jury could have reasonably inferred Appellant's mental state of recklessness from his actions based on the evidence presented at trial. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found the elements of the alleged offense beyond a reasonable doubt. Therefore, Appellant's issue is overruled.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

May 11, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.