Affirmed and Memorandum Opinion filed February 18, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00067-CR

NAKELL MARIE BUTLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 23,546

MEMORANDUM OPINION

A jury found appellant, Nakell Marie Butler, guilty of two counts of endangering a child and one count of possession of a controlled substance.[1] *See* Tex. Penal Code Ann. § 22.041(c) (Vernon 2003); Tex. Health & Safety Code Ann. § 481.115 (Vernon 2003). The trial court assessed punishment at 180 days' confinement for each of the child endangerment convictions and two years' confinement for the possession conviction, to be served concurrently. In three issues, appellant challenges: (1) the trial court's admission of expert testimony, (2) the legal sufficiency of the evidence, and (3) the trial court's denial

[1] Appellant pleaded guilty to the offense of possession of a controlled substance and does not challenge this conviction on appeal.

of appellant's motion for directed verdict. Finding no error, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Sergeant Jeff Fisher of the Texas Department of Public Safety testified that on December 23, 2005, at approximately 9 p.m. he witnessed a vehicle driving without a license plate in violation of the law. Sergeant Fisher activated his emergency lights, and the vehicle pulled over onto the side of the road. As Sergeant Fisher walked up to the vehicle he noticed the smell of burnt marijuana. The driver stepped out of the vehicle, and Sergeant Fisher asked him whether he had been smoking marijuana. At first the driver said no, but subsequently admitted to having smoked "one joint." Sergeant Fisher observed two other adults in the vehicle—appellant in the front passenger seat and another adult in the backseat with two small unrestrained children. Upon closer inspection with his flashlight, Sergeant Fisher noticed a large amount of marijuana residue scattered around the front seat area of the vehicle and large amounts of tobacco from the inside of a cigar scattered around the back seats. Sergeant Fisher also noticed that appellant was tightly clutching a crumpled-up paper towel in her lap. Sergeant Fisher asked appellant to get out of the vehicle and to leave the paper towel on the seat in the vehicle. Appellant left the paper towel and her jacket on the front passenger seat inside the vehicle. After Sergeant Fisher searched appellant for weapons, she requested her jacket because it was cold outside. While Sergeant Fisher retrieved appellant's jacket from the vehicle, he discovered that the crumpled-up paper towel was holding marijuana and five rocks of crack-cocaine. Sergeant Fisher testified that he arrested appellant, the driver, and the third adult passenger and secured someone to pick up the children.

During trial, after Sergeant Fisher finished testifying, the State called Dr. Darrel Wells as an expert witness. Dr. Wells testified about the effects of cocaine on the human body. He explained to the jury that in some instances cocaine usage could be fatal and that its effects depend on the size of the person using it and the amount used. He further testified that cocaine could also be fatal if ingested by a child. He said that the most

common situation where children ingest cocaine is where they pick a rock of cocaine off the floor or a table and put it in their mouths. Dr. Wells confirmed that crack cocaine wrapped in a paper towel left alone with children in a vehicle represents a danger to the children. Dr. Wells also told the jury that marijuana affects a human being's mental and physical abilities. He explained that he had not come across any research analyzing the effects of secondhand marijuana smoke on children. Dr. Wells confirmed that driving under the influence of marijuana could affect a person's ability to drive.

Appellant was convicted of two counts of endangering a child and pleaded guilty to one count of possession of cocaine. Appellant timely filed this appeal.

DISCUSSION

I. Expert Testimony

Appellant contends the trial court erred in admitting the testimony of Dr. Darrel Wells. Specifically, appellant argues Dr. Wells was not qualified to give expert testimony on the precise issue of the effects of marijuana and cocaine on children.

A. Standard of Review

We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007).

B. Applicable Law

Rule 702 of the Texas Rules of Evidence provides: "If 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." Tex. R. Evid. 702. Pursuant to Rule 702, the trial court, before admitting expert testimony, must be satisfied that three conditions are met: (1) that the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) that the subject matter of the testimony is appropriate for expert testimony; and (3) that admitting the

expert testimony will actually assist the fact finder in deciding the case. *Alvarado v. State*, 912 S.W.2d 199, 215–16 (Tex. Crim. App. 1995). The proponent of the expert testimony bears the burden of proving the expert's qualifications. *Turner v. State*, 252 S.W.3d 571, 584 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Furthermore, the expert's background must be tailored to the specific area of expertise about which he intends to testify. *Vela v. State*, 209 S.W.3d 128, 133 (Tex. Crim. App. 2006).

C. Analysis

In order to prove appellant guilty of the offense of endangerment of a child, the State had to show appellant engaged in conduct that placed a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment. *See* Tex. Penal Code Ann. § 22.041(c) (Vernon 2003). The State relied on the testimony of Dr. Darrel Wells to demonstrate that the presence of cocaine and marijuana in a vehicle could create an imminent danger of death, bodily injury, or physical or mental impairment to the children in the vehicle. Before Dr. Wells testified in front of the jury, the court held a *Daubert* hearing to determine whether he was qualified to testify. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993).

Dr. Wells explained that he has a specialty in emergency medicine and a secondary specialty in family practice. Dr. Wells testified that he has thirty years of experience in emergency medicine and has studied the effect of narcotics on the human body. He confirmed that he attended a week-long Forensic Death Investigation Course in 2007. At this course, Dr. Wells participated in discussions about various types of overdoses in children. During the hearing, appellant's counsel repeatedly inquired into whether Dr. Wells had researched the effects of controlled substances on children, specifically marijuana and cocaine. Dr. Wells explained that he had exposure to the topic through his continuing medical education courses. Dr. Wells was not able to give the exact date on which he had studied this topic, nor could he recall the title of the literature he read on the topic. Additionally, he admitted that he had not specifically studied the effects of secondhand marijuana smoke on children. The trial court overruled appellant's objection

to Dr. Wells' testimony and allowed him to testify as an expert.

The trial court did not abuse its discretion in overruling appellant's objection. Dr. Wells demonstrated that he was an accomplished emergency medicine doctor and had exposure to the matter at issue through experience and education. Appellant contends Dr. Wells only demonstrated knowledge of the effects of narcotics on a "human being," and not specifically on a child. Therefore, appellant argues, the State failed to establish Dr. Wells possessed the specialized knowledge required to assist the jury in resolving the issue at hand. We do not agree. The question here is the "fit" between Dr. Well's demonstrated knowledge and the matter at issue. *See Vela*, 209 S.W.3d at 133. To determine whether an expert witness is qualified, the trial court considers whether the witness has a sufficient background in a particular field and whether that background goes to the very matter on which the witness is to give an opinion. *See id*. Dr. Wells' specialized knowledge and experience in emergency medicine, including narcotics overdoses and the effects of narcotics on a human being, sufficiently fits his testimony on the potential effects narcotics could have on children. Accordingly, we overrule appellant's first issue.

II. Legal Sufficiency of the Evidence

In her second issue, appellant contends the evidence is legally insufficient to support the jury's verdict. In her third issue, appellant contends the trial court erred in denying her motion for directed verdict. The law is well settled that a challenge to the denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence. *Gabriel v. State*, 290 S.W.3d 426, 435 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Therefore, we will construe appellant's second and third issues as a single issue.

A. Standard of Review

When reviewing legal sufficiency, we view all the evidence in the light most favorable to the verdict and then determine whether a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The jury, as the trier of fact, is the sole judge of the

credibility of witnesses. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). The jury chooses whether or not to believe all or part of a witness's testimony. *See id.* We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

B. Analysis

A person commits the offense of endangering a child if she "intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment." Tex. Penal Code Ann. § 22.041(c) (Vernon 2009). Appellant's sole contention is that the State failed to prove appellant placed a child in *imminent danger*. The penal code does not statutorily define imminent danger. The Court of Criminal Appeals has relied on the following definition of "imminent:" "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near." *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989). Cases analyzing the offense of endangering a child using this definition of imminent require more than a potentially dangerous situation. *See Millslagle v. State*, 81 S.W.3d 895, 898 (Tex. App.—Austin 2002, pet. ref'd).

Appellant cites *Millslagle v. State* as an example of a court holding the evidence insufficient to support a finding of imminent danger. *Id.* Although *Millslagle* presents similar circumstances to the facts underlying the case at bar, its factual dissimilarities illuminate our analysis. In *Millslagle*, a father left a young boy alone in a vehicle while the father went into a sandwich shop. *Id.* 896–97. Inside the shop, the father went in the bathroom and crawled into the ceiling of the shop where he ingested methamphetamine. *Id.* After a worker at the shop noticed an unattended child "jumping around" in a vehicle, she notified police about the unattended child. *Id.* at 898. Police officers came to the aid of the boy and located his father thirty minutes later. *Id.* The father told officers that he had used methamphetamine. *Id.* at 897. The Austin Court of Appeals held the evidence

was legally insufficient to support a finding that the child was placed in imminent danger by being left alone on the vehicle. *Id*. 898. The court stated: "[a]lthough appellant's drug use may have carried with it the potential for danger should he return to the truck and drive away in an intoxicated state, appellant's drug use did not expose his child to imminent danger so long as appellant remained in the restroom and did not return to his truck." *Id*. The *Millslagle* Court's decision hinged on the fact the father did not use drugs in front of the child and the fact the father did not drive the vehicle after using the drugs. *See id*.

The facts in the case at bar present us with the situation *Millslagle* implied would create an imminent danger. Sergeant Fisher testified that (1) he smelled marijuana from outside the vehicle; (2) he saw marijuana debris inside the vehicle; (3) the driver of the vehicle admitted to having smoked marijuana; (4) appellant left a bag of cocaine and a bag of marijuana in the vehicle with the unrestrained children while she stepped out of the car to talk with Sergeant Fisher. Unlike in *Millslagle*, here the children were exposed to the narcotics and the narcotics were left within reach on the passenger seat of the vehicle while the children were unrestrained in the backseat of the vehicle. Viewing this evidence in the light most favorable to the verdict, we hold the combination of the near presence of the narcotics to the unrestrained children in the vehicle, and the fact that marijuana was smoked inside the vehicle with the children present is legally sufficient evidence to support a finding of imminent danger.[2]

[2] Although of no precedential value, we find *Anguiano v. State* persuasive. *Anguiano v. State*, No. 08-02-00443-CR, 2004 WL 178601 (Tex. App.—El Paso Jan. 29, 2004, pet. ref'd) (mem. op., not designated for publication). In that case, the El Paso Court of Appeals found the evidence sufficient to support a finding of imminent danger where the defendant had passed out in the front seat of a vehicle and a baby was strapped into the passenger seat reaching for an open syringe of an unknown substance. *Id*. at *2.

CONCLUSION

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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