In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00007-CR

JUAN FRANCISCO MEDINA ORTIZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 19th District Court
McLennan County, Texas[1]
Trial Court No. 2012-2235-C1, Honorable Ralph T. Strother, Presiding

February 29, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Appellant, Juan Francisco Medina Ortiz, appeals the trial court's judgment by which he was found guilty of injury to a child and two counts of aggravated assault with a deadly weapon[2] and sentenced to forty, fifteen, and fifteen years, respectively and to be served concurrently. On appeal, he contends the trial court erred by excluding evidence key to the presentation of appellant's defense, by providing testimony beyond

[1] Pursuant to the Texas Supreme Court's docket equalization efforts, this case was transferred to this Court from the Tenth Court of Appeals. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

[2] *See* TEX. PENAL CODE ANN. § 22.02 (West 2011), § 22.04 (West Supp. 2015).

that requested by note from the jury, by permitting evidence of an extraneous offense committed against a witness, and by denying his motion for a directed verdict when the evidence was insufficient to prove that appellant caused the injuries to the child and that he did so with a deadly weapon. We will affirm.

Factual and Procedural History

Although appellant was married and had a family, he began an affair with his teen-aged co-worker, T.G. Baby M was born of this relationship. When Baby M's arm appeared swollen and he was unable to move it, appellant and T.G. brought him to the hospital, reporting that it appeared the baby's arm was injured during a near fall from his car seat. Indeed, the baby had suffered a fractured arm. Upon further evaluation, however, the two-and-one-half-month-old Baby M had suffered a total of seventeen fractures in various stages of healing. One of those fractures, a left clavicle fracture, was documented as having been suffered during birth. The remaining fractures, however, were initially unexplained and were of a nature that, according to an evaluating physician, Dr. Erica Ward, was highly suspicious as resulting from abuse. The hospital staff ruled out medical conditions that could affect bone strength and structure and that might serve to explain the number of fractures. Following a meeting between the parents and the hospital's social worker, Child Protective Services and the West Police Department were notified. Baby M was treated and released into foster care pending further investigation.

Early in the investigation, it became clear that three people had access to Baby M: T.G., appellant, and a babysitter. In appellant's first statement to police, he

explained the fractured arm as resulting from his attempt to get Baby M out of the car seat. When appellant was getting him out, Baby M nearly slipped away from him and he grabbed him by the arm. He said he had no idea how Baby M suffered the other multiple fractures but offered that he suspected that the babysitter was involved. He did not think T.G. caused the injuries to the child. Similarly, in T.G.'s first statement to police, she suggested that something must have happened at the babysitter's house.

The police investigated and eliminated the babysitter as a suspect. In fact, the babysitter provided the officer photographs she had taken of a few marks on the baby—two marks being located on his arm—in an attempt to document her concerns about Baby M and, if need be, ask the parents about a course of treatment, if any. She cooperated with the officers and testified at trial that she did not have anything to do with the several injuries to the baby.

The parents were called to return to the police station the following day for further interviews. At this point, a very nervous and edgy T.G. spoke more candidly with investigating officers and acknowledged that appellant was rough with the baby. Appellant gave a different statement as well, implicating himself in Baby M's injuries while maintaining that they were accidental and inflicted during his attempts to play with and exercise Baby M.

Appellant was arrested and charged with one count of injury to a child and two counts of aggravated assault on Baby M. A McLennan County jury found him guilty of said offenses and assessed punishment at forty, fifteen, and fifteen years, respectively.

Appellant now appeals from that judgment of conviction, bringing to this Court four issues on appeal. We will affirm.

Sufficiency of the Evidence

It is in his fourth point of error that appellant contends the evidence is insufficient to support his conviction for injury to a child and aggravated assault; however, because this point of error would, if sustained, afford the greatest relief to appellant, we will address the sufficiency of the evidence first. *See Chaney v. State*, 314 S.W.3d 561, 565 (Tex. App.—Amarillo 2010, pet. ref'd) (citing TEX. R. APP. P. 43.3 and *Bradleys' Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999) (per curiam)). Appellant contends that the State failed to prove beyond a reasonable doubt that it was he who injured Baby M and, as to the aggravated assault convictions, that he did so with a deadly weapon.

Applicable Law and Standard of Review

A person commits the offense of injury to a child if he "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission," causes serious bodily injury to a child. TEX. PENAL CODE ANN. § 22.04(a)(1). "Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 1.07(a)(46) (West Supp. 2015).

A person commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another." *Id.* § 22.01(a)(1) (West Supp. 2015). An assault becomes aggravated if the actor commits assault and uses or exhibits a deadly weapon during commission of the assault. *See id.* § 22.02(a)(2). A "deadly weapon" is anything that, in the manner of its use or intended use, is capable of causing death or serious bodily injury. *Id.* § 1.07(a)(17)(B). The word "capable" enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force. *Quincy v. State*, 304 S.W.3d 489, 499 n.8 (Tex. App.—Amarillo 2009, no pet.) (citing *Tisdale v. State*, 686 S.W.2d 110, 114–15 (Tex. Crim. App. 1984) (en banc) (op. on reh'g)). Indeed, almost anything can be a deadly weapon depending upon the evidence shown. *Id.* at 499 n.9. Body parts, such as hands and knees, may be deadly weapons based on their manner of use or intended use and their capacity to produce death or serious bodily injury. *See Turner v. State*, 664 S.W.2d 86, 90 (Tex. Crim. App. 1983); *Quincy*, 304 S.W.3d at 499; *see also Lane v. State*, 151 S.W.3d 188, 191 (Tex. Crim. App. 2004).

In cases involving injury to a child, there is rarely direct evidence of exactly how the child's injuries occurred. *Bearnth v. State*, 361 S.W.3d 135, 140 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (quoting *Williams v. State*, 294 S.W.3d 674, 683 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd)). Instead, we look to rational inferences from circumstantial evidence to determine whether the State met its burden. *See id.* Intent can be inferred from the extent of the injuries to the victim, the method used to produce the injuries, and the relative size and strength of the parties. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) (en banc). It can also be inferred

from circumstantial evidence, such as acts, words, and appellant's conduct. *See id*. Further, "[t]he identity of the perpetrator of an offense can be proven by direct or circumstantial evidence." *Martin v. State*, 246 S.W.3d 246, 261 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986) (en banc)).

In assessing the sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Id.* When reviewing all of the evidence under the *Jackson* standard of review, the ultimate question is whether the jury's finding of guilt was a rational finding. *See id.* at 906–07 n.26 (discussing Judge Cochran's dissenting opinion in *Watson v. State*, 204 S.W.3d 404, 448–50 (Tex. Crim. App. 2006), as outlining the proper application of a single evidentiary standard of review). "[T]he reviewing court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899.

Analysis

In his first statement to police, appellant maintained that he did not know how Baby M could have sustained these several broken bones. Appellant's second statement changed course, revealing that he "hurt [his] baby playing with him without intention and without knowing that [he] could accidentally hurt him." Appellant's statement continued as follows:

> I would lift him a little and he would laugh. Also at the same time[,] I would take his feet and I would put him on the couch or my knees and I tried to exercise his legs trying not to hurt him and with care but it looks like I was not necessarily careful.
>
> . . .
>
> Sometimes I would bath him with me in the shower. The water was slow in between hot and cold so that I would not hurt him. It is the only way that I could explain how he could have encountered being hurt.
>
> . . .
>
> Maybe I made a bad decision but never have I tried to hurt my son.

While appellant's statement, in many ways, attempted to minimize his actions, it is important to note that appellant admits, to some degree, that he caused Baby M's injuries. Further, this second statement is very different than the one he gave a day earlier. When weighing circumstantial evidence, the finder of fact may consider a defendant's untruthful statements, in connection with all the other circumstances of the case, as affirmative evidence of guilt. *See Gear v. State*, 340 S.W.3d 743, 747 (Tex. Crim. App. 2011); *Padilla v. State*, 326 S.W.3d 195, 201 (Tex. Crim. App. 2010).

The record indicates that, at the time of Baby M's injuries, appellant was a very muscular man who worked out regularly. We learn from T.G. and the parents' former

co-workers that appellant would make disparaging remarks about the baby being a "sissy" or being "weak." Appellant proclaimed that Baby M was "not tough," that "he needs to toughen up." He also openly questioned or denied Baby M's paternity on that basis: the baby was too weak to be his son. One co-worker described an incident in which appellant lifted the baby above his head with one hand on his rib cage and the other supporting his feet. The co-worker intervened and took the baby from him. T.G. described the same incident.

Further, the jury heard Dr. Ward testify that several of Baby M's fractures were characterized as "corner" or "chip" fractures, fractures that have occurred to the ends of bones that come in contact with other bones and break off corners of the bones. These types of fractures are to be distinguished from the one mid-bone fracture of Baby M's arm. The jury also heard Ward's testimony regarding the several "corner" or "chip" fractures as having "a high specificity for abusive-type injuries." Dr. Ward explained that the particular fractures Baby M sustained were not "usually [seen] in accidental falls or other type of injuries." She elaborated that these types of fractures generally arise from "some sort of pulling, yanking, twisting or a shaking if you're holding a baby from the middle and shaking as the extremities are flopping vigorously." She explained that these fractures are generally caused by a "pulling, twisting type of force." Similarly, Ward testified to the typical mechanism that would cause the posterior rib fractures Baby M experienced: "It's–it's usually thought to be related to a squeezing pressure in the front and back of the chest, and then it gives way in the back or the lateral aspect. In this case[,] it was the back." This testimony is consistent with T.G.'s testimony of seeing appellant "exercise" the baby by moving Baby M's arms and legs and bending

them in seemingly awkward or uncomfortable ways and with the admissions from appellant. This evidence suggests that appellant used his hands to injure Baby M.

Further, Ward testified that the force and mechanism necessary to cause the several fractures could also cause additional injury, indicating that the force used posed a substantial risk of death. Ward testified that Baby M was unable to use his arm for some time as it was in a cast. Ward also advised child protective authorities that, due to his extensive injuries and his apparent pain after trips to the hospital, his time riding in a car seat should be limited as much as possible as he healed from the multiple fractures. We add that the jury was free to apply common sense, knowledge, and experience gained in the ordinary affairs of life in drawing reasonable inferences from the evidence presented to it. *See Sizemore v. State*, 387 S.W.3d 824, 830 (Tex. App.—Amarillo 2012, pet. ref'd). And, most certainly, common sense dictates that the force used by a grown, muscular man on a two-and-one-half-month-old infant—force sufficient to cause at least sixteen fractures—posed a substantial risk of killing the infant. Based on the evidence presented, the jury could have rationally concluded that appellant used his hands as a deadly weapon.

It was the fact-finder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319. Viewed in the light most favorable to the verdict, we conclude the evidence, despite the circumstantial nature of some of it, is such that the jury could have reasonably inferred that appellant was the person who injured Baby M. *See Brooks*, 323 S.W.3d at 912; *see also Martin*, 246 S.W.3d at 262–63. It also could have concluded, based on the evidence presented, that he used his hands as a deadly

weapon. *See Brooks*, 323 S.W.3d at 912; *Martin*, 246 S.W.3d at 262–63. We overrule appellant's contention to the contrary.[3]

Exclusion of Defense Evidence

In his first issue, appellant maintains that the trial court abused its discretion when it denied his efforts to introduce what he characterizes as "key" defense evidence: a recording of a conversation between T.G., appellant's counsel, and a defense investigator that occurred at T.G.'s workplace. Appellant sought admission of the recording to impeach T.G.'s trial testimony with prior inconsistent statements made during the recorded conversation. This evidence, he contends, substantiated his defensive theory and directly undermined T.G.'s credibility. Appellant maintains that the State repeatedly referred to this evidence and that the trial court's exclusion of the evidence deprived appellant of the right to present a defense and violated the rule of optional completeness. We review a trial court's evidentiary rulings for an abuse of discretion. *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006); *Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005) (en banc).

Deprivation of Right to Present a Defense

Appellant begins his discussion with a recitation of the right to present his defense as one of the "minimum essentials of a fair trial." *See Chambers v. Mississippi*,

[3] In his brief, appellant also contends that "the State's theory of prosecution was based upon circumstantial evidence that failed to exclude every reasonable hypothesis of guilt." To the extent that appellant relies on the proposition that the State must exclude every reasonable hypothesis, we note only that such a proposition has been rejected outright as an applicable standard. *See Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991) (en banc) (expressly rejecting alternative reasonable hypothesis analytical construct "as a method of appellate review for evidentiary sufficiency in this and other appellate courts of this State"), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000).

410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). He continues by describing his right to present a defense as "a right which comprehends more than the right to present the direct testimony of live witnesses, and includes the right under certain circumstances, to place before the jury secondary forms of evidence, such as hearsay or, as here, prior testimony." *See Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988). Appellant maintains that he was denied the opportunity to present a defense by the trial court's exclusion of the recorded conversation, intended as a tool to impeach T.G. with her prior inconsistent statements.

The State responds to appellant's contention with the parameters governing when and how prior inconsistent statements may be admitted. *See* TEX. R. EVID. 613(a). The State points out that, if the witness unequivocally admits having made such statement, extrinsic evidence of the same shall not be admitted. *See McGary v. State*, 750 S.W.2d 782, 786 (Tex. Crim. App. 1988) (en banc); *see also* TEX. R. EVID. 613(a)(4).

When confronted with the prior inconsistencies in her statements, particularly in the recorded conversation with defense counsel and defense investigator, T.G. readily admitted having made those inconsistent statements. Indeed, appellant points out that T.G. admitted at trial that she had given prior inconsistent statements both to police, in her first statement, and to defense counsel in the recorded conversation. The issue of her inconsistent statements is revisited and explored numerous times throughout the record. "Where a witness admits making the prior statement and that it is inconsistent with trial testimony, the prior inconsistent statement is not admissible, for under such circumstances the witness has performed the act of impeachment upon himself or

herself." *Wood v. State*, 511 S.W.2d 37, 43 n.1 (Tex. Crim. App. 1974) (citing *Cherb v. State*, 472 S.W.2d 273, 278 (Tex. Crim. App. 1971); *Kepley v. State*, 320 S.W.2d 143, 145 (Tex. Crim. App. 1959); and *Sloan v. State*, 84 S.W.2d 484, 486 (Tex. Crim. App. 1935)). The exclusion of the recorded conversation did not deprive appellant of the opportunity to impeach T.G. To the contrary, T.G. admitted having given prior inconsistent statements and, effectively, impeached herself. *See id.* On this basis, the trial court did not abuse its discretion by excluding the recording. *See Carrasco*, 154 S.W.3d at 129.

Rule of Optional Completeness

Appellant complains that the State used a copy of the transcript of the conversation to impeach the defense investigator with portions taken out of context. Appellant contends that the rule of optional completeness requires admission of the entirety of the recorded conversation. The rule of optional completeness provides as follows:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

TEX. R. EVID. 107.

Appellant's application of Rule 107 appears to be overly broad when, as here, the State read a portion of the transcript and appellant sought admission of the entirety

of the audio recording. The Fort Worth court clearly explains the limitations applicable to a similar factual scenario:

> A close examination of Rule 107 indicates that when a part of a writing is "given in evidence" the whole writing on the same subject may be "inquired into by the other" party. TEX. R. EVID. 107. The rule does not define the term "inquired into." The rule does state that any other writing necessary to fully understand or explain the initial offering "may also be given in evidence, as when a letter is read, all letters on the same subject . . . may be given." *Id.* This language indicates that if a portion of a document is read into evidence, then other portions or other writings may *only* be read into evidence. In other words, if one party simply reads from a document, the party does not open the door for the opposing party to *admit* the document into evidence.

Stewart v. State, 221 S.W.3d 306, 312 (Tex. App.—Fort Worth 2007, no pet.).

Here, appellant was permitted to repeatedly refer to the transcript of the conversation and question T.G. about her prior inconsistent statements therein, which, again, she readily admitted to making. The rule of optional completeness does not require that the entirety of the audio recording be admitted on these circumstances. The trial court did not abuse its discretion in this regard when it excluded the recording. *See Carrasco*, 154 S.W.3d at 129.

Trial Court's Response to Jury's Notes

During the course of its deliberations, the jury sent out three notes relating to excerpts from Dr. Ward's testimony. The trial court provided excerpts to the second and third of its notes on this matter. It is the trial court's response to the jury's third note on the topic of which appellant complains on appeal, contending that inclusion of too much of Ward's testimony placed an undue emphasis on the State's evidence.

Standard of Review and Applicable Law

When the jury asks that certain disputed testimony be re-read, the trial court must first determine if the jury's inquiry is proper under the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.28 (West 2006); *Brown v. State*, 870 S.W.2d 53, 55 (Tex. Crim. App. 1994) (en banc). If it is proper, the trial court must then interpret the communication, decide what sections of the testimony will best answer the inquiry, then limit the re-reading accordingly. *Brown*, 870 S.W.2d at 55 (citing *Iness v. State*, 606 S.W.2d 306, 314 (Tex. Crim. App. 1980) (en banc)). A reviewing court will not disturb the trial court's decision absent a clear abuse of discretion and a showing of harm. *Id.* The Texas Code of Criminal Procedure provides as follows:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

TEX. CODE CRIM. PROC. ANN. art. 36.28.

When a trial court reads too much or too little testimony in response to the jury note, such a response may serve to bolster the State's case unnecessarily. *See Jones v. State*, 706 S.W. 2d 664, 668 (Tex. Crim. App. 1986) (en banc); *Pugh v. State*, 376 S.W. 2d 760, 762 (Tex. Crim. App. 1964). The trial court does not abuse its discretion, however, when the testimony read to the jury provides the context for the specific testimony in dispute. *See Brown*, 870 S.W.2d at 56 (Tex. Crim. App. 1994) (concluding

that, although the testimony provided in response to jury note did include some testimony not directly addressing the disputed issue, challenged "testimony did provide the context for the testimony which was directly on point").

Notes from the Jury and the Trial Court's Responses

In Jury Note #2, the jury indicated as follows:

> [T]he jurors would like to hear the testimony in regards to the doctor's testimony of the force that would have been associated with the break of the scapula, also the testimony in the breaking of the arm, also the medical testimony if the arm breaking was due to the defendant dropping the baby.

The note concluded with a fragment that suggested the jury would also like to hear the "[l]egal definition of reasonable doubt and substantial risk." The trial court responded to Jury Note #2 as follows: "I have received your note regarding your request. Please refer to the last paragraph of the Court's Charge."

In Jury Note #3, the jury requested that "the testimony of Doctor Ward [be] read back to [it]." It further indicated that the jury was "in disagreement of what the doctor said in regards to the cause of the break of the arm." The trial court responded as follows: "In response to your question about the doctor's testimony, please find attached the relevant testimony." The trial court attached two excerpts of Ward's testimony that consisted of a little over one page of testimony. The excerpted testimony was limited to Ward's description of the mid-bone fracture to Baby M's humerus.[4] Appellant did not object to the trial court's response.

[4] To be clear, in her testimony, Ward identified the humerus as the arm bone. The record supports the interpretation that the mid-bone fracture to the humerus is "the break of the arm" specifically

About forty minutes after the trial court's response to Jury Note #3, the jury sent another note, Jury Note #4. In it, the jury informed the trial court that it "would like further testimony read back from Doctor Ward" to resolve its dispute over "whether or not the break in the arm could have been accidental or non-accidental" and "whether Ward's testimony indicated the break in the arm was accidental or non-accidental."

In response, the trial court attached a portion of Ward's testimony, about three pages in total. Said testimony related primarily to a discussion of the different mechanisms that could lead to the types of fractures the baby sustained. It specifically distinguishes the mid-bone fracture of Baby M's humerus from the other type of fractures found elsewhere throughout his body. However, the excerpted testimony also included Ward's testimony regarding the nature and frequency of a fractured scapula, an injury which the doctor characterized as rarely seen and very concerning in terms of potential abuse. Appellant specifically objected to the inclusion of Ward's testimony about the scapula fracture. The court overruled the objection with the explanation that, "for it to have the proper context with the – all of the doctor's testimony, especially considering the trouble the jury is having with it, I think contextually it makes more sense to include that in there so that they can kind of get the general picture of what the doctor was testifying to."

It is this same inclusion in the trial court's response of Ward's testimony concerning the scapula fracture with which appellant takes issue on appeal. Such

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mentioned by the jury in its notes. Ward's testimony suggests there were also other "corner" fractures to Baby M's arms, but these are to be distinguished from the particular fracture referenced here.

inclusion amounted to undue emphasis of evidence favorable to the State's theory, he contends. *See Pugh*, 376 S.W.2d at 762.

Analysis

In the excerpted portion of Ward's testimony, there is indeed testimony regarding the other fractures. However, with respect to much of that testimony, it is framed in such a way that the doctor was called upon to draw possible distinctions between the types of fractures Baby M sustained to different parts of his body. For example, the trial court's response included the following portion of the doctor's testimony:

> The injuries on his legs are the corner fractures that we were talking about that could happen from a twisting-pulling type episode or from the extremities flopping with shaking. The injury to the humerus is a different kind of injury. It's in the middle of the bone and would be a different type of mechanism.

The excerpt concluded with her opinions as to the possibility that the fractures—including a specific reference to the distinct type of fracture found in the baby's arm—were accidental injuries.

More concerning is the inclusion of the intervening discussion regarding the child's fractured scapula. Following the testimony regarding the mechanism that might have caused the type of fracture seen on Baby M's humerus as contrasted with the mechanism that might cause the type of fractures he experienced elsewhere, Ward's testimony continued as follows:

> Q. How often have you seen a fracture to the scapula?
>
> A. I have only seen it one other time, and that was related to an ATV accident.

Q. So is that like a four-wheeler?

A. Yes. It – it takes a high-energy type of injury.

Q. So you've seen kids that have been in car accidents, correct?

A. Yes.

Q. And is it significant at all that the – the shoulder blade is – is a bigger bone that it could be injured? Does that have any significance to you?

A. In general or in this –

Q. Or in –

A. I'm not sure I understand.

Q. In terms of abuse, does that – does that bone in particular have any special concerns to you?

A. It's very uncommon to have a fracture in that bone, really in any situation. When we see it in a young baby, it's a very concerning injury, as those other corner fractures were.

Q. Were there any fractures in this baby that you thought that, "Oh, that could just be an accident?"

A. Like I had said, the humerus fracture in an older child with a history that went along with it, I would say that could be an accident but the other fractures, no.

As can be seen, Ward's testimony returned to her observations regarding the accidental or non-accidental nature of the fractures, including her specific conclusions regarding the mid-bone humerus fracture.

Though it may have been more precise for the trial court to have excised the testimony regarding the scapula fracture, we do see that the jury was having trouble agreeing as to what the doctor's testimony was regarding the possibility that one fracture may have been caused accidentally. Contextually, as the trial court observed, the nature of the several other fractures the baby sustained is relevant to the doctor's

conclusions regarding the accidental or intentional cause of the type of fracture found in his arm bone. Her observations regarding the scapula fracture, much like the testimony that concerned the other fractures that were also of a different type than the humerus fracture, appear to have informed her conclusions regarding the force and cause of the humerus fracture. While the jury expressed its disagreement about the fracture to the baby's arm bone specifically, it also expressed its disagreement concerning the accidental or intentional nature of that fracture—"whether the break in the arm was accidental or non-accidental"—and Ward's conclusions as to the nature of certain fractures were closely related to her observations and conclusions regarding the several others. The distinction to be drawn, here, is that the testimony regarding the scapula fracture *could* have been more easily excised without affecting the clarity or coherence of Ward's remaining testimony. Nonetheless, we cannot say that the trial court's decision to include as context those lines of testimony in its response to the jury's note indicating a dispute over the accidental or intentional nature of the arm fracture was a decision that lies outside the zone of reasonable disagreement. *See Brown*, 870 S.W.2d at 56.

We add that, in the first of its three notes requesting Ward's testimony, the jury had asked the trial court to provide it Ward's testimony regarding, *inter alia*, the scapula fracture specifically, further edifying the position that the testimony regarding other fractures could be properly considered as context for the later requested testimony. The trial court did not provide the jury any testimony in response to this first note, presumably, because the jury had not specifically indicated that there was disagreement among jurors as to the testimony requested and to do so, in the absence of such

disagreement, could have constituted error. *See DeGraff v. State*, 962 S.W.2d 596, 599 (Tex. Crim. App. 1998) (affirming conclusion that trial court abused its discretion by providing the jury the testimony it specifically requested when its request "in no way suggested the existence of a disagreement"); *Moore v. State*, 874 S.W.2d 671, 673 (Tex. Crim. App. 1994) ("A simple request for testimony does not, by itself, reflect disagreement, implicit or express, and is not a proper request under Art[icle] 36.28."). Additionally, the jury's next note—Jury Note #3—had requested Ward's testimony regarding the "cause" of the arm fracture. The trial court provided two short excerpts from Ward's testimony. The final jury note requested *further* testimony from Ward suggesting that the testimony provided in response to the jury's preceding note was not sufficient to resolve the dispute among jurors. Under the circumstances presented here, the trial court did not abuse its discretion by providing the excerpted testimony. *See Brown*, 870 S.W.2d at 56.

Extraneous Offense Evidence

Applicable Law and Standard of Review

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. TEX. R. EVID. 404(b)(1). However, Rule 404(b) also provides that extraneous offense evidence may be admissible for other purposes. *See* TEX. R. EVID. 404(b)(2); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). Subject, of course, to limitations posed by other evidentiary rules, Rule 404(b) permits a party to introduce evidence of other crimes, wrongs, or acts if such evidence logically serves to make more or less probable

an elemental fact, an evidentiary fact that inferentially leads to an elemental fact, or defensive evidence that undermines an elemental fact. *See Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1991) (en banc) (op. on reh'g). More specifically, one of the purposes for which extraneous offense evidence is admissible is to rebut a defensive theory that a witness has fabricated his testimony. *See De La Paz v. State*, 279 S.W.3d 336, 346–47 (Tex. Crim. App. 2009); *Bass v. State*, 270 S.W.3d 557, 562–63 (Tex. Crim. App. 2008). We review a trial court's ruling on the admissibility of extraneous offenses under an abuse of discretion standard. *De La Paz*, 279 S.W.3d at 343.

Analysis

In her first statement to police, T.G. suggested the babysitter was to blame for Baby M's injuries. She testified that appellant directed her to do so and that she was scared of him and his presence right next to her as she wrote the statement. T.G. admitted during trial that, during the first interview with police, she did not give a truthful statement. The defense suggested on cross-examination that T.G. gave her subsequent statement the next day in which she implicates appellant because she wanted to regain custody of her son and avoid prosecution for his injuries; it is appellant's theory that her second statement to police is the untruthful, self-serving one. The State then sought to introduce evidence of appellant's prior assault on T.G., an uncharged offense, to undermine appellant's theory and show that T.G. had reason to fear appellant.

After hearing argument regarding admissibility of evidence of that uncharged assault, the trial court ruled that such evidence was admissible on the following basis:

> [I]t's admissible for the purposes the State cited to refute the defensive theory that she's lying, that this is a fabrication and that she's doing it simply to – as the means to get her child back, so I'm going to let the assault – extraneous assault come in, and I – I believe the evidentiary effect outweighs the prejudicial value of it.

Following the trial court's ruling, T.G. testified that, when she was about five or six weeks pregnant, appellant choked and shoved her, an assault which resulted in vaginal bleeding and a laceration to her foot that required medical attention.

The record indicates that appellant advanced a defensive theory that T.G. was fabricating her later statement to police in an effort to regain custody of her son, that she "lied to the police because [she] wanted to do anything to get [her] baby back." Defense counsel also suggested that police pressured T.G. into making her later statement implicating appellant. According to T.G., appellant was sitting right next to her as she wrote out her statement in the hallway. The evidence that appellant had assaulted her in the past provided a basis for her having been reticent to reveal her information regarding appellant to police during the first interview and to cast blame on the babysitter as appellant had directed her to do. In that sense, the evidence of appellant's prior assault on T.G. was relevant for a purpose other than character conformity. The trial court did not abuse its discretion by admitting evidence of the prior assault on T.G. for the purpose of rebutting appellant's defensive theory that she fabricated her second statement to police. *See Bass*, 270 S.W.3d at 563.

Conclusion

Having overruled appellant's points of error, we affirm the trial court's judgment of conviction. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Justice

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