Opinion filed February 8, 2018

In The

Eleventh Court of Appeals

No. 11-15-00239-CR

SEGUNDO M. RAMIREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 244th District Court
Ector County, Texas
Trial Court Cause No. C-42,040

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

The jury found Segundo M. Ramirez guilty of the offense of injury to a child[1] and guilty of the offense of injury to a child by omission,[2] both as charged in the indictment.[3] The jury assessed his punishment at confinement for ninety-nine years

[1]*See* TEX. PENAL CODE ANN. § 22.04(a)(1) (West Supp. 2017).

[2]*See* PENAL § 22.04(b)(2).

[3]The grand jury also indicted Appellant in Count One for capital murder, but the jury found him not guilty of this offense.

for the first offense and thirty years for the second offense. The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently. On appeal, Appellant asserts four issues. We affirm in part and reverse in part.

I. *The Charged Offenses*

The grand jury alleged in the indictment that Appellant intentionally or knowingly caused serious bodily injury to Omar Frias, Jr. (Junior), a child fourteen years of age or younger, by hitting Junior with his hands or kicking him with his feet, by a manner and means unknown to the grand jury, or by a combination of those acts. The grand jury further alleged that Appellant intentionally or knowingly, by omission, caused serious bodily injury to Junior when he did not seek medical attention for him or failed to prevent injury to him and that Appellant had assumed care, custody, or control of Junior or that Appellant had a legal or statutory duty to act, to wit: as a stepparent and had assumed care, custody, or control of Junior.

A person commits an offense if he "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child" serious bodily injury or bodily injury. PENAL § 22.04(a)(1), (3), (b)(2). If the person causes serious bodily injury and the conduct is committed intentionally or knowingly, then the offense is a felony of the first degree. *Id.* § 22.04(e). For the State to prove the offense of serious bodily injury caused by omission, a defendant must have "assumed care, custody, or control of a child." *Id.* § 22.04(b)(2).

II. *Evidence at Trial*

Jasmine Gabriella Olivas testified that she was the mother of Junior, the victim, and that she also had another son. She had dated Omar Frias, Sr. (Omar) in junior high when he was fourteen years old and she was fifteen years old. She ended the relationship with him when Junior was nine months old. Jasmine met Appellant about a month later, and they started dating. A year later, they moved in with her

mother. Approximately four months later, Jasmine, Junior, and Appellant moved into an apartment. A month after moving into the apartment, Junior went to live with Jasmine's mother. When Jasmine became pregnant with her second child, she also went to live with her mother. After that child was born, Jasmine moved back into the apartment with Appellant, and later Junior came to live with them.

Junior, who was a premature baby, had contracted tuberculosis when he was ten months old. He suffered from asthma and had frequent nose bleeds. Jasmine indicated that Junior had been treated for tuberculosis and that more than a year had passed without any complications regarding the tuberculosis.

Dr. Vinh Nguyen, a pediatrician, saw Junior for the first time in late March 2012. He saw Junior a total of five times—twice for sickness and three times for wellness checks—with the last visit on January 3, 2013. Dr. Nguyen was not aware that Junior had had tuberculosis, but he noted that Junior did not present any complications from that disease.

A. Junior's physical condition in the days prior to January 10.

Jasmine explained that she and Appellant went to Mexico for Christmas and that Junior stayed with his biological father, Omar. Omar testified that Junior also spent January 4 and 5 with him and that Junior did not get hurt or injured and did not "throw up." Omar said that Junior did not want to go back to the apartment at the end of the weekend.

On January 3, after Jasmine and Appellant had returned from Mexico, she took Junior to see Dr. Nguyen because she was concerned about bruises "along his spine." Jasmine testified that, on Monday, January 7, Junior had stayed at her mother's house and had "thrown up."[4] Jasmine said that she got him Tuesday

[4]Elia Olivas, Jasmine's mother, corroborated Jasmine's testimony that Junior vomited only once. Elia also testified that on Tuesday, Junior "was fine" and that and he had no fever, cough, diarrhea, or other complaint. She said that he never wanted to go to the apartment and would cry. She always had kids and family around her house for Junior to be around. Elia also said that Junior did not like Appellant.

evening and that he was acting "normal"—playing, eating, and running around—and did not "throw up." On Wednesday, January 9, she noticed blisters on his eyelids, and she took him to the emergency room at Medical Center Hospital (MCH) in Odessa.

Junior was examined by Dr. Vik Wall, an emergency room physician. Dr. Wall testified that no one reported that Junior had been vomiting. He completed a full physical examination, checked Junior's abdomen, and ordered a blood test and chest x-ray, the results of which were "normal." After over two hours of observation, Dr. Wall saw nothing that caused him concern. He had no reason to think that Junior was not "perfectly healthy." Dr. Wall recommended to Jasmine that she watch for signs of either a "virus" or "allergies" because those could cause red spots. Afterward, Junior cried and wanted to go with Omar, who had met them at the hospital, but Jasmine got Junior to calm down and took him to the apartment. When Junior went to bed that night he was "fine."

B. Junior's physical condition on January 10

At 4:00 a.m. on Thursday, January 10, Junior asked for water, and Jasmine gave him a drink. Jasmine checked on Junior again at 9:00 a.m., and he "was fine." Later that morning, Junior wanted eggs, so Jasmine went to the store to get eggs and left Junior with Appellant. Jasmine was gone for about thirty to forty-five minutes and returned "somewhere around 11:45 to 12:00." When she walked into the apartment, she saw Appellant sitting next to Junior on the couch, and Junior had a bloody nose. When Jasmine asked what had happened, Appellant told her that Junior had walked into the bedroom and told Appellant that he had a "cucu," which meant he had an "owie" or a "boo-boo."

Jasmine testified that she changed Junior's diaper and notice that he had a watery stool. She also testified that Junior had bruises on his chest, forehead, and back. Junior then began to violently "throw up." He would throw up, then try to

take a breath, and then throw up again. When asked how long this continued, Jasmine said, "It seemed like forever." Junior asked for water, and he drank it very fast. Jasmine also gave him Pedialyte and he threw up again. Jasmine testified that Junior did not want to eat, that he was "shivering" and "shaking," and that he looked pale and yellow. He also looked like he was trying to go to sleep. Jasmine and Appellant showered, got dressed, and then drove Junior to the emergency room at MCH.

C. The events that occurred en route to and at MCH.

As Jasmine and Appellant went down the stairs at the apartment complex to go to their vehicle, Junior began throwing up again. As Appellant tried to put Junior in his booster sear, Junior went limp, slumped over, and had no color. Appellant handed Junior to Jasmine, and she noticed that he had stopped breathing. On the way to MCH, Jasmine performed CPR on Junior. At MCH, the emergency room personnel treated Omar. Dr. Wall again treated Junior at this time. Dr. Wall testified that Junior was lifeless, that there was no evidence of respiration or cognitive action, and that the muscles were flaccid. Dr. Wall had a CAT scan done of Junior's brain, which indicated a "significant amount of edema," which was "very bad." Junior was put on a ventilator. Dr. Wall noted bruises and discoloration on Junior's abdomen and chest. The bruising on the lower right quadrant of the child was consistent with external trauma. The bruises indicated internal bleeding. Dr. Wall further noted that the abdomen was "far less elastic than it should be" but that, when he had examined it the day before, it had been normal. Junior's "pH" and hemoglobin levels were low, and his white blood cell count was elevated. Junior's abdomen showed bruises and was not as soft as it should be, and he was in full cardiac arrest. The trauma to Junior's abdomen could not have resulted from a self-inflicted injury unless he "could jump off the roof." Junior had severe injuries and trauma with no explanation, and those injuries were "just a matter of hours old."

D. Junior is airlifted to a hospital in Fort Worth.

Junior had to be airlifted to Cook Children's Medical Center (Cook Hospital) in Fort Worth. There, Junior was put on life support, but after it was determined that he was not going to survive, life support was withdrawn and he died. Dr. Sophia Grant, a pediatrician at Cook Hospital works on the "care team." She evaluated Junior that night because the doctors thought that he would die before morning. She learned that Junior had been healthy but was now dying. He was on a ventilator and had no spontaneous movements. "His head was very cold," and his eyes were "equal, fixed, and dilated." His eyes were not responding to light, which meant he had "decreased to no brain activity."

Junior also had a bloody stool and serum, which was indicative of bowel death caused by some type of abdominal trauma. Dr. Grant explained that the injuries sustained by Junior could not have been self-inflicted. She agreed that he could have been hit with a fist, kicked with a foot, or struck by something like a baseball bat and that any of the three could have penetrated the abdomen. Because the gut filled with bacteria, Junior would have had a fever, malaise, and listlessness. He also would have suffered pain, bleeding, loss of bowel function, fever, and extreme thirst. Dr. Grant opined that, if Junior had suffered from an abdominal injury earlier than January 10, the doctor who examined Junior during the visit to the emergency room the night before would have detected the injury.

E. Dr. Fries completes an autopsy on Junior.

Dr. Richard Fries, a deputy medical examiner for the Tarrant County Medical Examiner's office, with training in forensic pathology, performs inquests into the cause and manner of deaths of individuals. Ector County retained him as an expert witness in this case in regard to the autopsy he had performed on Junior. Dr. Fries opined that Junior died from blunt force trauma to the abdomen.

Dr. Fries noted that Junior was struck in the abdomen with a penetrating type of force that the child could not have inflicted on himself or received from a fall. Dr. Fries explained that the laceration in the abdomen was deep and was commonly associated with blunt force trauma. This type of injury is typically seen in motor vehicle collisions where someone has struck the vehicle's steering column or has had a seatbelt injury. Dr. Fries said this injury was not an accident. Dr. Fries took pictures of the body during the autopsy and noted a protruded abdomen, a tear in the mesentery with a large blood clot, and hemorrhages in the bowel.

Dr. Fries explained that Junior would have felt sleepy, dizzy, and thirsty and would have had a tense abdominal wall with pain. Junior also would have had "GI symptoms, vomiting, nausea, . . . diarrhea, . . . [and] watery stools." Dr. Fries also noted other tears in the mesentery and ischemic changes to the bowel due to a lack of blood flow. When this happens, bacteria begins to grow in the body, gets into the blood, and causes the body to become septic with symptoms of pallor, fever, nausea, and vomiting. He explained that he could not pinpoint how long before the symptoms appeared that the injury occurred.

During his examination, Dr. Fries also noted "marked brain swelling" and increased fluid in Junior's brain. Junior's brain weighed as much as a typical adult's brain, which is abnormal for a three-year-old child. Dr. Fries noted that the brain would have a lack of oxygen because of the brain swelling and fluid.

F. Police respond to a medical call and conduct an investigation.

Cody Watts, an officer with the Odessa Police Department, went to MCH to respond to a "medical call," and he spoke with Jasmine and Appellant. Angie Reyes, a detective with the Odessa Police Department responded to a call about an unresponsive three-year-old child at MCH. Detective Reyes spoke to Jasmine, Omar, and Appellant. She explained that, when Junior had to be airlifted to Fort Worth, Appellant did not want to say goodbye to the child.

James Patrick Chadwick, a homicide detective with the Odessa Police Department at the time of the incident, testified that he interviewed Appellant. Detective Chadwick explained that he read Appellant his *Miranda*[5] rights, which Appellant understood. Appellant told Detective Chadwick that Jasmine went to the store the morning of January 10 and that Junior did not get sick until after Jasmine returned. He then began to vomit every five minutes. Appellant told Detective Chadwick that he had not felt well and had stayed home from work that day. Appellant told Detective Chadwick that the plan had been for Appellant to go to the doctor, and for Jasmine to take Junior to the pediatrician, but they decided to take Junior to the emergency room. Detective Chadwick noted that Appellant could remember certain times and events but not others and that he showed a lack of emotion when he spoke about what had happened. Appellant also spoke in a low and quiet voice and appeared relaxed.

Detective Chadwick acknowledged that Appellant never told him or anyone else that Appellant had injured Junior. However, Detective Chadwick thought that Appellant was being deceitful based on his responses, body movements, and pattern of speech. Detective Chadwick detected what he thought were lies.

G. Appellant and Jasmine are charged with Junior's death.

Both Jasmine and Appellant were investigated and later charged with Junior's death. Before trial, Jasmine reached a plea agreement for an eight-year sentence in return for her testimony. At trial, Jasmine conceded that Junior had never told her that Appellant had hit, punched, or kicked him or threw him down. On cross-examination, she testified that she thought Junior was afraid of Appellant, but she also agreed that Junior did not like the apartment because he liked to play with the other kids. On redirect examination, Jasmine testified that Junior would ask if

[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant was at the apartment when Junior had to go there, and he would cry if the answer was yes.

H. Appellant challenges the State's case.

Dr. Amy Gruszecki, a forensic pathologist, testified that she reviewed Junior's medical records and the autopsy report. She agreed with the finding in the autopsy report that the cause of death was blunt force trauma to the abdomen, which was probably caused by child abuse. Dr. Gruszecki opined that it is possible for symptoms from a mesentery tear to display "a little later" and that symptoms do not necessarily "show up immediately." She stated that nausea was indicative of the injury, but she could not pinpoint when the injury occurred.

Leslie Rodriguez, the mother of Appellant's other children, testified that Appellant normally spoke in a passive way without a loud voice and was good to their children. He provided child support for their children and had never been physical or violent with their children. She admitted that she had not received child support from Appellant since his incarceration and did not know anything about the events that involved the death of Junior.

Elvia Sanchez, a friend of Appellant, testified that she lived with Jasmine and Appellant for four months and moved out two weeks before Junior's death. She never saw Appellant discipline Jasmine's children or be violent toward them. Elvia never saw Appellant be mean to Junior, and she would entrust her own children's care to Appellant. Elvia admitted that she was not present at the apartment when Junior was injured.

III. *Analysis*

Appellant claims in his first two of four issues that the trial court abused its discretion when it allowed the State to introduce evidence that several months prior to Junior's death, and while Junior was in Appellant's care, Junior suffered a cut on his head and two fractured fingers. Appellant asserts in his final two issues that the

State adduced insufficient evidence to support his convictions. The State points out that the conviction for injury to a child by omission violates the Double Jeopardy Clause, and the State requests that this court vacate that conviction. We will address the double jeopardy matter first, followed by the sufficiency issues and then the evidentiary issues.

A. Double Jeopardy Issue: Appellant's convictions for injury to a child and injury to a child by omission violate the Double Jeopardy Clause.

The State concedes that the convictions for injury to a child and injury to a child by omission constitute a double jeopardy violation under the constitutions of the United States and the State of Texas. U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 14. We note that these double jeopardy claims may be addressed for the first time on appeal. *See Ex parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013) (allowing issue to be addressed for first time in habeas corpus proceeding where there was a fully developed record and no legitimate state interest preventing review); *Gonzalez v. State*, 8 S.W.3d 640, 643–46 (Tex. Crim. App. 2000). At oral argument, the State conceded that the convictions constitute a double jeopardy violation, and we agree.

The Double Jeopardy Clause bars "multiple punishments for the same offense" without clearly expressed legislative intent to the contrary. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). Absent evidence of such legislative intent, "[a] multiple-punishments double-jeopardy violation occurs if both a greater and a lesser-included offense are alleged and the same conduct is punished once for the greater offense and a second time for lesser." *Denton*, 399 S.W.3d at 546. If the prosecution necessarily must prove one charged offense by proving all the elements of another charged offense, "then that other offense is a lesser-included offense." *Id.* at 547 (quoting *Girdy v. State*, 213 S.W.3d 315, 319 (Tex. Crim. App. 2006)). To

compare the offenses, "we focus on the elements alleged in the charging instrument." *Id.* at 546 (quoting *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008)).

The grand jury alleged that Appellant intentionally or knowingly caused serious bodily injury to Junior by hitting Junior with his hands or kicking him with his feet, by a manner and means unknown to the grand jury, or by a combination of those acts. The grand jury also alleged that Appellant failed to seek medical attention for Junior or failed to prevent injury to him while Appellant, as a stepparent, had assumed care, custody, or control of Junior.

A person commits an offense of injury to a child by omission if he "intentionally, knowingly, or recklessly by omission, causes to a child" serious bodily injury or bodily injury. PENAL § 22.04(a)(1), (3), (b)(2). "Both act and omission are contained within the same penal section—indeed, the same penal *sub* section. They are phrased in the alternative. The offense is called the same, whether committed by act or omission, and the punishment range is essentially identical." *Villanueva v. State*, 227 S.W.3d 744, 748 (Tex. Crim. App. 2007). As the Court of Criminal Appeals has also explained, "[T]he 'gravamen' of the offense is the same; the statute focuses on the result caused, without criminalizing any particularized conduct by which that result may have been caused." *Id.* (citing *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006)). "Moreover, the statute employs a kind of 'imputed theory of liability,' in the sense that it makes an offender equally criminally liable whether he actually engaged in the conduct that caused the result, or alternatively, failed to take measures to avert that result . . . ." *Id.* Based on its

Ervin[6] analysis, consistent with its *Jefferson*[7] holding, the *Villanueva* court held that injury by act or by omission or by a combination of act and omission is the same offense for double jeopardy purposes when committed against the same victim at the same time. *Id.*

In Appellant's case, Dr. Fries and Dr. Gruszecki agreed that blunt force trauma to the abdomen caused Junior's death. Dr. Fries said the injury was no accident, while Dr. Gruszecki opined it was the result of child abuse. Dr. Wall indicated that the injuries to Junior were just a few hours old. Various doctors concluded that Junior's injuries were fatal. With similar facts to those in *Villanueva*, we hold that the two convictions violate the Double Jeopardy Clause.

When a trial court erroneously punishes a defendant multiple times for a single crime, the proper remedy is to retain the conviction for the "most serious" offense and vacate the other conviction. *Ex parte Cavazos*, 203 S.W. 3d 333, 337–38 (Tex. Crim. App. 2006); *see also Bigon*, 252 S.W.3d at 372. The most serious offense is "the offense of conviction for which the greatest sentence was assessed." *Cavazos*, 203 S.W.3d at 338. In this case, Appellant received a sentence of confinement for ninety-nine years for the offense of injury to a child, while the punishment imposed for the second offense of injury to a child by omission was confinement for thirty years. Therefore, the law requires us to vacate the conviction with the lesser punishment, which is the conviction for injury to a child by omission. We vacate

[6]*Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999) (factors include: whether the offenses' provisions are contained within the same statutory section; the offenses are similarly named or the "gravamen" is the same; whether the offenses are phrased in the alternative, have a common focus and punishment range, and have the same elements under an imputed theory of liability; and whether the legislative history reflects an intent to treat the offenses as the same or different for double jeopardy purposes).

[7]189 S.W.3d at 312.

Appellant's conviction for injury to a child by omission and set aside the trial court's judgment as to Count Three.

B. Issue Three: The State adduced sufficient evidence for a rational jury to find beyond a reasonable doubt that Appellant committed the offense of injury to a child.

In his third and fourth issues, Appellant contends that there was insufficient evidence to support his convictions. In light of the resolution of the double jeopardy issue, we only address his sufficiency-of-the-evidence issue on his conviction for injury to a child. We review a sufficiency challenge by asking whether any rational jury could have found Appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This court views all evidence introduced by both the State and Appellant in the light most favorable to the jury's verdict and decides whether any rational jury could have found each element of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The trier of fact may believe all, some, or none of a witness's testimony because the factfinder is the sole judge of the weight and credibility of the witnesses. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd).

As charged in this case, a person commits an offense if he intentionally or knowingly, by act or omission, causes serious bodily injury to a child. PENAL § 22.04(a)(1), (3), (e). "Injury to a child is a result-oriented offense requiring a mental state that relates not to the charged conduct but to the result of the conduct." *Baldwin v. State*, 264 S.W.3d 237, 242 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (citing *Alvarado v. State*, 704 S.W.2d 36, 38 (Tex. Crim. App. 1985)). Given the evidence that we have previously outlined about Junior's injuries and the medical personnel's description of the injuries that caused his death, we turn to Appellant's argument that the State adduced insufficient evidence that he caused Junior's injuries

because the evidence failed to show at what time the injuries were sustained or that Appellant was alone with Junior at that time.

Omar testified that Junior was with him on January 4 and 5 and that Junior did not get hurt or injured. Likewise, Jasmine and her mother testified that Junior vomited once while in his grandmother's care on January 7 and that, when he returned to Jasmine's care on January 8, he was "normal." The next day, Jasmine noticed blisters on Junior's eyelids and took him to the emergency room. Jasmine testified that she was told that Junior had an environmental allergy. Afterwards, Junior went back home with his mother, and she said that, when she put Junior to bed, he was "fine."

Jasmine testified that, the next morning, which was January 10, Junior was "fine" when she left him alone with Appellant and went to the store. When she returned, Junior had a bloody nose and later violently vomited. She explained that he looked pale and yellow, and she described his other symptoms, including his attempt to sleep. Medical personnel opined that these symptoms were the result of blunt force trauma to the abdomen and indicative of the onset of "bowel death." Dr. Wall testified that, the night before Junior died, his physical examination and tests were normal. The next day, Junior returned to the emergency room with severe, non-accidental injuries that were "just a matter of hours old." Later, Junior died after being transported to Cook Hospital.

Appellant argues that it was not possible to conclude beyond a reasonable doubt that the injury occurred while Junior was in Appellant's exclusive possession. In a circumstantial evidence case, the State is not required to negate every reasonable hypothesis before it convicts a defendant. *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991), *overruled in part on other grounds by Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000). Dr. Grant opined that Junior could have been kicked or punched in the abdomen, and Dr. Fries opined that Junior died from blunt

force trauma to the abdomen. The jury chose to believe Jasmine, Dr. Wall, Dr. Fries, and Dr. Grant, as it was free to do so. *See Sharp*, 707 S.W.2d at 614; *Isham*, 258 S.W.3d at 248. And, although Appellant argues a different version of events, his assertions do not mean that the State failed to prove its case. *See Anderson v. State*, 701 S.W.2d 868, 872 (Tex. Crim. App. 1985). The jury could infer that Appellant intentionally or knowingly caused Junior's injuries when Junior was alone with Appellant on the morning of January 10. We defer to the jury's resolution of any conflicting inferences raised in the evidence and presume that the jury resolved such conflicts in favor of the verdict. *Jackson*, 443 U.S. at 326; *Brooks*, 323 S.W.3d at 899; *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999) (citing *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993)). We overrule Appellant's third issue.

C. Issues One and Two: The trial court did not abuse its discretion when in the punishment phase it admitted testimony about Junior's prior injuries because the information was relevant to punishment.

In his first and second issues, Appellant asserts that the trial court abused its discretion during the punishment phase when it admitted evidence of prior injuries that Junior had suffered while in Appellant's care. The State responds that the trial court properly admitted the extraneous offense evidence because it was relevant to punishment and sentencing and because the State proved beyond a reasonable doubt that Appellant committed the acts. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3 (West Supp. 2017). We review the decision of the trial court to admit extraneous offenses under an abuse of discretion standard. *Bain v. State*, 115 S.W.3d 47, 50 (Tex. App.—Texarkana 2003, pet. ref'd) (citing *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002); *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001)).

Article 37.07 of the Texas Code of Criminal Procedure provides that, whether punishment is assessed by the jury or judge, the State may introduce evidence of an extraneous crime or other bad act if the trial court determines that the evidence is relevant to sentencing. CRIM. PROC. art. 37.07, § 3(a)(1). "The test for relevancy is much broader during the punishment phase, because it allows a jury to consider more evidence in exercising its discretion to assess punishment within the appropriate range." *Bain*, 115 S.W.3d at 50 (citing *Murphy v. State*, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988) (op. on reh'g)). The purpose of a punishment proceeding is not to prove guilt but, instead, to allow a factfinder to assess punishment in line with the objectives of the Texas Penal Code. *Id.*

On appeal, Appellant complains of Jasmine's testimony that, while in Appellant's care in 2012, Junior suffered a cut on his forehead and, in another incident, two broken fingers. The trial court admitted this evidence despite Appellant's objections and provided a reasonable-doubt instruction on extraneous crimes or bad acts, which outlined the requisite level of proof that had to be shown in order for the jury to consider those acts in assessing punishment. The trial court did not abuse its discretion when it admitted the evidence and gave the required instruction because Junior's earlier injuries were relevant to assess the punishment of Appellant. *See Huizar v. State*, 12 S.W.3d 479, 481 (Tex. Crim. App. 2000) (reasonable doubt instruction on level of proof for extraneous offense or bad acts statutorily required); *see also Franks v. State*, No. 01-07-00253-CR, 2008 WL 4427665, at *2 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, no pet.) (mem. op., not designated for publication) (medical evidence of prior injuries to an older child by mother's boyfriend admissible against mother in punishment phase of her trial for conviction of injury to her younger child). We overrule Appellant's first and second issues.

IV. *This Court's Ruling*

We affirm the judgment of the trial court with respect to Count Two. We vacate Appellant's conviction in Count Three for injury to a child by omission, and we reverse the trial court's judgment and render a judgment of acquittal as to that count.

MIKE WILLSON
JUSTICE

February 8, 2018

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

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.[8]

[8]Jim. R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.