



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00491-CR

Joel **SOTO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 379th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR8804
Honorable Ron Rangel, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Irene Rios, Justice

Delivered and Filed: May 23, 2018

AFFIRMED

A jury convicted Appellant Joel Soto (“Soto”) of felony murder, manslaughter, injury to a child, and arson, all in connection with the death of Soto’s 2-year-old grandson. On appeal, Soto argues: (1) the evidence is legally insufficient to support his convictions on the charges of felony murder, manslaughter, and injury to a child; (2) the trial court erred in failing to grant Soto’s motion to quash the indictment; (3) the trial court erred in proceeding to trial without entry of an indictment; and (4) the trial court erred in admitting gruesome photographs of the decedent.

We affirm the trial court’s judgment.

BACKGROUND

A. Testimony regarding the timeline of events

In late 2013, Soto was living with his ex-wife, Martha Quintanilla, and his three grandchildren. Soto's youngest grandson, Jeremy, was two years old. Quintanilla had noticed changes in Soto's behavior while he was living with her that caused her concern regarding the children. Soto would disappear for three days at a time and then come back without telling her where he had been. Quintanilla suspected Soto was "in drugs," but she never saw Soto using drugs and never saw any drugs in the house.

On November 15, 2013, Quintanilla left directly from work to go to dinner with her sister at around 7 p.m. About an hour later, she returned home and observed Soto and the children watching television in separate rooms. Quintanilla went straight to bed. When she was almost asleep, at around 10 p.m., Quintanilla thought she saw Soto's and Jeremy's shadows walking out of the house. When Quintanilla woke up the next morning, the other two children were still in the house but Soto and Jeremy were not.

On the morning of November 16, 2013, Linda Dean Mayen saw a red pickup truck on fire on the side of the road. The truck's hood was down and the doors were closed, and only the inside of the cab was on fire. There was a gas can next to the driver's side of the truck.

After calling 9-1-1 to report the fire, Mayen exited her vehicle to see if anyone was inside the truck. Mayen observed the street was completely empty, and she found it strange that no one was nearby. As Mayen was attempting to look inside the truck, Soto "came out of—further up the road, he came out of nowhere and said that his grandson was in the truck." While someone else tried to pull the victim from the truck, Mayen observed Soto "was up the road. He [was] just—not in a panic, just there." "The only other thing that [Soto] ever said was, 'What am I going to tell my daughter?'"

When San Antonio Police Officer René Ramirez first arrived at the scene, the inside of the cab of the truck was fully engulfed in flames, and Soto was standing in a wooded area approximately eighty feet away. Officer Ramirez spoke to Soto, who was not excited and was “kind of mumbling to himself. . . . he wasn’t distraught or anything.” Soto told Officer Ramirez he had not tried to get his grandson out of the pickup truck but had run to get help.

San Antonio Police Detective Robert Bunnell also was dispatched to the scene. When he arrived, Soto was up the street in a wooded area, approximately three hundred feet away from the pickup truck. Detective Bunnell interviewed Soto and did not believe Soto’s version of the events. Soto’s demeanor was “Stoic. Void of anything.” He did not appear distraught and was not crying. Soto did not call 9-1-1 or a hospital. Detective Bunnell later investigated Soto’s home, where he found prescriptions in Soto’s name for buspirone and paroxetine (the antidepressant Paxil), as well as a prescription for sertraline (the antidepressant Zoloft) for a “Linda Perez.”

A CPS caseworker interviewed Soto on November 17, 2013. Soto admitted to the caseworker that he had been using methamphetamine for two weeks prior and had last used on November 14, 2013. Soto stated he was taking methamphetamine in capsule form and had been using at home in the backyard.

B. Testimony regarding the fire

Several witnesses testified regarding the cause and origin of the fire. Officer Ramirez testified that after the fire was extinguished, he detected a strong odor of gasoline coming from inside the truck, and there were some rags on the floorboard of the passenger side of the cab that smelled strongly of gasoline.

Arson Investigator Juan Martinez also observed a stronger than usual smell of gasoline coming from the passenger compartment of the pickup truck. He observed a lot of clothes on the floorboard on the passenger side and noticed the gasoline smell getting stronger as he moved the

clothes out of the way. Investigator Martinez testified this was unusual because there should not have been any gasoline in the passenger compartment. Fire Department Investigator Justin Davis's canine is trained to detect petroleum-based hydrocarbons and alerted on the ground area near the open driver-side door and on the passenger side of the pickup truck.

Investigator Martinez opined that the fire originated in the passenger compartment, gasoline was the accelerant used, and the fire was set intentionally. Investigator Martinez explained the gasoline smell was strongest in the passenger compartment on the passenger-side floorboard. He opined that if someone threw an ignitor through the open driver-side door, they would have fire damage on their right arm and the entire right side of their body. Investigator Martinez observed burn marks on Soto's right arm. Officer Ramirez also observed "some . . . singed hair on [Soto's] arm, and I believe . . . on the side of the face," but he did not observe that Soto had any major injuries.

ATF Special Agent Ryan McCormick investigated the pickup truck at the police impound lot. Based on his investigation, Special Agent McCormick determined the fire originated in the passenger compartment of the pickup truck by ignition of gasoline by an open flame. Fire damage to the pickup truck indicated the driver-side door was open during the fire and the truck was not running during the fire. Special Agent McCormick sent nineteen items of debris taken from the pickup truck to California to be tested for ignitable liquids. Jamie Baerncopf, a forensic chemist for the ATF forensic science laboratory in California, analyzed evidence from the pickup truck and found gasoline and limonene (a citrus-smelling compound found in many commercial products) in most of the debris.

At Special Agent McCormick's request, Robert James Crompton, Jr. went to the impound lot to inspect the pickup truck. Crompton is a General Motors technician who is master certified

in American Service Excellence. Based on his inspection of the vehicle, Crompton opined the fire did not originate in the engine compartment or underneath the hood of the pickup truck.

C. Testimony regarding the autopsy of Jeremy's body

Medical Examiner Kimberly Molina performed an autopsy of Jeremy's body. Dr. Molina opined that Jeremy was not alive when his body was burned because there was no evidence Jeremy was breathing during the fire and there was no evidence of carbon monoxide or cyanide from burnt plastics in Jeremy's blood.

Dr. Molina found several medications and illicit drugs in Jeremy's body, so his death may have been a result of a drug overdose. Specifically, Dr. Molina found salicylic acid (aspirin), methamphetamine and its breakdown product amphetamine, diphenhydramine (Benadryl), a small amount of dextromethorphan (over-the-counter cough medicine), sertraline and its breakdown product metabolite desmethylsertraline (Zoloft), and paroxetine (Paxil). Methamphetamine can kill a person at any concentration, and 5 milligrams per liter of methamphetamine, which was the level found in Jeremy's body, is a very high concentration. Regarding the combination of Paxil, Zoloft, and methamphetamine in Jeremy's body, Dr. Molina testified:

[T]hat particular combination is particularly bad. Again, we have this very high level of methamphetamine, which alone could potentially be lethal. However, it's then mixed with two other medications, which will also stimulate and work on the neurotransmitters in the brain much the same way that methamphetamine is. So it's kind of a triple hit, if you will. And these three medicines shouldn't go together, and certainly shouldn't be found together in a two-year-old.

Dr. Molina was unable to determine the cause and the manner of death with certainty due to the condition of the remains. Jeremy's body was "extensively burned" or "charred." Dr. Molina explained that "since we can't exclude or rule out specifically other causes, mainly trauma, then the cause of death can't be absolutely determined to be a drug overdose."

SUFFICIENCY OF THE EVIDENCE

In his first three issues, Soto challenges the sufficiency of the evidence to support his convictions on the charges of felony murder, manslaughter, and injury to a child. We address each charge separately.

A. Standard of review

In reviewing a challenge to the sufficiency of the evidence, we examine all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). Direct and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction if the cumulative force of all the incriminating circumstances supports the verdict. *Ramsey*, 473 S.W.3d at 809. “The trier of fact is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the evidence so long as it is supported by the record.” *Id.* We are mindful that we may not sit as a thirteenth juror and substitute our judgment for that of the factfinder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

B. Felony murder

1. Applicable law

A person commits the offense of felony murder if he:

commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX. PENAL CODE § 19.02(b)(3). Here, the State charged Soto with committing the underlying felony offense of possession or attempted possession of methamphetamine, and the alleged act

clearly dangerous to human life was storing or leaving the methamphetamine in a place or area accessible to Jeremy. Possession of a controlled substance, together with placing a child in a circumstance where he can ingest that controlled substance, is conduct sufficient to prove acts clearly dangerous to human life. *Driver v. State*, 358 S.W.3d 270, 276 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

A person commits the offense of possession of a controlled substance if he “knowingly or intentionally possesses a controlled substance listed in Penalty Group 1 unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.” TEX. HEALTH & SAFETY CODE § 481.115(a); *see also id.* § 481.102(6) (Penalty Group 1 includes “Methamphetamine”). To support a conviction for possession of a controlled substance, the State must prove: (1) the defendant exercised actual care, control, and management over the controlled substance; and (2) the defendant knew the substance in his possession was contraband. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995); *Barbosa v. State*, 537 S.W.3d 640, 645 (Tex. App.—San Antonio 2017, no pet.).

Mere presence in the place where a controlled substance was found is not sufficient, by itself, to establish possession. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006). The mere presence of a controlled substance in a person’s body also is insufficient, without more, to establish possession. *Jackson v. State*, 833 S.W.2d 220, 223 (Tex. App.—Houston [14th Dist.] 1992, writ ref’d). If the defendant is merely present where the controlled substance is found, then independent facts and circumstances must link him to the controlled substance. *Evans*, 202 S.W.3d at 162. Whether the evidence is direct or circumstantial, it must establish the defendant’s connection with the controlled substance was more than fortuitous. *Id.* at 161.

Courts consider a laundry list of facts to establish links between the defendant and the contraband, including:

(1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.

Id. at 162 n.12. It is "not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial." *Id.* at 162.

2. Analysis

The State argues the following evidence links Soto to the methamphetamine found in Jeremy's body:

- [The CPS caseworker] spoke with [Soto] on November 17th, the day after Jeremy's death[,] and [Soto] admitted to her that [he] was using methamphetamines in capsule form at home and he had been using the last two weeks.
- Martha [Quintanilla], who lived with [Soto] and at one time was married to him, suspected he was using drugs again because of his change of behavior and that change concerned Martha. Although Martha did not actually see [Soto] with drugs, the change in his behavior and the fact that [Soto] would disappear for days at a time caused her to suspect drug use.
- When [Martha Quintanilla] arrived at home [Soto] and the three children were present[;] when she awoke the next morning [Soto] and Jeremy were gone.
- [F]ire did not kill Jeremy; he was already dead and had enough drugs in his system to cause death in an adult[,] much less a two year old.
- [T]he Zoloft and Paxil prescriptions were found in the house and while no methamphetamines were found, Jeremy's body [] had an extremely high amount of meth along with Zoloft and Paxil.
- [E]vidence indicates that [Soto] set his truck on fire with Jeremy, already deceased, inside. [Soto] did not at any time attempt to get help for Jeremy and he attempted to destroy evidence of how Jeremy died.

Looking to the laundry list of non-exclusive facts set forth in *Evans*, we agree these facts establish a link between Soto and the methamphetamine found in Jeremy's body. First, Soto made an incriminating admission to the CPS caseworker that he was using methamphetamine in capsule form at home and he had been using during the prior two weeks. Second, while no other contraband or drug paraphernalia were found in Soto's home, police found prescriptions for Zoloft and Paxil, suggesting Soto stored or left those drugs in a place where Jeremy could access them. The medical examiner testified Zoloft and Paxil were found in Jeremy's body in a combination of drugs that "shouldn't go together, and certainly shouldn't be found together in a two-year-old."

Third, Soto's conduct indicated a consciousness of guilt. Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations are probative of guilt. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Ross v. State*, 154 S.W.3d 804, 812 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) ("A defendant's conduct after the commission of a crime which indicates a 'consciousness of guilt' is admissible to prove that he committed the offense."). Here, the evidence demonstrates Soto set fire to Jeremy's body after Jeremy died in an attempt to conceal evidence of the cause of Jeremy's death.

Further, this case is similar to *Driver v. State*, in which the defendant was convicted of felony murder of his eight-month-old son, who died of cocaine poisoning while in the defendant's care, based on the underlying offense of possession of cocaine. 358 S.W.3d 270 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). The *Driver* court held there was legally sufficient evidence linking the defendant to the cocaine ingested by the child because: (1) the defendant was the only adult present at the time the child ingested cocaine; (2) neither the defendant nor the child left the defendant's apartment that day; (3) the defendant was in the sole possession of the apartment during the relevant time period; (4) the defendant admitted he had handled and cut cocaine within a day or two of the child's death; and (5) the defendant admitted the only way he could conceive

of how the child ingested cocaine was that there had been cocaine residue on the defendant's hands and the child, who was teething, sucked on the defendant's fingers. *Id.* at 275–76.

Here, too, there is evidence Soto was the only adult present at the time Jeremy ingested methamphetamine. Martha Quintanilla testified Soto was alone with Jeremy and the other children when she arrived home from dinner on November 15 and she thought she saw Soto leaving the house alone with Jeremy later that night. When Jeremy's body was discovered the next morning, Linda Dean Mayen and the responding police officers testified Soto was the only other person present besides onlookers.

Viewing the evidence in the light most favorable to the jury's verdict, and considering the logical force of the evidence linking Soto to the methamphetamine, a rational trier of fact could conclude beyond a reasonable doubt that Soto knowingly possessed the methamphetamine found in Jeremy's body. Therefore, the evidence is legally sufficient to support Soto's conviction on the charge of felony murder.

C. Manslaughter

1. Applicable law

A person commits the offense of manslaughter if he “recklessly causes the death of an individual.” TEX. PENAL CODE § 19.04(a).

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Id. § 6.03(c). Here, the State charged Soto with manslaughter by recklessly allowing Jeremy to ingest methamphetamine or paroxetine (Paxil) or sertraline (Zoloft).

2. Analysis

There is evidence in the record that Soto was aware of, but consciously disregarded, a substantial and unjustifiable risk that Jeremy could access prescription drugs and methamphetamine. First, Soto admitted to the CPS caseworker that he was using methamphetamine in capsule form at home and had been using during the prior two weeks. Second, police found prescriptions for Paxil and Zoloft in Soto's home, and the medical examiner testified the combination of these drugs, especially in an infant, would be "particularly bad." Third, Martha Quintanilla testified Soto was alone with Jeremy during the evening of November 15, indicating Soto likely had sole possession and control over Jeremy and Jeremy's environment when he ingested the drugs found in his body. Fourth, Detective Robert Bunnell testified Soto did not call 9-1-1 or a hospital to get help for Jeremy. *See Guevara*, 152 S.W.3d at 50 (holding attempts to conceal incriminating evidence are probative of guilt); *Ross*, 154 S.W.3d at 812 (holding defendant's conduct indicating a consciousness of guilt is admissible to prove guilt).

Viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact could conclude beyond a reasonable doubt that Soto recklessly allowed Jeremy to ingest methamphetamine or paroxetine or sertraline. Therefore, the evidence is legally sufficient to support Soto's conviction on the charge of manslaughter.

D. Injury to a child

1. Applicable law

A person commits the offense of injury to a child if he "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, recklessly by omission, causes to a child . . . serious bodily injury." TEX. PENAL CODE § 22.04(a)(1). A person acts intentionally when it is his conscious objective or desire to engage in the conduct or cause the

result. *Id.* § 6.03(a). A person acts knowingly when he is aware of the nature of his conduct or that the circumstances exist or that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b).

2. Analysis

The State charged Soto with intentionally or knowingly causing serious bodily injury to Jeremy “by failing to provide necessary medical treatment” or by omission because he “had a legal duty to act, or a statutory duty to act, or had assumed care, custody, or control of Jeremy” and “failed to provide necessary medical treatment” for Jeremy. Soto argues the evidence is legally insufficient to support the jury’s verdict because the medical examiner testified it was possible Jeremy would not exhibit side effects of the ingested drugs such that another person would know medical attention was needed.

There is evidence in the record that Soto intentionally or knowingly caused serious bodily injury to Jeremy by failing to provide necessary medical treatment to Jeremy after he ingested the drugs found in his body. Martha Quintanilla testified Soto was alone with Jeremy during the evening of November 15 and that she thought she saw Soto leave the house with Jeremy at around 10 p.m., which is evidence that Soto had sole care, custody, and control over Jeremy and Jeremy’s environment when he ingested the drugs found in his body. Detective Bunnell testified Soto did not call 9-1-1 or a hospital to get help for Jeremy. In addition, there is substantial evidence in the record that, rather than seek help for Jeremy, Soto set a fire to conceal the circumstances of Jeremy’s death.

While the medical examiner testified it was possible for someone to have adverse effects to the drugs found in Jeremy’s body without knowing medical attention was necessary, she also testified the combination of drugs could cause rapid heartbeat, rising blood pressure, heart attack, cardiac arrhythmia, seizures, or convulsions. Thus, there was some evidence in the record that

Jeremy would have exhibited side effects of the ingested drugs such that Soto would have known Jeremy needed medical attention.

Therefore, viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact could conclude beyond a reasonable doubt that Soto intentionally or knowingly caused serious bodily injury to Jeremy by failing to provide necessary medical treatment. We hold the evidence is legally sufficient to support Soto's conviction on the charge of injury to a child.

Because we hold the evidence is legally sufficient to support Soto's convictions on the charges of felony murder, manslaughter, and injury to a child, we overrule Soto's first three issues.

MOTION TO QUASH THE INDICTMENT

In his fourth issue, Soto argues the trial court erred in denying his Motion to Quash and Exception to Substance of Indictment and Exception to Form of Indictment because the indictment denied him notice of the offenses charged in violation of the Texas and United States Constitutions and the Texas Code of Criminal Procedure.

A. Standard of review

We review the trial court's denial of a pretrial motion to quash the indictment de novo. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007). The United States and Texas Constitutions require a defendant be given fair notice of the specific offense charged. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10 & art. V, § 12b; *State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017).

Chapter 21 of the Texas Code of Criminal Procedure governs the requirements and adequacy of notice. *Zuniga*, 512 S.W.3d at 906. The indictment must state everything that must be proved with such certainty as "will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." TEX. CODE. CRIM. PROC. arts. 21.03, 21.04. An indictment gives sufficient notice if it:

charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment.

Id. art. 21.11. In cases in which recklessness is alleged, the code imposes an additional requirement:

Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

Id. art. 21.15 (emphasis added). The State must allege circumstances indicating the defendant was aware of the risk and acted with conscious disregard of that risk. *Smith v. State*, 309 S.W.3d 10, 15 (Tex. Crim. App. 2010).

While these constitutional notice requirements generally are met when the indictment tracks the statutory text for the offense, a reviewing court must “engage in a two-step analysis” to identify the elements of the offense and consider whether the statutory language is sufficiently descriptive of the charged offense. *Zuniga*, 512 S.W.3d at 907.

B. Analysis

In a pretrial hearing, Soto moved to quash Count 1 (felony murder) and Count 2 (manslaughter) of the indictment. The trial court quashed paragraphs A and B of Count 1 but denied the motion as to paragraph C of Count 1 and Count 2. On appeal, Soto argues the trial court erred by not quashing Count 1 and Count 2 in their entirety.

1. Count 1

The revised Count 1 was read to the jury as follows:

On or about the 16th day of November, 2013, Joel Soto, hereinafter referred to as defendant, did then and there commit or attempt to commit the felony offense of possession of a controlled substance, PG-1, by intentionally and knowingly possessing methamphetamine and while in the course of or in furtherance of or in immediate flight from the commission or the attempted commission of this offense, the defendant did then and there commit or attempt to commit an act clearly dangerous to human life, to-wit: storing the controlled substance and leaving the controlled substance in a place or area accessible to Jeremy Soto, thereby causing the death of an individual, namely Jeremy Soto.

The essential elements of felony murder are “(1) an underlying felony, (2) an act clearly dangerous to human life, (3) the death of an individual, (4) causation (the dangerous act causes the death), and (5) a connection between the underlying felony and the dangerous act (‘in the course of and in furtherance of . . . or in immediate flight from’).” *Contreras v. State*, 312 S.W.3d 566, 583–84 (Tex. Crim. App. 2010); *accord* TEX. PENAL CODE § 19.02(b)(3). Count 1 of the indictment alleges each of these essential elements:

- (1) an underlying felony (“. . . Joel Soto . . . did then and there commit or attempt to commit the felony offense of possession of a controlled substance, PG-1 . . .”);
- (2) a connection between the underlying felony and the dangerous act (“. . . while in the course of or in furtherance of or in immediate flight from the commission or the attempted commission of this offense . . .”)
- (3) an act clearly dangerous to human life (“. . . the defendant did then and there commit or attempt to commit an act clearly dangerous to human life, to-wit: storing the controlled substance and leaving the controlled substance in a place or area accessible to Jeremy Soto . . .”); and
- (4) causation and the death of an individual (“. . . thereby causing the death of an individual, namely Jeremy Soto”).

Soto does not appear to dispute that Count 1 alleges each element of the offense but argues Count 1 is improperly vague because it does not identify the controlled substance he allegedly possessed. Before the trial court, Soto also argued the indictment must specify the quantity of

methamphetamine because possession of less than one gram of methamphetamine may not be a felony. However, the indictment clearly identifies “methamphetamine” as the controlled substance Soto is alleged to have possessed, and possession of a PG-1 controlled substance is a felony in any quantity. *See* TEX. HEALTH & SAFETY CODE § 481.115(b) (“An offense . . . is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.”).

Therefore, we hold Count 1 of the indictment sufficiently identifies the elements of the offense and is sufficiently descriptive of the offense.

2. Count 2

Count 2 was read to the jury as follows:

On or about the 16th day of November, 2013, Joel Soto did recklessly cause the death of an individual, namely Jeremy Soto, hereinafter referred to as complainant, by allowing the complainant to ingest methamphetamine, paroxetine and sertraline.

The essential elements of manslaughter are (1) a person (2) recklessly (3) causing the death of an individual. *Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012); *accord* TEX. PENAL CODE § 19.04(a). The Penal Code provides that a “person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.” *Id.* § 6.03(c). “The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.” *Id.* This statutory definition of “recklessly” is sufficiently descriptive to notify Soto of the manslaughter charge against him. *See Flores v. State*, 536 S.W.3d 560, 568 (Tex. App.—San Antonio 2017, pet. filed).

Again, Soto does not appear to dispute that Count 2 alleges each element of the offense but argues Count 2 is improperly vague because it does not specify how he allowed Jeremy to ingest methamphetamine, paroxetine, and sertraline.

As noted above, the indictment generally must describe how the alleged act was reckless under the circumstances. *See* TEX. CODE. CRIM. PROC. art. 21.15. However, where the alleged act is inherently reckless, the indictment satisfies article 21.15 if it merely alleges the act was committed. *Tata v. State*, 446 S.W.3d 456, 463 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing *Smith*, 309 S.W.3d at 16). For example, leaving a child less than two years old in a house without supervision, especially when a pan of oil is left on top of a heated burner, is an inherently reckless act. *Id.* at 464. Similarly, allowing a two-year-old child to ingest methamphetamine (an illegal drug that can be lethal in any amount) and paroxetine and sertraline (drugs intended for adult use that require a prescription) is an inherently reckless act. Accordingly, the indictment sufficiently alleges recklessness by charging Soto with “allowing [Jeremy] to ingest methamphetamine, paroxetine and sertraline.”

We hold Count 2 of the indictment sufficiently identifies the elements of the offense and is sufficiently descriptive of the offense, including the element of recklessness. Because we hold the trial court did not err by denying Soto’s motion to quash paragraph C of Count 1 and Count 2 of the indictment, Soto’s fourth issue is overruled.

ENTRY OF INDICTMENT

In his fifth issue, Soto argues the trial court erred by proceeding to trial without entry of an indictment.

A. Standard of review

The Texas Constitution gives a defendant the right to be charged by indictment for felony offenses. *Perez v. State*, 429 S.W.3d 639, 641 (Tex. Crim. App. 2014) (citing TEX. CONST. art. I

§ 10; *Riney v. State*, 28 S.W.3d 561, 564 (Tex. Crim. App. 2000)). The grand jury indictment protects citizens from arbitrary accusations by the government and provides a defendant with notice of the charges so that he may prepare a defense. *Id.* A matter of form or substance in an indictment may be amended at any time before trial on the merits commences after notice to the defendant. TEX. CODE CRIM. PROC. art. 28.10(a). The indictment may not be amended over the defendant's objection if the amendment charges him with an additional or different offense. *Id.* art. 28.10(c). If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the trial on the merits commences, he waives and forfeits the right to complain of the defect, error, or irregularity on appeal. *Id.* art. 1.14(b).

B. Analysis

Here, Soto argues the indictment filed in the clerk's record differs from the indictment read to the jury in three respects: (1) the term of the grand jury is identified as July 2015 (but was September 2014 in the filed indictment); (2) paragraphs A and B of Count 1 were omitted; and (3) paragraph C of Count 1 alleges "attempt to commit the felony offense of possession of a controlled substance," which phrase Soto claims the State agreed to remove. We address each point in turn.

First, regarding the date of the grand jury term, Soto was given actual notice of the proposed amendment to the indictment by the State's Motion to Amend Indictment, which was filed on the first day of the trial on the merits. The State's motion specifically sought to amend the indictment to state the correct date of the grand jury term. Soto's counsel announced on the record that he had no objection to the State's motion. Therefore, Soto waived any complaint. *See* TEX. CODE CRIM. PROC. art. 1.14(b).

Second, regarding the omission of paragraphs A and B from Count 1, those paragraphs were quashed at Soto's request in his Motion to Quash and Exception to Substance of Indictment and Exception to Form of Indictment. The indictment read to the jury did not include any additional

or different charges, but rather eliminated two paragraphs of Count 1. Therefore, we conclude there was no error. *See Perez*, 429 S.W.3d at 643 (holding amendment eliminating six counts, which defendant agreed to, was not error).

Finally, Soto complains the State failed to omit the “attempt to commit” language from paragraph C of Count 1. At the hearing on Soto’s Motion to Quash and Exception to Substance of Indictment and Exception to Form of Indictment, the State acknowledged if Soto’s sole complaint regarding “paragraph C is the words ‘attempt to commit,’ the State is willing to—if the defense counsel agrees—the State is willing to orally amend paragraph C by removing the words ‘attempt to commit’ and go forward with just the term ‘commit.’” Ultimately, however, the trial court read paragraph C to the jury with the “attempt to commit” language, and Soto made no objection. Therefore, Soto waived any complaint. *See TEX. CODE CRIM. PROC. art. 1.14(b)*.

Because there was no error in proceeding to trial on the indictment read to the jury, Soto’s fifth issue is overruled.

ADMISSIBILITY OF EVIDENCE

In his sixth issue, Soto argues the trial court erred by admitting gruesome photographs of the burned pickup truck and Jeremy’s burned body.

A. Standard of review

We review the trial court’s evidentiary rulings for abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). We will not reverse the trial court’s decision on admissibility of evidence unless it falls outside the zone of reasonable disagreement. *Id.*

A photograph is generally admissible if verbal testimony regarding the matter depicted in the photograph is also admissible. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). Photographs showing a victim’s injuries inflicted by the defendant are relevant and admissible to show the defendant’s guilt, even if they merely corroborate other kinds of evidence. *See id.* In

deciding whether a photograph's probative value is substantially outweighed by the danger of unfair prejudice, we consider the following factors: the number of photographs, the size, whether they are in color or black and white, whether they are gruesome, whether any bodies are clothed or naked, and whether a body has been altered by autopsy. *Narvaiz v. State*, 840 S.W.2d 415, 429 (Tex. Crim. App. 1992).

B. Analysis

Soto specifically objects to State's Exhibits 4-7, 11, 27, 37, 39, and 43, which depict the burned pickup truck with Jeremy's body obscured by a tarp, and State's Exhibits 45 and 46, which depict Jeremy's body inside the pickup truck.

Arson Investigator Martinez testified regarding the significance of the photographs of the burned pickup truck. He explained the photographs were taken as he walked around the truck at the scene of the fire, and each photograph depicts damage to the truck from a different angle. From various angles, the visible damage is evidence the fire originated in the passenger compartment, not in the engine. For instance, State's Exhibit No. 11 depicts the front hood of the pickup truck, and Investigator Martinez testified the lack of damage to the hood is notable because a fire that originates in the engine will typically destroy the hood if it is closed. State's Exhibits 37 and 27 depict glass and debris inside the passenger-side and driver-side, respectively, of the pickup truck's cab, and Investigator Martinez testified the glass on top of other debris indicates the windshield failed due to the fire originating in the passenger compartment, not in the engine.

Investigator Martinez also explained the significance of the photographs in which Jeremy's burned body is visible. He testified State's Exhibit 45 depicts heavy oxidation inside the interior passenger compartment and windshield damage, both of which are evidence of the area of origin of the fire. He explained State's Exhibit 46 is taken from a completely different angle and shows damage to the truck's steering wheel.

The State charged Soto with arson, which required proof that Soto started a fire with the intent to destroy or damage a vehicle. *See* TEX. PENAL CODE § 28.02(a)(2). The photographs of the burned pickup truck are relevant to demonstrate the cause and origin of the fire. Therefore, the State needed these photographs to illustrate the evidence supporting Investigator Martinez's opinion that the fire originated in the passenger compartment, and the photographs are highly probative of Soto's guilt of arson. *See Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999) ("Visual evidence accompanying testimony is most persuasive and often gives the fact finder a point of comparison against which to test the credibility of a witness and the validity of his conclusions."). Soto does not explain in his briefs how these photographs have the potential to impress the jury in some irrational, yet indelible, way, and we do not believe they do. The photographs merely depict the damage to the burned pickup truck.

State's Exhibits 45 and 46, which depict Jeremy's burned body in the passenger seat of the pickup truck, are gruesome. However, only two photographs in which Jeremy's body is visible were shown to the jury, and neither photograph depicts Jeremy's injuries close-up or depicts damage to Jeremy's body caused by the subsequent autopsy. These photographs were introduced to depict Jeremy's body's location at the crime scene, as well as additional damage to the interior of the pickup truck demonstrating the cause and origin of the fire. The photographs also are probative of Soto's guilt of felony murder, manslaughter, and injury to a child, as they support the State's theory that Soto set fire to Jeremy's dead body in order to conceal evidence of the cause of his death. *See Guevara*, 152 S.W.3d at 50 (holding attempts to conceal incriminating evidence are probative of guilt); *Ross*, 154 S.W.3d at 812 (holding defendant's conduct indicating a consciousness of guilt is admissible to prove guilt).

We conclude these two photographs' probative value is not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not abuse its discretion in admitting the photographs. Soto's sixth issue is overruled.

CONCLUSION

We affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

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