Affirmed and Opinion Filed November 1, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00640-CR

CLAUDIA LASHA JOHNSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F-1475910-J

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Francis

A jury convicted Claudia Lasha Johnson of injury to a child by omission in the death of her fifteen-month-old son, Marquis, and assessed punishment at forty years in prison. In five issues, appellant complains about the sufficiency of the evidence to support her conviction and the jury's rejection of her affirmative defense, the State's closing argument, admission of autopsy photographs, and excessive punishment. We conclude these issues are without merit and affirm the trial court's judgment.

Marquis died on June 2, 2014 of blunt force trauma. Appellant's boyfriend, Clezel Mughni, was convicted of capital murder in Marquis's death. Appellant was charged with injury

to a child by omission for failing to seek adequate medical care for Marquis or failing to protect Marquis from Mughni.[1]

Evidence at trial showed appellant met Mughni online in April 2014. Two weeks later, appellant and her three children, Marquis, two-and-a-half-year-old MaKayla, and four-year-old De'Asia, moved in with Mughni in a one-bedroom apartment he shared with his long-time girlfriend, Sasha Mitchell, and Mitchell's four-year-old son, Isaiah.

Appellant trusted Mughni and allowed him to discipline her children. At first, he spanked them "on the butt area" only, but then he began hitting them with his fist. He also hit Marquis with hair brushes, leaving "little holes" on his side, stomach, and back. After appellant complained that Mughni was hitting Marquis too hard, Mughni began taking Marquis in the bathroom, locking the door, and punishing him. Appellant heard Marquis cry "from time to time," but did nothing. During the last month of Marquis's life, appellant said Mughni punched Marquis at least thirty times or more with his fist, usually in his stomach.

On the morning of June 2, appellant awakened at about 8 a.m. and went outside with Mughni to smoke a cigarette. Mughni went back inside first. When appellant re-entered the apartment about ten minutes later, Mughni was coming down the hallway carrying Marquis in his arms. Marquis was limp. Appellant asked what happened, and Mughni insisted Marquis was "faking it." When Mughni put Marquis down, the child "dropped" to the floor. Appellant tried to give him his sippy cup, but he could not grab it. Marquis's breathing was "real light," and Mughni gave him a "breathing treatment." As Marquis's breathing worsened, appellant said

[1] In a footnote, appellant informs us the indictment contained in the clerk's record contains no charging paragraph but acknowledges an indictment was read into the record, on four separate occasions including arraignment, and matches the charge of the court. Apparently, at the time of the filing of the briefs, the parties were attempting to locate the indictment to have it included in our record. As of this date, however, our record does not include the indictment on which the State proceeded to trial. A lost indictment does not "divest the court of jurisdiction." *Carrillo v. State*, 2 S.W.3d 275, 278 (Tex. Crim. App. 1999). Appellant does not argue the indictment read into the record was wrong or defective, and in fact, acknowledges it matches the charge of the court. Further, during each reading of the indictment, appellant did not raise any complaint. So, to the extent appellant raises an "alternate issue in the event the Court finds the record insufficient to support the charge on which all parties apparently proceeded," we conclude the complaint is without merit.

Mughni and Mitchell talked about calling the police but did not want CPS involved and Mughni left the apartment. Appellant tried to comfort Marquis and then noticed his lips had begun to turn blue. She tried to perform CPR, but heard "gurgling noises" as she tried to breathe into him. Mughni returned to the apartment, and at 10:57 a.m., called 911.

The Dallas Fire Department dispatched emergency medical workers, who arrived at the apartment to find Marquis lying on the floor with no signs of life. Paramedic Alan Matijevich noticed that Marquis had a bruise on his eye and his stomach appeared to be distended. When he asked what happened, one of the women said Marquis had bumped his head the night before and was unable to hold his sippy cup that morning.

Matijevich said he recognized the adults in the room because he had been to the apartment a week earlier on a medical call involving Mughni, who complained about difficulty breathing. Matijevich was at the apartment that day for about thirty minutes assessing Mughni while appellant and Mitchell tried to convince him to go to the hospital. During that time, Matijevich said appellant had several opportunities to tell him if something was wrong or she was in a "difficult situation," but she did not.

Marquis was transported to the hospital, where medical personnel observed multiple bruises on his face, back, and abdominal area, and "odd markings" on his shoulder and side. Despite their efforts, they were unable to revive him. Appellant told medical personnel that Marquis had been throwing up for three or four days, had not been eating or drinking, was not active, and was not doing "real well." She indicated Marquis had possibly fallen in the bathtub, but her explanation did not account for the multiple visible injuries. Police talked to appellant at the hospital to try to determine what had happened and appellant told them Marquis had been ill–vomiting, having diarrhea, and not eating at all–and she had been trying to give him Pedialyte.

She did not give any information to account for Marquis's injuries and did not report that Mughni had been punching him with his fist.

Dr. Reade Quinton, the Dallas County medical examiner, performed an autopsy that day and determined Marquis died of blunt force trauma. As Quinton testified, he used photographs taken during the autopsy to explain the various injuries to the jury. Marquis's intestine was "completely torn in half," which Quinton said was caused by a "significant blow," similar to the force of a motor vehicle accident. Other internal injuries included a lacerated kidney, torn liver, skull fracture, and old and new rib fractures. In addition to these injuries, Marquis had bruises to his face and abdomen. He also had "patterned" injuries on his back, shoulder, chest, and forehead, consistent with the bristles from three different hair brushes.

With respect to the severed intestine, Quinton said Marquis would have had "devastating symptoms" within a short period of time, and those symptoms would have been obvious enough that even a layperson would have known something was wrong with him. He estimated Marquis's death was within hours, not days, of the injury. According to Quinton, had Marquis received immediate help, he might have survived.

In the meantime, the police took the other children living in the apartment to Dallas Children's Advocacy Center for forensic interviews. Almost immediately, MaKayla began showing signs of injury. She was lethargic, limping, struggling to walk, moaning, and had soiled her clothing. At first, workers had her lie down. When she began vomiting green bile, they took her to the hospital. A CT scan showed a "complete separation" of a portion of her intestine, like the injury suffered by Marquis. MaKayla also had a liver hematoma and fractured finger. She "clearly was hurting." MaKayla underwent surgery and survived her injuries. The attending pediatric surgeon, Dr. David Schindel, testified her injuries were consistent with an adult punching her with a significant amount of force, similar to that seen in a car accident. He agreed

it would be reasonable "at first" for an "untrained eye" to believe MaKayla's symptoms were due to the flu or virus. He also agreed that parents commonly attempt home remedies before taking children to the doctor or hospital.

Dr. Matthew Cox, a board-certified child abuse pediatrician and director of the Referral and Evaluation of Abused Children (REACH) Clinic at Children's Medical Center Dallas, examined MaKayla while she was in the intensive care unit. He spoke with appellant, who told him MaKayla and Marquis had been ill for about four or five days and MaKayla would "cry out" if she touched her stomach. Cox was aware MaKayla and Marquis suffered similar injuries. He testified the delay or withholding of medical care contributed to Marquis's death and said the injury was "survivable" if medical care had been sought in a timely manner. Cox believed the injuries to the intestine and liver were caused by some type of punch or kick to the abdominal wall. The force of the punch or kick was significant, such as the force from a car accident. Cox believed the average person should know that kind of force could cause serious bodily injury to a fifteen-month-old baby.

After MaKayla was hospitalized and Marquis's autopsy was completed, the police interviewed appellant again, this time warning her of her *Miranda* rights. A recording of the interview was admitted as evidence. During the interview, Detective Emilio Henry explained to appellant that the children had indicated they "saw things" and he wanted to know what appellant saw. Initially, she denied any knowledge of what had taken place and said she did not know Mughni hit her children.

As they talked, she told Henry she noticed marks, like "little holes," on Marquis's side, stomach, and back, and realized they came from the bristles of a hair brush. She asked Mughni about it, but he gave no explanation. She said Mughni did not display "rough behavior" at first, although he "balled up his hand" and used his fist. When asked, she said she was not scared of

Mughni and he never hit her. But, she ultimately admitted she had seen Mughni hit Marquis with his closed fist at least thirty or more times, usually to his stomach or side. She had also witnessed him hit MaKayla. She told Henry that Mughni engaged in a "military thing" where he had the children squat with their backs to the wall, without touching the wall, and their hands out. If the children dropped their hands or their hips, he punched them in the stomach or side with his fist.

About two or three weeks before Marquis's death, appellant said Mughni punched Marquis in the side and she told him to stop because she "felt like he was hitting him too hard." Mughni told her Marquis "needed to get 'some act right.'" After that, Mughni began punishing Marquis in the bathroom behind a locked door.

On the weekend before Marquis's death on a Monday, Mughni took Marquis in the bathroom at least twice a day to discipline him; after one of these times, Marquis defecated on himself. Appellant cleaned him up but did not ask him anything. On Sunday, she said Marquis was weak, throwing up, and unable to get comfortable. That night, she heard Marquis crying in the bathroom and thought Mughni was hitting him. The next morning, she said, Marquis was "like Jello" and could "barely move at all." She acknowledged that if Mughni, who was 6'1" and 325 pounds, hit her, she would "double over." When Henry asked what she thought a one-year-old would do if hit by Mughni, appellant said the "same thing." Appellant told Henry she had "failed" her children.

Mitchell's son, Isaiah, who was five years old at trial and lived in the apartment, testified Mughni, who was his "daddy," punched him when he got in trouble. He said Mughni also punched Marquis when he got in trouble, and it happened more than once. Isaiah said the punches hurt, and he and Marquis would cry. During these times, he said appellant was in the

apartment. According to Isaiah, Marquis got in trouble on the day the fire truck came to the apartment.

At trial, appellant testified she was "too scared" to get help and did not realize how badly her children were injured or that they needed medical help. Contrary to what she told the police immediately following Marquis's death, she said she was "scared" of Mughni, explaining he was a "big guy" who she had seen hit a wooden pole and dent it. She said he "pushed" her once when she tried to intervene when he was disciplining Marquis. Although she knew he was punching Marquis and MaKayla with his fists, she said she did not call the police because she did not have a telephone, although she acknowledged she had access to a computer. She also said she did not ask her neighbors for help because she could not trust them not to tell Mughni. She acknowledged the week before Marquis died, a family member and a paramedic were at the apartment, on two separate occasions, but she did not say anything to them.

At the time Marquis died and MaKayla was hospitalized, she said she believed they both had the flu and she had been giving them Pedialyte, Tylenol, and Ibuprofen. She testified all of her children previously had the flu, and when she took them to the hospital, that was the course of treatment she was given. When shown the various photographs depicting bruises to Marquis's face, ear, and stomach, she testified those injuries were not there before he died or she had not seen them.

Appellant admitted telling the police that Mughni had punched Marquis at least thirty times, but she denied seeing it happen. She said she only saw him hit Marquis once; the other times, he was with Marquis in the bathroom with the door locked. She knew Mughni was hitting Marquis on those occasions, but did not get him out of the situation. On the night before he died, Mughni had Marquis in the bathroom. That night, she said, she promised him "they were getting out" of there. The next morning when Marquis was showing signs of distress—his arms and legs

were limp and he was struggling to breathe—she said she did not call 911 because she was "trying to find out what was going on" with him. She denied she did not call 911 because of all the marks on Marquis's body.

At the conclusion of the evidence, the jury was charged on the offense of intentionally or knowingly causing serious bodily injury to a child by omission as well as an affirmative defense provided in the same statute. The jury rejected the affirmative defense and convicted appellant of the offense.

Appellant argues her first and second issues together. In her first issue, appellant challenges the sufficiency of the evidence that she intentionally or knowingly caused serious bodily injury to Marquis by failing to get him medical care or failing to protect him from Mughni. In her second issue, she challenges the legal and factual sufficiency of the evidence to support the jury's rejection of her statutory affirmative defense.

As charged here, a person commits the offense of injury to a child if she intentionally or knowingly by omission causes serious bodily injury to a child. TEX. PENAL CODE ANN. § 22.04(a)(1) (West Supp. 2016). A person acts intentionally, or with intent, with respect to a result of her conduct when it is her conscious objective or desire to cause the result. TEX. PENAL CODE ANN. § 6.03(a). A person acts knowingly, or with knowledge, with respect to a result of her conduct when she is aware that her conduct is reasonably certain to cause the result. *Id*. § 6.03(b). "Child" means a person fourteen years of age or younger. *Id*. § 22.04(c)(1). "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id*. § 1.07(a)(46) (West Supp. 2016). "Omission" means failure to act. *Id*. § 1.07(a)(34). An omission that causes a serious bodily injury to a child is conduct constituting an offense if the actor has a legal or statutory duty to act. *Id*. § 22.04(b)(1). Under the Texas

Family Code, the parent of a child has the duty to care for, control, protect, and provide medical care to her children. TEX. FAM. CODE ANN. § 151.001(a)(2), (3) (West 2014).

It is an affirmative defense to prosecution for injury to a child by omission that (A) there is no evidence that, on the date prior to the offense charged, the defendant was aware of an incident of injury to the child, and (B) the defendant (i) was a victim of family violence committed by a person who is also charged with an offense against the child, (ii) did not cause the injury to the child, and (iii) did not reasonably believe at the time of the omission that an effort to prevent the person also charged would have an effect. TEX. PENAL CODE ANN. § 22.04(*l*)(2). The defendant has the burden to prove her affirmative defense by a preponderance of the evidence. TEX. PENAL CODE ANN. § 2.04(d) (West 2011).

When an appellant challenges the sufficiency of the evidence supporting a conviction, we examine the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). 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 to ultimate facts. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Therefore when analyzing the sufficiency of the evidence, we "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Id.* Direct and circumstantial evidence are treated equally. *Id.*

Affirmative defenses may be evaluated for legal and factual sufficiency, similar to the review in civil cases. *See Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015); *Matlock v. State*, 392 S.W.3d 662, 668 (Tex. Crim. App. 2013). In a legal sufficiency review, we first determine whether the record contains a scintilla of evidence favorable to the jury's adverse

finding and disregard all evidence to the contrary unless a reasonable factfinder could not. *Id*. We overturn a jury's rejection of an affirmative defense only if the evidence conclusively proves the affirmative defense and no reasonable jury was free to think otherwise. *Butcher*, 454 S.W.3d at 20. In a factual sufficiency review, we examine the evidence in a neutral light and overturn the jury's rejection of the affirmative defense only if the adverse finding is so against the great weight and preponderance of the evidence so as to be manifestly unjust, conscience-shocking, or clearly biased. *See id*.; *Matlock*, 392 S.W.3d at 671. In making our review, we may not usurp the jury's function by substituting our judgment in place of the jury's assessment of the weight and credibility of the witnesses' testimony. *Matlock*, 392 S.W.3d at 671.

In her brief, appellant asserts her conduct was the result of "poverty and bad judgment," rather than knowing or intentional criminal conduct. She said she was desperate, needed a place to live, and had nowhere to go, and could not have known that moving in with Mughni would set off a "chain of events." She contends an "untrained eye" could not have known the level of Marquis's injury. As for her affirmative defense, she contends she, too, was a victim of family violence. For the most part, she relies on her closing argument at trial to support her arguments on appeal.

Appellant admitted she knew Mughni, a large adult man, was punching her fifteen-month-old son in the stomach and side with his fist to discipline him; in fact, she testified he had done so at least thirty times in the month prior to Marquis's death. On the weekend before he died, Mughni took Marquis behind a closed bathroom door, at least twice a day, to punish him. She knew he was hitting Marquis because she heard Marquis crying. On the morning of Marquis's death, Mughni was inside the apartment with Marquis while appellant was outside. When appellant went back into the apartment ten minutes later, Mughni was carrying her son down the hallway. Marquis was limp, could "barely move at all," could not grab his sippy cup,

and struggled to breathe, all evidence of the "devastating symptoms" that the medical examiner said would have been apparent within a short period of time of having his intestine torn in half. As Quinton said, those symptoms would have been obvious enough that even a layperson would have known something was wrong with the child. Nevertheless, despite the objective evidence that Marquis was seriously ill, appellant never called for help, and it was not until almost three hours later that Mughni called 911.

Both Quinton and Cox, the child abuse pediatrician, testified the injury was caused by a "significant" blow or force, such as would be sustained in an automobile accident, and Cox said the average person should know that kind of force could cause serious injury to a fifteen-month-old child. Both also believed Marquis's injuries were survivable had he received the medical care that MaKayla received. Cox, in particular, testified that delaying medical care contributed to Marquis's death.

Although appellant claimed she believed Marquis had a virus or flu because of symptoms he exhibited for the previous four or five days, the jury could have disbelieved her, particularly in light of all the evidence of physical abuse to Marquis and the fact she withheld information of the abuse to medical personnel who tried to save her son. To the extent she suggests she was unaware of the extent of Marquis's injuries, the jury could have found her testimony incredible. Appellant herself testified that just one or two days before he died, Marquis defecated on himself after a beating by Mughni, which certainly indicated the force with which Mughni was imposing punishment. Medical workers described the multiple bruises and other marks covering Marquis's face, stomach, shoulder, and abdomen. The jury could have believed appellant did not want to seek medical care because she wanted to protect Mughni and did not want CPS involvement. Likewise, the jury could have believed that, knowing what Mughni had been doing to her son, appellant failed to protect Marquis from Mughni.

Finally, although appellant testified at trial that she feared for her safety and was also a victim of abuse, that testimony contradicted what she told the police right after Marquis died. When asked if she was scared of Mughni or if he hit her, she denied both. And even if she were afraid, the evidence showed she had opportunities to alert law enforcement or her family and get out of the situation. The week before Marquis's death, paramedics were dispatched to the apartment and were there for thirty minutes, but she said nothing. That same week, a family member visited and handed her a phone so that appellant could call her mother. Still, appellant said nothing.

Viewing all of the evidence in the light most favorable to the verdict, any rational jury could have found appellant caused by omission serious bodily injury to Marquis. Further, we conclude the jury could have properly rejected appellant's affirmative defense. We overrule the first and second issues.

In her third issue, appellant complains the trial court erred by overruling her objection to "facts not in evidence" and allowing the State to argue at closing that "[i]t took two people to kill this baby."

Proper jury argument must fall within one of four general areas: summation of the evidence, reasonable deduction from the evidence, answer to argument of opposing counsel, and pleas for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). We consider the remark in the context in which it appears. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). Counsel is allowed wide latitude without limitation in drawing inferences from the evidence so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith. *Id.*

Appellant argues the prosecutor's argument suggests she was guilty of capital murder and "imputed all the evidence that Mughni had committed the offense of capital murder" onto her. We cannot agree.

Injury to a child is a "result of conduct" offense. *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011). When the conduct is an omission, as here, proof that a defendant knowingly caused the result requires evidence that the defendant was aware with reasonable certainty the injury would have been prevented had the defendant performed the act that was omitted. *See Payton v. State*, 106 S.W.3d 326, 331 (Tex. App.—Fort Worth 2003, pet. ref'd). As explained earlier, the alleged omissions were the failure to protect Marquis and the failure to obtain medical care for him.

The evidence established that appellant was aware Mughni had punched her fifteen-month-old son with his closed fist at least thirty times or more but did not get him out of the situation. And, when she was aware that he was exhibiting symptoms of severe distress—he could not move his arms or legs or breathe—she still failed to act. Both Cox and Quinton testified the injuries were survivable, if medical treatment had been sought in a timely manner. Given the evidence presented, we conclude the State's argument that Marquis's death was the result of both Mughni and appellant's actions or inactions was a reasonable deduction from the evidence at trial. As such, it was not improper. We overrule the third issue.

In her fourth issue, appellant contends the trial court abused its discretion by admitting nine autopsy photographs because they were more prejudicial than probative in violation of Texas Rule of Evidence 403. Specifically, she complains about the admission of State's exhibit 20, an autopsy identification photograph, and exhibits 69 through 76, photographs of internal injuries.

Rule 403 allows for the exclusion of otherwise relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). A court may consider several factors in determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice. These factors include, but are not limited to, the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in black and white or color, whether they are close-up, and whether the body is depicted naked or clothed. *Gallo*, 239 S.W.3d at 762. The trial court's decision is reviewed for an abuse of discretion and may be disturbed on appeal only when it falls outside the zone of reasonable disagreement. *Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009).

Initially, we note the complained-of photographs contained in our record are black-and-white copies and are poor reproductions. Both sides, however, refer to color photographs contained in the appendix to appellant's brief; accordingly, we likewise will consider those photographs in our analysis.

Exhibit 20 is an autopsy identification photograph showing only Marquis's face and the autopsy case number. The photo was offered to establish that the child who had been identified as Marquis was the same child on whom Quinton performed the autopsy and whose corresponding autopsy report contains the same unique case number depicted in the photograph. A photo of the victim displaying the autopsy number ensures that the autopsy report will correspond to the photo of the correct victim. *Young*, 283 S.W.3d at 875. The photo is relevant,

took little time to develop, and is not particularly gruesome or detailed. The trial court did not abuse its discretion by admitting this photo.

Exhibits 69 through 76 are photographs depicting Marquis's internal injuries that would not have otherwise been seen. Appellant contends they "only serve to foster an ever increasing emotional reaction" by the jury. We disagree.

As noted above, appellant was charged with intentionally or knowingly causing Marquis's death, by omission; thus, the photographs were probative to fully show the jury the nature and extent of the injuries he suffered. The medical examiner used the photographs for this purpose. Exhibits 69 depicted a "Y" incision on Marquis's back, and Quinton testified he did this to look for evidence of trauma because Marquis was "darkly pigmented" and "there are subtle injuries that you may not see until you actually get under the skin." Quinton said the photo highlighted a number of injuries not seen before, and explained that the "red" in the picture was "abnormal." Exhibit 70 depicted the scalp showing a "cluster of bruises" under the skin of the forehead. Exhibit 71 showed the base of the skull with the brain removed and depicted an L-shaped skull fracture. Exhibits 72 and 73 depict the child's left- and right-side rib cages, showing new and old rib fractures. Exhibit 74 shows a cross-section of the liver with a hemorrhage in the middle area. Exhibit 75 shows the right kidney, which had been lacerated. Exhibit 76 shows the child's duodenum (a portion of the small intestine), which was "completely torn in half."

The injuries these photographs depict were not immediately apparent externally. The photos, along with the medical examiner's testimony, explained the damage to Marquis internally as a result of Mughni's punches and the symptoms that would have occurred as a result. Given appellant's testimony that she did not seek medical care because she believed Marquis had the flu or a virus, the photographs gave the jury another means of gauging whether

her story was believable or reasonable. Multiple photos depict multiple injuries, but the photos do not duplicate each other. Finally, any gruesomeness can be attributed to the subject matter depicted by the photos and is no more gruesome than one would expect in this sort of crime. *See Gallo*, 239 S.W.3d at 763. Under these circumstances, we conclude the probative value of the photographs is not substantially outweighed by the danger of unfair prejudice. The trial court's decision to admit the photographs was within the zone of reasonable disagreement and was not an abuse of discretion. We overrule the fourth issue.

In her fifth issue, appellant argues the trial court erred by denying her motion for new trial on the basis that the jury assessed a prison term, rather than probation, in violation of the objectives of the penal code.

To preserve alleged error relating to excessive punishment, a defendant must make a timely request or motion in the trial court. *See* TEX. R. APP. P. 33.1(a)(1); *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). Appellant raised no such complaint at the time the trial court imposed the sentence. Although appellant filed a motion for new trial, the motion only generally asserted the verdict was contrary to the law and evidence and raised no specific complaint about punishment.

Nevertheless, appellant urges us to address the merits of her complaint because (1) her complaint was apparent from the context, relieving her of the duty to object, (2) "fundamental error in punishment" can be raised for the first time on appeal, and (3) a specific objection would have served "no useful purpose." None of these arguments have any merit. *See Jackson v. State*, No. 05-12-00852-CR, 2014 WL 260302, at *1–2 (Tex. App.—Dallas Jan. 22, 2014, no pet.) (mem. op.) (not designated for publication) (rejecting exact same arguments); *Garza v. State*, 05-11-01626-CR, 2013 WL 1683612, at *2 (Tex. App.—Dallas Apr. 18, 2013, no pet.) (mem. op.) (not designated for publication) (same). We conclude appellant has forfeited this issue.

Regardless, even if appellant preserved her complaint for review, she has not shown error. As a general rule, punishment that is assessed within the statutory range for an offense is not excessive or unconstitutionally cruel or unusual. *Kirk v. State*, 949 S.W.2d 769, 772 (Tex. App.—Dallas 1997, pet. ref'd). Appellant was convicted of intentionally or knowingly by omission causing serious bodily injury to a child. *See* TEX. PENAL CODE ANN. § 22.04(a)(1) (West Supp. 2016). The offense is a first-degree felony, which is punishable by a term of five to ninety-nine years or life in prison and up to a $10,000 fine. *See* TEX. PENAL CODE ANN. §§ 22.04(e), 12.32 (West Supp. 2016 & 2012). As appellant concedes, the jury assessed punishment within that range. We resolve appellant's fifth issue against her.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CLAUDIA LASHA JOHNSON, Appellant	On Appeal from the Criminal District Court No. 3, Dallas County, Texas
No. 05-15-00640-CR V.	Trial Court Cause No. F-1475910-J.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Francis; Justices Evans and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 1, 2016.