NUMBER 13-14-00571-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

GLENN GUARDADO A/K/A GLENNA BISHOP, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 148th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Justice Longoria

Appellant Glenna Guardado, a/k/a Glenna Bishop ("Guardado") and co-defendant Nathian Rittgers[1] ("Rittgers") were charged by indictment with six counts of injury to a child and one count of continuous violence against a family member. *See* TEX. PENAL

[1] Nathian Rittgers is not a party to this appeal.

CODE §§ 22.04(a)(1), 25.11(a) (West, Westlaw through 2015 R.S.). Guardado was convicted by a jury on all counts except for count five, on which Guardado was found guilty of a lesser-included offense. In one issue, Guardado argues that the trial court erroneously admitted extraneous offense evidence during the guilt-innocence phase of trial. *See* TEX. R. EVID. 403, 404(b). We conclude that Guardado was not harmed by the admission of the extraneous offense evidence, assuming it was an error to admit such evidence. We affirm.

I. BACKGROUND

On January 26, 2013, twenty-month-old E.P. was brought to Driscoll Children's Hospital by her mother, Guardado, and Rittgers, Guardado's boyfriend. The hospital staff discovered E.P. had numerous injuries, including a fractured left humerus, healing fractures to the right radius and ulna, and nine different bruises to sites on her face, head, and neck.

Dr. Ada Booth was part of the Child Abuse Resource and Evaluation (CARE) Team at the hospital. She testified at trial that she became involved with this case shortly after E.P. was admitted to the hospital. To explain the injuries, Guardado and Rittgers told the hospital staff that E.P. had fallen on her side the previous day and that E.P. was clumsy and bruised easily. However, Booth testified that E.P. did not seem to fall any more than usual for a child that age and that the lack of details about the fall concerned her. Also, medical tests conducted on E.P. revealed that she had no condition that would cause her to be more likely to bruise. Dr. Booth was further concerned that almost two weeks prior to her admission to the hospital, E.P.'s dermatologist also noticed extensive bruising. The bruises were in different locations than the bruises noticed by Dr. Booth, indicating that they were from different injuries. Child Protective Services became involved and E.P.

was voluntarily placed with another family. E.P. has sustained no major injuries since her placement.

Dr. Nancy Harper, the medical director of the CARE team, testified that on August 7, 2013, a fellow doctor in the hospital requested that she respond to the emergency room. Guardado and Rittgers had been referred to the radiology department for injuries sustained by N.R., their one-month-old son. Guardado and Rittgers refused to confer with Booth and left the hospital with the child. However, based on photographs and X-rays, it was ultimately determined that N.R. had, among many other injuries, a fracture in the left tibia, a fracture of the left radius, and a subdural hemorrhage around the brain with accompanying swelling. Hospital records indicated that N.R. had not sustained any injuries during birth just one month before.

Dr. Harper testified that Guardado and Rittgers gave "several histories of possible injury to the baby." For example, Guardado told Dr. Harper that she thought she had bruised N.R.'s leg while trying to roll up his legs in an attempt to help him have a bowel movement. But Dr. Harper testified that such extensive bruising on an infant is "highly unusual." Likewise, Guardado reported to Dr. Harper that N.R.'s broken arm was caused by Rittgers playing disc golf two weeks prior to coming to the hospital. According to Guardado, Rittgers threw a disc on one occasion, which bounced off the floor and landed in the car on the baby, allegedly breaking his arm without waking him. Dr. Harper testified that she did not believe this version of events and that the arm showed no signs of the healing one would expect to find if it were a two-week-old injury. Guardado and Rittgers gave no explanation for the serious head trauma. According to Dr. Harper, the head injury was consistent with "shaking-type injuries to the head." On August 23, 2013, during a follow-up visit, additional fractures on the right leg were discovered. Dr. Harper testified

that it is not easy to break a child's bone: "[i]t wouldn't occur during normal, routine care and handling of children."

At trial, N.R.'s grandfather testified that he never saw anything out of the ordinary when he visited N.R. In rebuttal, Dr. Harper testified that she had also treated Guardado's son, B.D., on November 15, 2010. B.D. was similar in age to E.P. at the time of his admittance to the hospital. Child Protective Services had removed B.D. from Guardado's care just several days before he was admitted to the hospital. According to Dr. Harper, B.D.'s injuries had a "similar pattern" and a "similar distribution" of bruises compared to E.P.

During closing arguments, Guardado's counsel accused Rittgers of committing the crimes. She also argued that evidence regarding her other son, B.D., should be ignored by the jury because she had never been charged for that conduct. The State focused its closing arguments on the "sheer number of injuries" that had been inflicted on E.P. and N.R. The State briefly mentioned that B.D.'s injuries indicated a "pattern of behavior."

On counts one through six, Guardado was charged with injury to a child. *See* TEX. PENAL CODE § 22.04(a)(1). On count seven, Guardado was charged with continuous violence against a family member. *See id.* § 25.11(a). The jury found Guardado guilty on all counts except for count five, on which it found Guardado guilty of the lesser-included offense of recklessly causing bodily injury to the victim by omission, a state-jail felony. *See id.* § 22.04(f).

On count one, a first-degree felony, the jury assessed punishment at thirty years' imprisonment. *See id.* § 22.04(e). On counts two, three, four, and six, felonies of the third degree, Guardado's punishment was assessed at ten years' imprisonment. *See id.* § 22.04(f). On count five, the jury assessed punishment at two years' imprisonment. All

counts were ordered to run concurrently. Because count seven was charged in the alternative to counts one through six, the State proceeded only on counts one through six for punishment purposes. This appeal followed.

II. Erroneously Admitted Evidence

In her sole issue on appeal, Guardado claims that the trial court erroneously admitted extraneous offense evidence; more specifically, she argues that evidence regarding B.D.'s injuries should have been excluded. *See* Tex. R. Evid. 403, 404.

A. Standard of Review and Applicable Law

We review the admission of extraneous offense evidence for an abuse of discretion. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009); *Knight v. State*, 457 S.W.3d 192, 198 (Tex. App.—El Paso 2015, pet. ref'd). "As long as the trial court's ruling is within the 'zone of reasonable disagreement,' there is no abuse of discretion, and the trial court's ruling will be upheld." *See De La Paz*, 279 S.W.3d at 344.

Rule of Evidence 403 states that a trial court may exclude relevant evidence if the evidence's probative value is substantially outweighed by one or more of the following: "unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. However, courts presume that the probative value of relevant evidence always exceeds any potential danger of unfair prejudice until proven otherwise. *See Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990) (en banc) (op. on reh'g).

Rule 404 states that, generally, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Tex. R. Evid. 404(b)(1). However, this type of evidence may be admissible for other purposes, "such as proving motive,

opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or *lack of accident*." *Id*. R. 404(b)(2) (emphasis added).

Even if there is an error in admitting extraneous offense evidence, "we must disregard the error if, after examining the record as a whole, we have come to a 'fair assurance' that the error did not affect appellant's substantial rights because it did not influence the jury's verdict or had but a slight effect." *Fears v. State*, 479 S.W.3d 315, 338 (Tex. App.—Corpus Christi 2015, pet. ref'd) (internal citations omitted). In determining whether the jury's verdict was affected by the error, we consider the evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the error, jury instructions, the State's theories, defensive theories, closing arguments, voir dire, and the State's emphasis on the error. *See id.*

B. Substantial Rights not Affected

Guardado argues that the evidence concerning B.D.'s injuries should have been excluded under Rule 403. Furthermore, she argues that the State did not lay a sufficient foundation for an exception to Rule 404(b). She also alleges that the injuries to B.D. were too remote since they occurred two years prior to E.P.'s and N.R.'s injuries. Lastly, she claims that the injuries to B.D. had no common distinguishing characteristic with E.P.'s and N.R.'s injuries. In its brief, the State does not argue that it was proper to admit the evidence relating to B.D.'s injuries; instead, the State essentially argues that there is no reversible error. *See Fears*, 479 S.W.3d at 338. We agree with the State.

Assuming, without deciding, that it was an error to admit the evidence regarding B.D.'s injuries, either under Rule 403 or 404, we cannot conclude that Guardado's substantial rights were affected by admitting such evidence. *See id.* There was ample evidence apart from B.D.'s injuries to support Guardado's conviction. Numerous

photographs and x-rays displayed the serious injuries sustained by E.P. and N.R. Dr. Booth and Dr. Harper testified that these kinds of injuries are highly unusual in toddlers and infants because of the force required to cause such injuries. Dr. Booth further testified that Guardado and Rittgers admitted to her that they were the sole caregivers of E.P. and N.R., even though there was another adult living in the home. The history of events given to the police and medical staff to explain the children's injuries were contradictory, lacked details, and tended to change over time. Despite only being twenty-months old at the time, E.P. had already been subjected to "multiple episodes of extensive bruising." In addition, the State never mentioned the injuries to B.D. during voir dire or its opening statement and the State only mentioned B.D.'s injuries briefly during closing statements. The focus of the State's case was on the severity of E.P.'s and N.R.'s injuries and on the "sheer number" of injuries they both sustained, not the brief testimony regarding B.D.'s injuries.

Furthermore, on appeal, we generally presume the jury follows the trial court's instructions. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). The jury in the present case was instructed to disregard all evidence of Guardado committing any offense other than the offenses currently alleged against her. Guardado has not overcome the presumption that the jury followed the instruction that it received. *See id.* Therefore, we conclude that Guardado's substantial rights were not affected by admitting evidence of B.D.'s injuries. *See Fears*, 479 S.W.3d at 338. We overrule Guardado's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
8th day of September, 2016.