AFFIRMED and Opinion Filed November 9, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01204-CR

TATRIAUNA MARIAH ROBERTS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 069387

MEMORANDUM OPINION

Before Justices Myers, Nowell, and Evans
Opinion by Justice Evans

Appellant Tatriauna Mariah Roberts appeals from her conviction of injury to a child. In two issues, appellant asserts that the evidence was insufficient to support the conviction and the trial court abused its discretion in excluding appellant's expert testimony. We affirm the trial court's judgment.

BACKGROUND

Appellant was charged by indictment that she, intentionally and knowingly, by omission, caused serious bodily injury to complainant, a child under fourteen years of age, by failing to provide him with adequate food or medical care and the

appellant had a statutory duty or legal duty to act or had assumed care, custody, or control of the child. Appellant pled not guilty and the case proceeded to a jury trial.

A. State's Witnesses

David Gallagher, the fire chief and fire marshal for the City of Gunter, testified that he has been an EMT since 2000 and a full-time firefighter since 2016. On June 12, 2017, Gallagher responded to a call for assistance regarding a two-month old child (hereinafter, "complainant" or "infant") who was not breathing. Gallagher testified that when he arrived, the infant was laying on his back without a pulse and Gallagher commenced CPR. He described the infant as "very small, frail" who had his skin "drawn in" and did not look like a "normal baby." Gallagher stated that appellant, the mother of complainant, told him that she was taking a nap on the mattress with complainant and another baby and when she woke up, complainant was not breathing. Gallagher stated that the infant was cold to the touch which indicated to him that the infant had not been breathing for some time. Gallagher continued CPR until the ambulance arrived and paramedics took over the infant's care.

Adam Huttash, a lieutenant paramedic with the Van Alstyne Fire Department, testified that he responded to a call on June 12, 2017 for a pediatric patient with CPR in progress. Huttash testified that the infant was cold to the touch, nonresponsive, not breathing, without a pulse, and very small for its age. Huttash continued CPR, inserted an IV for medication, placed an advanced airway, and put the infant on a

monitor to search for a heart rhythm. During the trip to the hospital, the infant remained nonresponsive, not breathing and pulseless.

Emily Ogden, a medical examiner for the Dallas County Medical Examiner's Office, testified that she performed an autopsy of complainant at the request of Grayson County. Dr. Ogden testified that complainant was "very emaciated for his age" and she had "concerns before even starting the autopsy" which included low weight for a seven-week old infant, signs of dehydration including sunken eyes, skin tenting,[1] and visible ribs and spine. Medical examination photographs in evidence depict the infant's skin puckered or wrinkled (tented) all over his body, head to toe, front and back. A photograph of the front depict the infant's ribs protruding far beyond his abdomen and a photograph of his back depicts his spine and ribs protruding. Dr. Ogden testified that these conditions were not due to decomposition of the body. Dr. Ogden noted that complainant's stomach was completely empty and that the majority of his digestive tract had mucoid material which indicated that it had been several hours to two days since complainant had last eaten. Dr. Ogden's professional conclusion as to the cause of death was malnutrition and dehydration. At his time of death, complainant weighed 4.48 pounds and a baby of his age in the 50th percentile weighs 11.46 pounds. Dr. Ogden examined his digestive tract but

[1] Dr. Ogden, and later Dr. Sridevi Alapati, explained skin tenting is done to check the normal fullness of the skin from hydration and normal subcutaneous fat. When skin has normal fullness and the skin is pulled up and released, it returns to its normal shape. But when skin is dehydrated and lacks normal subcutaneous fat and is pinched and released, the skin remains in a pinched or tented shape.

could locate no inflammation or evidence of any disease that would cause complainant not to absorb food. For example, complainant had no history of feeding intolerance, vomiting, diarrhea, or disease that would not allow for the absorption of food. Complainant had very little subcutaneous fat, which indicated his body had already used up his glucose stores and fat storage. Dr. Ogden testified that the manner of death was homicide because the infant was unable to get food for himself and "a normal adult would have taken him to a hospital if they were concerned that he was not getting proper nutrition, because he did not have a reason to not be absorbing his nutrition other than not getting nutrition." Dr. Ogden further testified that it would have taken several weeks for complainant to be in this condition and he suffered serious bodily injury in the process.

Sridevi Alapati, a pediatrician at the Pediatric Care Center and an on-call pediatrician with Wilson N. Jones, testified that his was on call on the date of complainant's birth on April 19, 2017. Complainant was born at 37 weeks with hypoglycemia (low blood sugar) and intrauterine growth retardation (lacking sufficient calories). Complainant received IV fluids and baby formula supplements during his four-day stay in the hospital after birth. Dr. Alapati testified that appellant elected to solely breastfeed and a doctor and a lactation nurse would have spoken with her about breastfeeding. Although appellant made a two-week appointment with Dr. Alapati's office, she did not show up to the appointment or call to let them know she could not come. Appellant came to Dr. Alapati's office on June 7, 2017

and refused vaccinations on the new patient paperwork. Dr. Alapati explained that the office does not take patients whose parents refuse vaccinations and appellant stated she would find another provider. Dr. Alapati did not examine the infant or see the infant on June 7, 2017. Dr. Alapati testified that appellant would be in the best position to know if complainant was getting enough food based on the amount of wet diapers and to know the heaviness of her breasts to provide enough milk.

Lenora Marshall, appellant's aunt, testified that appellant lived with her for a while. Appellant has four children in addition to complainant. Appellant was living with Marshall when she gave birth to complainant. Marshall worked nights as a nurse and did not see complainant a lot due to her work schedule. Appellant moved out with her five children a few days before complainant died. Marshall testified that appellant talked to her twice about appellant thinking she was not making enough milk for the infant. Marshall testified that complainant had a twin who was stillborn. Marshall also identified appellant's Facebook page which had a user name of "Mariah and My Four Roberts."

Ashley Brumm, an OB-GYN physician, testified that appellant came to see her when appellant was twenty-eight weeks pregnant with complainant. Appellant went to her routine post-partum visit with Dr. Brumm but voiced no concerns about not being able to get a pediatrician, breastfeeding, or the well-being of the baby. In her notes, Dr. Brumm noted that appellant met the requirements for post-partum depression.

Danny Jones, an officer with the Gunter Police Department, testified he responded to a call about a two-month old infant failing to breathe. Jones observed the infant and described him as "a dark deflated baby doll, frail, small, very thin." Jones testified that he saw canisters of baby formula in the home.

Shawn Johnson, the Gunter Chief of Police, testified that he interviewed appellant and "at one point she said she felt like she knew she wasn't making enough milk." Johnson asked her why she did not supplement with formula if she knew she was not making enough milk, and appellant stated that she started the "night before" because she had wanted to keep trying to breastfeed. In regard to her prior children, appellant stated that she had attempted to breastfeed all of them but she never had enough milk for any of them and she always had to use formula.

Shaun Hopkins, a special investigator with Texas Department of Family and Protective Services and a police officer, testified that he met with appellant and heard her state that "the baby had died because she did not produce enough milk."

Following Hopkins's testimony, the State introduced exhibits including a business record affidavit from the business record custodian of Facebook who produced the business records of Facebook pursuant to a search warrant. One of these exhibits included an image of appellant's Facebook account with the following entry dated October 9, 2016 and read into the trial transcript as follows:

> [Appellant]: Because my bd talking about turning himself in, and when I get the kids, not going to have a babysitter and I won't be able to work without someone watching the kids. This is too much stress and I don't

> want to be a single mother of five kids. It's already hard with four. Frowny face. Frowny face. I just hate to think about it.
>
> [Response]: Why boo?
>
> [Appellant]: Frowny face. Frowny face. I just don't think I can keep this baby.

Joseph Lipscomb, a pediatrician, testified that he reviewed complainant's autopsy report, complainant's medical records and the siblings' medical records. Dr. Lipscomb testified that complainant's death was due to a failure to thrive, but not because of any metabolic or genetic disorders. Instead, Dr. Lipscomb testified that complainant's failure to thrive was due to malnutrition—a lack of calories—and that the infant would have suffered physical pain due to the malnutrition. He further testified that in his professional opinion, complainant's death could have been prevented with medical intervention.

B. Defense Witnesses

Henrietta Wilkes, appellant's cousin and Marshall's daughter, testified that she was living at Marshall's house at the time of complainant's birth along with her son, Marshall, appellant, appellant's five children and the children's father. Wilkes testified that she helped take care of complainant and never had any concerns about the infant not properly feeding. Wilkes testified that she did not believe appellant would cause harm to her children.

Dr. Charles Keenan, a psychologist, testified that he had met with appellant and conducted a psychological evaluation, a mental status evaluation, and other tests.

Dr. Keenan did not find any indication that appellant was incompetent to proceed in the case. He also noted that appellant was mildly to moderately depressed, but no indication of mental illness. As discussed further below, the trial court excluded Dr. Keenan's testimony concerning specific characteristics of appellant and whether or not those characteristics make her a mother who would form the intent or not.

ANALYSIS

A. Sufficiency of the Evidence

Appellant asserts the evidence is legally insufficient to show that she desired for the complainant to sustain serious bodily injury or that she was reasonably certain her omission would lead to serious bodily injury.

1) Standard of Review

When reviewing whether there is legally sufficient evidence to support a criminal conviction, the standard of review we apply is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The evidence may be circumstantial or direct, and we permit juries to draw multiple reasonable inferences from the evidence presented at trial. *Vernon v. State*, 571 S.W.3d 814, 819 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). The jury is the sole judge of witness credibility and of the weight given to any evidence presented. *Id.* at 819–20. A jury may believe or disbelieve some or

all of a witness's testimony. *Id.* at 820. On appeal, reviewing courts 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. *Murray*, 457 S.W.3d at 448.

2) Penal code

Section 22.04 of the Texas Penal Code defines the offense of injury to a child:

> (a) 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, elderly individual, or disabled individual:
>
> (1) serious bodily injury;
>
> (2) serious mental deficiency, impairment, or injury; or
>
> (3) bodily injury.

TEX. PENAL CODE § 22.04(a).

In this case, appellant was charged with intentionally or knowingly causing serious bodily injury to complainant by failing to provide complainant with adequate food or medical care. The Texas Penal Code defines the culpable mental states at issue here as follows:

> (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

TEX. PENAL CODE § 6.03(a), (b).

3) Indictment

The indictment in this case charged appellant with the following offense:

> intentionally or knowingly, by omission, cause serious body injury to [complainant], a child 14 years of age or younger, by failing to provide [complainant] with adequate food, medical care, or [sic] and the defendant had a statutory or legal duty to act, namely the duty of a parent under section 151.00l(a) of the Texas Family Code; or
>
> intentionally or knowingly, by omission, cause serious body injury to [complainant], a child 14 years of age or younger, by failing to provide [complainant] with adequate food, medical care, or [sic] and the defendant had assumed care, custody, or control of the child[.]

4) Analysis

Appellant argues that the evidence is insufficient to prove that appellant acted intentionally or knowingly to cause complainant serious bodily injury. We disagree.

Here, Fire Chief Gallagher testified complainant was "very small, frail" who had his skin "drawn in" and did not look like a "normal baby." Officer Jones testified that he responded to a call of a two-month old failing to breathe and witnessed a "dark deflated baby doll, frail, small, very thin." Officer Jones saw canisters of baby formula in the house. Chief of Police Johnson interviewed appellant who admitted that she had attempted to breastfeed all of her children and never had enough milk for any of them and always had to use formula. Appellant also told Johnson that she knew she was not making enough milk but she wanted keep trying and only began to supplement her breast milk with formula the night before complainant died.

Dr. Ogden testified complainant was "very emaciated for his age" and had signs of dehydration, sunken eyes, skin tenting, visible ribs and a visible spine. She testified that complainant's weight at his time of death was 4.48 pounds and her professional conclusion as to the cause of death was malnutrition and dehydration. Dr. Ogden testified that the manner of death was homicide because the infant was unable to get food for himself and "a normal adult would have taken him to a hospital if they were concerned that he was not getting proper nutrition, because he did not have a reason to not be absorbing his nutrition other than not getting nutrition." She noted that complainant had no history of feeding intolerance, vomiting, diarrhea, or disease that would not allow for the absorption of food. She further testified that it would have taken complainant several weeks to come to this condition and he would have suffered serious bodily injury in the process.

Dr. Alapati testified that appellant elected to solely breastfeed complainant following his birth and a lactation nurse had spoken to her in the hospital. Dr. Alapati testified that appellant would be in the best position to know if complainant was getting enough food based on the amount of wet diapers and the heaviness of appellant's breast to provide milk. He also testified that appellant made a two-week appointment following complainant's birth but did not come to the appointment.

Dr. Lipscomb testified that complainant's failure to thrive was due to a lack of calories and that the infant would have suffered physical pain because of this

malnutrition. He also testified that complainant's death could have been prevented with medical intervention.

Viewing all the evidence in the light most favorable to the verdict, we conclude a rational jury could have found beyond a reasonable doubt that appellant had intentionally or knowingly injured complainant by failing to provide food and medical care. We resolve appellant's first point against her.

B. Expert Testimony

Appellant asserts the trial court abused its discretion in excluding expert testimony.

1) Additional facts

When the defense called Dr. Keenan to testify at trial, the State requested a hearing outside the presence of the jury. Dr. Keenan testified that he had conducted a forensic psychological evaluation of appellant based upon the discovery, the arrest and incident reports, and six hours of conducting assessments and interviewing appellant. Dr. Keenan performed the MMPI which is an objective assessment of her personality structure and functioning, and the Shipley-2 which is a brief cognitive, intellectual assessment which consists of vocabulary tests and a test for abstract reasoning. Dr. Keenan's "basic findings were that she did not demonstrate any mental illness, that she did not indicate any of the personality characteristics or traits that are typically associated with mothers that intentionally harm or kill their children."

The State argued that the MMPI is designed to diagnose psychological illnesses, not to determine if someone would formulate an intent to commit a crime. The State asked Dr. Keenan about maternal filicide and Dr. Keenan testified that he was unaware of maternal filicide research findings. Dr. Keenan did agree that the "science of predicting when one is capable of killing is inexact" and that "there is not enough research into the characteristics of filicide to come up with a set profile."

The following exchange then took place between the State and the trial court:

> [Trial Court]: What is it you're exactly asking me to do, Mr. Smith?
>
> [State's attorney]: Your Honor, this expert is -- basically what he's going to do is get up in front of this jury and basically testify that based on his clinical review and the studies that he performed that she does not fit the psychological characteristics of a mother who would intentionally harm or neglect her child. One is, she's charged intentionally and knowingly by omissions committing these acts. I think it's going to confuse and mislead the jury. And secondly, by his own testimony, as far as the maternal filicide issue, I don't think he's got the qualifications to testify in that regard, because, in fact, the science is not clear and he's admitted as much. And I have a case law on point, Gallo v State, which is from the Court of Criminal Appeals I'll be glad to tender to the court. But they specifically denied an expert's ability to testify when he answered the questions just as Dr. Keenan just did that basically –
>
> ***
>
> So, I guess what the gist of what Dr. Keenan may testify to is that in his opinion he's reviewed her, she doesn't have any mental retardation, she doesn't have any mental illness. She was at the time he interviewed her suffering from depression, which would certainly be admissible, certainly be relevant to the defense in this case. But I think testifying about the ultimate issue in this case regarding intent, just based on his testimony, regarding the inexact science of being able to predict and profile maternal filicide I think would be inadmissible.

After hearing argument from both sides, the trial court then continued the trial until the next day so he could review the legal research and additional papers. The next day, the trial court made the following ruling:

> The Court's reviewed the Gallo case. The Court's also reviewed some of the material provided by the defense. At least, the Court's reading of the Gallo case, it indicates that not so much to do with whether or not Dr. Keenan did enough work or not himself, it's just with the science and the reliability of the issue of filicide and being able to competently or reliably be predictive to the point where it could be applied in a court of law.
>
> So I'm going to sustain the State's objection in that regard. Dr. Keenan will not be allowed to testify with regard to the specific characteristics of Ms. Roberts and whether or not that makes her a mother who would form the intent or not. That's the Court's reading of the Gallo case.

2) Standard of Review

We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion only when its decision falls outside the zone of reasonable disagreement. *Id.* at 83.

3) Analysis

In this case, the trial court allowed Dr. Keenan to testify but excluded his testimony regarding to the specific characteristics of appellant and whether or not that makes her a mother who would form the intent or not. Appellant asserts that the evidence was sufficiently relevant and reliable to assist the jury in determining a fact in issue. We disagree.

Rule 702 of the Texas Rules of Evidence provides "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *See* TEX. R. EVID. 702. The proponent of the scientific evidence must show, by clear and convincing proof, that the evidence is sufficiently relevant and reliable to assist the jury in accurately understanding other evidence or in determining a fact in issue. *Gallo v. State*, 239 S.W.3d 757, 765 (Tex. Crim. App. 2007). The reliability of "soft" science evidence may be established by showing that: (1) the field of expertise involved is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and, (3) the expert's testimony properly relies upon or utilizes the principles involved in that field.[2] *See Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

Appellant argues that Keenan satisfied the test for soft sciences outlined in the *Nenno* decision and should have been allowed to fully testify. Appellant further argues that the *Gallo* decision is distinguishable because in the present case, Keenan's opinion was based on his extensive psychological testing of appellant while the expert in *Gallo* based his conclusions on the defendant's CPS records,

[2] The Court of Criminal Appeals defined "soft" science as the social sciences or field that are based primarily upon experience and training as opposed to the scientific method. *Nenno*, 970 S.W.2d at 561.

psychological report, and his research expertise on filicide. In *Gallo*, the defendant was on trial for killing a three-year old child. 239 S.W.3d at 761–62. The defendant sought to put on the expert testimony of a professor with a Ph.D. in development psychology to testify regarding filicide—"what researchers call the phenomenon of parents that kill their children." *Id.* at 766. The expert planned to testify why mothers are statistically more likely to kill their children than fathers and the "risk factors" associated with the victim's mother that made her a "risk and potential suspect for the perpetration of the homicide." *Id.* On cross-examination, the expert testified that the "science of predicting one who is capable of killing is inexact" and "there hasn't been extensive enough research into the characteristics of filicide in order to come up with a set profile." *Id.* The trial court ruled that the expert's testimony was inadmissible because the court had questions as to whether it was a legitimate field of expertise, whether it would be helpful to the jury, and did not find the testimony with regard to the studies of filicide or child abuse to be reliable. *Id.* The Court of Criminal Appeals affirmed the ruling by concluding the trial court did not abuse its discretion in ruling the evidence was inadmissible. *Id.* at 766–67.

As stated above, the trial court relied upon the *Gallo* decision in determining that Keenan could not testify with regard to the specific characteristics of appellant and whether that makes her "a mother who would form the intent or not" because the testimony is not sufficiently reliable to assist the jury. As in *Gallo*, Dr. Keenan admitted the "science of predicting when one is capable of killing is inexact" and

that "there is not enough research into the characteristics of filicide to come up with a set profile." Accordingly, appellant cannot satisfy the *Nenno* factors. We conclude appellant did not show by clear and convincing proof that Dr. Keenan's testimony was sufficiently reliable to assist the jury and the trial court did not abuse its discretion in ruling this evidence inadmissible. We resolve appellant's second point against her.

CONCLUSION

On the record of this case, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TATRIAUNA MARIAH ROBERTS, Appellant	On Appeal from the 397th Judicial District Court, Grayson County, Texas
No. 05-19-01204-CR V.	Trial Court Cause No. 069387. Opinion delivered by Justice Evans.
THE STATE OF TEXAS, Appellee	Justices Myers and Nowell participating.

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

Judgment entered November 9, 2020.