Affirmed and Memorandum Opinion filed March 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00974-CR

WILLIE LEE DAVIDSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1440222

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

In this appeal of his conviction for assault, appellant Willie Lee Davidson raises two issues. First, he argues that the trial court erred by admitting medical records that he contends contain hearsay within hearsay. Second, he argues that the jury charge failed to guarantee a unanimous verdict.

We affirm.

Background

Appellant and Lavenia Randall began dating around February 2014, and appellant moved in with Randall. Six months later, while the couple was in a car leaving a nightclub, appellant hit or punched Randall in her face, mouth, and arms. Randall testified that she jumped out of the car and tried to run away, but appellant caught her, knocked her to the ground, and kicked her. Randall was eventually able to free herself and run home, where her daughter called the police.

Randall went to a dentist to repair damage to her front teeth that she claims resulted from appellant's blows. At trial, the State introduced photographs of Randall's injuries, as well as the medical records from the dentist who treated her, marked as State's Exhibit 14:

> [Prosecutor]: Your Honor, at this time State would offer into evidence what's been in the Court's file State's Exhibit No. 14.
>
> (State's Exhibit No. 14 offered)
>
> [Court]: Okay.
>
> [Defense]: No objection.
>
> [Court]: All right. Fourteen is admitted.
>
> (State's Exhibit No. 14 admitted)
>
> [Prosecutor]: Permission to publish, Judge?
>
> [Court]: Yes.

The prosecutor then began to read from the dental records, and the following exchange occurred:

> [Prosecutor]: Okay. I'm going to read into the record. "The Teeth No. 7 through 10 are fractured due to trauma to the maxillary interior."
>
> [Defense]: Objection to hearsay within hearsay, your Honor.
>
> [Court]: Overruled. These are -- have already been admitted into evidence. Go ahead.

> [Prosecutor]: That "Teeth No. 7, 8, 9 and 10 were fractured due to the trauma to the maxillary interior. Number 6, 11 and 12 contained fracture lines, which could be the result of trauma."

The jury was charged on the offense of assault of a person with whom the defendant had a dating relationship. The instructions stated that "if you find from the evidence beyond a reasonable doubt that . . . Willie Lee Davidson . . . intentionally or knowingly cause[d] bodily injury to Lavenia Randall . . . by striking Lavenia Randall with his hand; or . . . by kicking Lavenia Randall with his foot," then the jury was to find appellant guilty of assault.[1]

The jury found appellant guilty and assessed 45 years' confinement.

Analysis

A. Evidentiary Ruling

In his first issue, appellant argues the trial court erred in improperly admitting Randall's dental records. The State responds that appellant waived any complaint by failing to timely object.

We review a trial court's evidentiary ruling for an abuse of discretion. *Zavala v. State*, 401 S.W.3d 171, 176 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). We will uphold a trial court's evidentiary ruling if it is reasonably supported by the record and correct on any applicable theory of law. *Id.*

When the State offered the dental records into evidence, appellant's counsel stated, "No objection." When the State published the dental records, appellant's counsel objected to the admitted records as hearsay within hearsay. Appellant

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[1] Because the State introduced evidence that appellant had previously been convicted of assault committed against a family member, appellant was charged as a second offender, and the jury was to find appellant guilty of felony assault in this case if it found, beyond a reasonable doubt, that appellant had been convicted of the earlier assault against a family member. There is no issue in this appeal about appellant's second-offender status or the prior conviction.

concedes that the dental records may have been properly admitted under the business records exception to the general evidentiary rule that hearsay is inadmissible. *See* Tex. R. Evid. 803(6). But appellant contends that the dentist's statements contained within the dental records were inadmissible hearsay, and that the trial court accordingly erred in admitting them. We need not decide whether the dentist's statements were layered hearsay or whether the trial court erred in admitting the dental records, because we hold that appellant waived any complaint by failing to timely object.

If a defendant's attorney affirmatively states that there is no objection to the admissibility of the evidence when it is introduced at trial, the defendant waives the right to complain of its admission on appeal. *See Heidelberg v. State*, 36 S.W.3d 668, 672 n.2 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Holmes v. State*, 248 S.W.3d 194, 201 (Tex. Crim. App. 2008). The record here clearly reflects that appellant's attorney stated "no objection" when the State offered the dental records into evidence.

Appellant's counsel's subsequent objection, once the prosecutor began to read from the admitted dental records, was too late to preserve any error. *See, e.g.*, *Mason v. State*, 416 S.W.3d 720, 737 n.22 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (objection after evidence is admitted is too late to preserve error) (citing Tex. R. App. P. 33.1); *see also Wells v. State*, 220 S.W.2d 148, 151 (Tex. Crim. App. 1949) (objection to prosecutor reading deceased's will came too late, after there was no objection when will was offered into evidence); *Sharp v. State*, No. 06-12-00134-CR, 2013 WL 494027, at *1-2 (Tex. App.—Texarkana Feb. 11, 2013, no pet.) (mem. op., not designated for publication) (rejecting argument that initial "no objection" to admission of police report does not waive later hearsay objection to prosecutor reading portion of report during closing argument).

We overrule appellant's first issue.

B. Jury Charge

In his second issue, appellant argues that the jury charge improperly allowed the jury to convict without reaching a unanimous verdict because the charge asked about two separate assaults in the disjunctive. The State responds that there was no charge error because the charge permissibly set forth alternative theories of a single offense.

We review a complaint about error in the jury charge in two steps. We first determine whether an error exists. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If it does, we then analyze the error for harm. *Id.* There are separate standards for the harm analysis, depending on whether the defendant timely objected to the jury instructions. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016). If the defendant timely objected, then reversal is required if there was some harm to the defendant. *Id.* If the defendant failed to timely object, then reversal is required only if the error was so egregious and created such harm that the defendant did not have a fair and impartial trial. *Id.*

Under our state constitution, jury unanimity is required in felony cases; the Legislature has expanded that to require unanimity in all criminal cases. *See Ngo v. State*, 175 S.W.3d 738, 745 & n.23 (Tex. Crim. App. 2005) (citing Tex. Const. art. V, § 13; Tex. Code Crim. Proc. arts. 36.29(a), 37.02, 37.03, 45.034–45.036). "Unanimity in this context means that each and every juror agrees that the defendant committed the same, single, specific criminal act." *Id.* at 745.

The charge here instructed the jury that it was to find appellant guilty if the State proved beyond a reasonable doubt that appellant "cause[d] bodily injury . . . by striking Lavenia Randall with his hand; or . . . by kicking Lavenia Randall with

his foot." Appellant argues that the disjunctive phrasing in the charge allowed the jury to find appellant guilty of assault without reaching a unanimous verdict regarding which of the two different acts—hitting or kicking—he committed.

We hold that there is no error in the charge as submitted to the jury. The jury must agree that the defendant committed one specific crime. *See Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008). But a defendant's right to a unanimous verdict does not mean that the jury must unanimously find that the defendant committed the charged crime in one specific way or even with one specific act. *See id.* The jury is not required to unanimously agree on the preliminary factual issues that underlie the verdict, such as the manner and means by which the offense was committed. *See Schad v. Arizona*, 501 U.S. 624, 632 (1991) (plurality op.); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991). The State can, as here, argue alternative theories of committing the same offense, and "it is proper to charge a jury in the disjunctive with multiple theories of committing a single offense." *Jefferson v. State*, 189 S.W.3d 305, 310 (Tex. Crim. App. 2006) (quotation omitted).

Here, appellant was charged with assaulting Randall. A person commits assault if he intentionally, knowingly, or recklessly causes bodily injury to another. Tex. Penal Code § 22.01(a)(1). Bodily injury assault is a result-oriented offense. *See Landrian*, 268 S.W.3d at 536. The essential element of the statute criminalizing assault is the result of the defendant's conduct—in this case, causing bodily injury to a person with whom the accused has a dating relationship—and not "the possible combinations of conduct that cause the result." *Jefferson*, 189 S.W.3d at 312.

Thus, the jury was required to unanimously agree that appellant was guilty of causing bodily injury to Randall, but the jury was not required to unanimously

agree how appellant assaulted her. *See id.* at 311 ("'To say that the jury must be unanimous, however, does not explain what the jury must be unanimous about.'") (quoting *State v. Johnson*, 627 N.W.2d 455, 459-60 (Wis. 2001)). Charging the jury in the disjunctive did not violate appellant's right to a unanimous verdict because kicking and hitting are not separate criminal offenses; they are simply two different methods of causing bodily injury, which is the essential element of assault. *See, e.g.*, *Johnson v. State*, 364 S.W.3d 292, 296-97 (Tex. Crim. App. 2012) (jury unanimity not violated if "stabbed with a knife" and "bludgeoned with a baseball bat" were both submitted in support of a single murder offense, because the two methods of committing murder do not result in two offenses).

We think the guidance from the Court of Criminal Appeals noted above sufficient to resolve the issue against appellant, but we also note several other decisions as persuasive authority. For example, this court previously rejected an argument that a defendant's right to a unanimous jury verdict was violated when the trial court did not force the State to elect the manner and means by which it sought to prove the defendant assaulted his wife: whether by striking her, grabbing her, or pushing her. *See Kessro v. State*, No. 14-99-01325-CR, 2001 WL 726469, at *2 (Tex. App.—Houston [14th Dist.] June 28, 2001, pet. ref'd) (not designated for publication); *see also Mosley v. State*, No. 14-98-01325-CR, 2000 WL 144104, at *2-3 (Tex. App.—Houston [14th Dist.] Feb. 10, 2000, no pet.) (not designated for publication) (rejecting appellant's argument that unanimity was required for assault charge where he was alleged to have assaulted his wife by biting, grabbing, pushing, and hitting her). Similarly, the El Paso Court of Appeals held it was proper to charge the jury on alternative theories of assault, whether by pulling the victim's hair or by grabbing her neck. *See Davila v. State*, 346 S.W.3d 587, 591 (Tex. App.—El Paso 2009, no pet.); *see also Bryant v. State*, No. 09-15-00282-CR,

2016 WL 3356568, at *3-4 (Tex. App.—Beaumont June 15, 2016, no pet.) (mem. op., not designated for publication) (no unanimity instruction required in assault case, where complainant testified that defendant hit, scratched, and kicked complainant).

Appellant relies on two cases to support his argument that hitting and kicking Randall constituted two assaults, necessitating a unanimity instruction, but the cases are distinguishable. In *Francis v. State*, the Court of Criminal Appeals found a jury charge—on a single count of indecency with a child—erroneous because some jurors could have found that the defendant committed indecency by touching a child's breast while others could have concluded that he touched her genitals. *See Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (op. on reh'g) ("The breast-touching and genital-touching were two different offenses, and therefore, should not have been charged in the disjunctive."); *see also Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007) (indecency with a child is a conduct-oriented offense, and each instance of criminalized conduct constitutes a different criminal offense). Also, the acts of indecency in *Francis* occurred on different times and dates, and thus constituted separate offenses that should not have been charged in the disjunctive. *See Francis*, 36 S.W.3d at 122, 125.

Cosio v. State, the second case appellant cites, is similarly inapplicable. *See Cosio v. State*, 353 S.W.3d 766 (Tex. Crim. App. 2011). The defendant in *Cosio* was charged with two counts of aggravated sexual assault and two counts of indecency with a child. *Id.* at 769. The evidence showed that more than one instance of misconduct supported each count of aggravated sexual assault (instances in different locations and at different times), and that more than one instance of misconduct supported one count of indecency (different manners of touching the child). *Id.* at 770-71. Because each instance constituted a different

offense, the court held that the jury could have non-unanimously relied on separate instances of criminal conduct in reaching its verdict. *Id.* at 774.

Appellant's acts against Randall occurred at one time—or at least so near each other as to constitute a single offense. When "acts so closely connected . . . form part of one and the same transaction, and thus one offense," it is not error to charge the jury in the disjunctive. *See Jefferson*, 189 S.W.3d at 313-14 & n.11 (quotation omitted); *compare Zuliani v. State*, Nos. 03-13-00490-CR, -491, -492, -493 & -495, 2015 WL 3453942, at *9 (Tex. App.—Austin May 29, 2015, pet. ref'd) (mem. op., not designated for publication) (defendant's multiple strikes, by hand and with foreign objects, against complainant as defendant chased her through house constituted single aggravated assault when there was no clear break in time), *with Ansari v. State*, No. 04-14-00728-CR, 2015 WL 4638286, at *2 (Tex. App.—San Antonio Aug. 5, 2015, no pet.) (unanimity required when evidence showed that three separate assaults occurred: when couple was alone in a car, after the couple picked up a third party, and after all three arrived home). There was no danger here of the jury relying on separate instances of misconduct when reaching its verdict on the single count of assault.

Further, because assault is a result-oriented offense, the incidents of appellant hitting and kicking Randall do not constitute separate instances of criminal conduct. *See Jefferson*, 189 S.W.3d at 312; *see also Phillips v. State*, 787 S.W.2d 391, 395 (Tex. Crim. App. 1990) (assault is a result-oriented offense that is complete with the injury of a single individual). Charging the jury in the disjunctive therefore did not violate appellant's right to a unanimous verdict. *See Johnson*, 364 S.W.3d at 296-97.

We hold that there is no error in the charge as presented to the jury. Having found no error, we need not engage in a harm analysis. *See Sakil v. State*, 287 S.W.3d 23, 26 (Tex. Crim. App. 2009).

We overrule appellant's second issue.

Conclusion

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

/s/ Kevin Jewell
Justice

Panel consists of Justices Jamison, Wise, and Jewell.
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