



IN THE
TENTH COURT OF APPEALS

No. 10-14-00117-CR

ROBERT J. BORDEN, JR.,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. D35017-CR

MEMORANDUM OPINION

Robert Borden appeals from convictions for three counts of injury to a child, one for causing bodily injury and two for causing serious bodily injury to his then two-month-old son. TEX. PEN. CODE ANN. § 22.04 (West 2011). Borden complains that the trial court abused its discretion in the admission of testimony, erred by denying his motion for directed verdict, erred in including an instruction on the law of parties in the jury charge, and that the separate sentences for the three convictions constitute multiple

punishments for the same offense. Because we find no reversible error, we affirm the judgments of the trial court.

Directed Verdict

In his second issue, Borden complains that the trial court erred by denying his motion for directed verdict as to all three counts for which he was convicted. There were three counts alleged: first, that Borden had caused bodily injury to Denton by causing his head to strike an unknown object, second, caused serious bodily injury by striking him with an unknown object, and third, caused serious bodily injury by shaking him. The charge to the jury allowed the jury to find Borden guilty as the primary actor or as a party.

Standard of Review

A challenge to the trial court's denial of a motion for an instructed verdict or a motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly 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. "Each fact need not point

directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.” *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has also explained that our review of “all of the evidence” includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson v. Virginia*, 443 U.S. at 326. Further, direct and circumstantial evidence are treated equally: “Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt.” *Hooper v. State*, 214 S.W.3d at 13. Finally, it is well established that the factfinder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

Facts

Robert Borden and Nina Lanier were in an informal marriage and had two children. Denton, the youngest, was approximately two months old when he was brought into the emergency room in Corsicana by his parents. Denton was unresponsive at the emergency room but was revived somewhat by the medical personnel there. Denton was airlifted to a hospital in Dallas, where it was determined

that he had suffered fractures on both sides of his skull, had hemorrhages on both sides of his brain, and had suffered extensive brain tissue damage. Denton also had extensive retinal hemorrhages in both eyes, bruising on one side of his head, a bruise on his neck, a bruise near his collarbone, ligament damage and swelling in his neck, and bruising on both legs and one wrist and hand. Testing showed that there were at least two separate events of brain injury causing hemorrhaging that occurred several days to a week apart. The treating physician stated that the head and neck injuries could only have been caused by blunt impact against a hard object and could have been caused by shaking with blunt impact of some kind against a hard object.

Lanier gave several statements over time and at trial regarding what could have caused the injuries to Denton. At the hospital, Lanier was overheard yelling at Borden and asking him what he had done to her child. Lanier also told an investigator for the Department of Family and Protective Services it was her fault because “[a] mother should have protected, is supposed to protect her child.” In the days following Denton’s hospitalization, Lanier testified that Borden tried to convince her that she had hurt Denton and that if they were charged for the injuries, she would go to a mental hospital but he would go to prison for the rest of his life.

Lanier told law enforcement and the Department that she had been losing blocks of time leading up to Denton’s hospitalization, and that if she did anything to Denton it was an accident. Lanier recounted an occasion approximately a week prior to Denton’s

hospitalization where she was carrying Denton in her arms while very sleepy and she ran her arm and his head into the door frame. Lanier was unable to recall any other instance when she might have hurt Denton. In a statement to police during the investigation, Borden stated that he was unaware of Lanier having any issues and was unable to describe any event that had occurred during which Denton might have been injured.

At trial, Lanier testified that the night before Denton was taken to the hospital, Denton was extremely fussy and projectile vomited once right after she fed him. Lanier stated that Borden took Denton from her and went into their bedroom alone with Denton. Lanier remained in the living room until she heard a loud pop coming from the bedroom. Lanier stated that she went to the bedroom and saw Borden with his hand around Denton's throat and Denton was crying as if he was in pain. Lanier testified that Borden told her that if Denton was going to cry, he was going to give him a reason to cry. Borden told Lanier that he had hit himself in the leg which caused the loud pop.

Denton eventually settled down late that night. The next morning, Lanier left their house to take her older child to school. Borden and Denton were home alone. When Lanier returned, Borden came running out of the house carrying Denton, who was unresponsive and they immediately rushed Denton to the hospital in Corsicana.

In an interview, Lanier's child from a previous relationship stated Borden and

Lanier were arguing that night and Borden was angry and didn't like it when Denton was so fussy that night. Borden gave a statement to law enforcement several days after Denton's hospitalization where he denied hurting Denton but admitted that he was fearful of hurting Denton because he was unable to control his hands due to not having feeling in his fingers. Borden also stated that sometime after he popped his leg, he was so frustrated with Denton that night that he had to put Denton into his bassinette and go sit in his truck to calm down. Borden also stated in the recorded interview that he had seen a bruise on Denton's head and thought he had squeezed him too hard at some point because of the issues in his fingers.

The treating physician indicated that it would be impossible for a non-abusing parent to not observe that Denton had suffered a severe injury because he would have been crying in pain, the bruising to his face was easily observable, and his behavior would have changed after an injury like Denton had suffered. The injuries to Denton's head and neck were not accidental.

Analysis

Borden argues that there was insufficient evidence to show that he was the individual that caused the injuries because the evidence showed that Lanier was responsible for them. Borden describes the evidence presented at trial that supports his position; however, he does not include the evidence against him in his analysis. A review of the sufficiency of the evidence requires us to view the evidence in the light

most favorable to the verdict, not to the defendant. The jury was called upon to determine whether Borden inflicted the injuries upon Denton or if he was responsible for the injuries as a party. Certainly, there was conflicting evidence presented at trial. Borden testified that he did not cause any injury to Denton and blamed Lanier but Lanier testified that Borden must have caused the injuries.

The weight given to contradictory testimonial evidence is within the sole province of the jury because it turns on an evaluation of credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997) (en banc). The jury here chose not to accept the testimony proffered by Borden and the competing evidence is sufficient to sustain the verdict. Viewing all the evidence in the light most favorable to the verdict and giving proper deference to the jury's credibility determinations, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Thus, the trial court did not err by denying Borden's request for a directed verdict. We overrule issue two.

Jury Charge Error

In his third issue, Borden complains that the trial court erred by including an instruction in the jury charge regarding the law of parties. Borden argues that because the evidence was insufficient for the jury to have found that he committed the offenses either as a primary actor or a party, the instruction was erroneously included in the jury charge. Borden argues that although he was present during the times when the

offenses could have been committed by Lanier, mere presence is insufficient and there was no evidence that he acted as a party in the commission of the offenses.

We review charge error on appeal by determining whether error occurred, and if so, whether that error caused sufficient harm to require reversal. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). In deciding whether or not to include an instruction on the law of parties in the jury charge, the trial court's task is not to determine whether the State is correct that the defendant is liable under the law of parties. *In re State ex rel. Weeks*, 391 S.W.3d 117, 125 (Tex. Crim. App. 2013). Rather, the trial court's task is simply to determine whether the evidence raises the issue. *Id.* It then becomes the jury's province to resolve conflicts in the evidence.

There was testimony presented that Borden wanted Lanier to get Denton to stop crying and was angry when she could not. Further, there was evidence that Borden and Lanier's actions in hiding out together in order to avoid being arrested after Denton was hospitalized could be construed as being indicative of a participation as a party. Thus, there was some evidence to support the inclusion of the instruction on the law of parties in the jury charge and the trial court did not err by including the instruction. We overrule issue three.

Separate Punishments

In his fourth issue, Borden complains that he was erroneously assessed three separate punishments, which violates the prohibition against double jeopardy. In the

title of his issue, Borden also complains of the trial court including a separate entry for the jury to choose imprisonment for life rather than including it with the entry for the number of years the jury could assess. However, Borden does not address this complaint further and therefore we will not address it. TEX. R. APP. P. 38.1(i).

Borden complains that he was assessed three separate sentences for what he claims was one incident and that by the use of a general verdict, it is impossible to determine under which theory the jury found Borden guilty, i.e. as a principal actor or as a party. The indictment alleged that all three counts occurred on the same date. Borden argues that each count was actually a separate manner of committing one offense and that he should not be subject to multiple punishments for this one offense because it violates his right against double jeopardy in the Fifth Amendment.

In support of his position, Borden cites to *Villanueva v. State*, 227 S.W.3d 744 (Tex. Crim. App. 2007). In *Villanueva*, the defendant was convicted for two separate offenses of injury to a child, causing the injury and then by omission for failure to seek medical treatment for that same injury. The Court of Criminal Appeals determined that since the offense of injury to a child is a result-oriented offense, the act of omission for failing to timely seek treatment for the same injury actually caused by the defendant without other injury or circumstance constituted multiple punishments for the same offense, which violated the double jeopardy provision in the Constitution. *Villanueva*, 227 S.W.3d at 749.

The facts and holding in *Villanueva* are distinguishable from this proceeding, however. In *Villanueva*, there was no separate injury to the child that was caused by the failure to seek medical treatment for the child. Here, the medical expert testified that there were at least two separate significant injuries to Denton's brain that were inflicted several days to a week apart. Other injuries that had caused the bruising on Denton's wrist, hand, and legs were separate and distinct from the head injuries as well, as the bruising showed differing coloring which was some indication of the age of the bruising.

Although the indictment alleged that the offenses occurred on or about the same date, the State is not limited to the injuries caused to Denton on the exact date alleged in the indictment. An indictment may allege any date that is within the statute of limitations for the charged offense and before the date of the presentment of the indictment. *Ex parte Goodman*, 152 S.W.3d 67, 71 (Tex. Crim. App. 2004); *Sledge v. State*, 953 S.W.2d 253, 255-56 (Tex. Crim. App. 1997). When an indictment alleges that an offense occurred on or about a particular date, the accused is put on notice to prepare for proof that the offense happened at any time within the statutory period of limitations. *Thomas v. State*, 444 S.W.3d 4, 9 (Tex. Crim. App. 2014). Consequently, it is not improper for the jury to find that the conduct that formed the basis of each count could have taken place on different dates rather than on the same date as argued by Borden.

Borden's argument is that it was possible for him to be convicted for a single injury to Denton (1) as a direct actor, (2) as a party by assisting the commission of the offense, and (3) as a party by failing to prevent the commission of the offense with the intent that the offense occur. However, the evidence established that Denton was injured on more than one occasion, which is not "serious bodily injury committed against the same victim at the same time" making it the same offense for purposes of multiple punishments. See *Villanueva*, 227 S.W.3d at 748. Therefore, because the evidence showed that Denton was injured on more than one occasion, the theory upon which Denton was convicted whether directly or as a party, would not constitute multiple punishments for the same offense. We overrule issue four.

Admission of Evidence

In his first issue, Borden complains that the trial court abused its discretion by overruling his objection to a question asked by the State to a social worker from the hospital where Denton was treated because it was speculative. In his brief to this Court, Borden presents no legal authority in support of his position other than one citation that sets forth the general standard of review for an abuse of discretion. In presenting error to this Court, an appellant's brief must contain "argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Failure to properly brief an issue presents nothing for us to review; we are not required to make an appellant's arguments for him. See *Lucio v. State*, 351 S.W.3d 878, 896 (Tex.

Crim. App. 2011) (*citing Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008)).

This issue is inadequately briefed due to Borden's failure to cite to authority to support his argument. Issue one is overruled.

Conclusion

Having found no reversible error, we affirm the judgments of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins

Affirmed

Opinion delivered and filed January 21, 2016

Do not publish

[CRPM]

