NO. 12-16-00319-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ANDREW LEWIS, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Andrew Lewis appeals his conviction for injury to a child. In one issue, he challenges the admission of certain evidence during trial. We affirm.

BACKGROUND

The State charged Appellant with six counts of injury to a child, A.L. Before trial, the State dismissed Count VI. Five counts proceeded to trial and Appellant pleaded "not guilty" to all five counts.

Appellant and Amber Lewis are the parents of A.L., who was born in January 2014. After A.L.'s birth, Appellant became A.L.'s primary caregiver when Amber returned to work. On March 25, 2014, A.L. was admitted to the hospital for multiple injuries. According to Appellant, he prepared a bottle for A.L. in the morning and noticed that it was "very odd how she was feeding." Because she was fussy, Appellant thought she needed a diaper change. When he placed her on the changing table, she appeared startled and he noticed some twitching. He picked her up and noticed her arm violently shaking and her eyes rolling to the back of her head. He panicked and went to Craig Minkner, his father-in-law, who instructed him to call 9-1-1. Craig described A.L. as "very limp and then she shook." He testified that she "felt dead." He described Appellant as upset, afraid, and nervous. Appellant testified that, at some point, A.L.

became very stiff, let out a shrill cry, and spit up. When Ivan Tapia with the Lufkin Fire Department responded to the scene, he noticed that all of her movements tracked to the left side, which he explained indicates a brain injury. He observed that Appellant was not as concerned as a father should be.

According to Dr. Marciella Donaruma, A.L. suffered from multiple bruises, bleeding inside her head, biochemical liver trauma, and broken bones in her chest, hand, and leg. Some of her injuries were old enough to have begun the healing process and she had both fresh and old collections of blood overlying the surface of her brain. Dr. Donaruma explained that, based on Appellant's account of having fed A.L. before she began seizing, A.L. would not have been able to eat if she had the brain injury at the time of feeding; thus, it was logical to believe that the injury occurred after the feeding. Dr. Randell Alexander testified that a child with a brain injury would suffer from an impaired ability to swallow.

Witnesses testified that A.L.'s previous wellness checkups never reflected any abnormalities. In the days before March 25, Appellant, Amber, and others noticed slight bruising on A.L.'s facial area. The parents planned to take her to the doctor on March 24, but the appointment never happened. When Patrick Brice with Child Protective Services asked Appellant about A.L.'s subdural hematoma, and fractured femur, clavicle, and ribs, Appellant appeared shocked. He described Appellant as calm, cooperative, and forthcoming. Appellant's mother, sister, and sister-in-law testified that Appellant was a loving father, interacted with A.L., and was proud of A.L. Amber, Craig, and Michelle Minkner, Appellant's mother-in-law, testified that they never saw Appellant harm A.L. Appellant denied causing A.L.'s injuries.

Nicole Yarbrough, an investigator for CPS, testified that Appellant thought perhaps Michelle hurt A.L. Appellant's sister likewise testified that Amber blamed Michelle, not Appellant. Appellant's mother observed an argument between Amber and Michelle, during which Amber asked Michelle, "Well, you had her for the last two weeks, what did you do to her?" Appellant's sister and mother also testified that they had seen Amber being aggressive and "rough" with A.L.

Craig testified that A.L. did not have the same bond with Appellant as she did with Amber and Michelle. Bailey Legg, Amber's best friend, testified that A.L. preferred Amber. Samantha Skinner, a foster case supervisor for CPS, testified that she observed a recorded visitation between A.L. and her parents, during which A.L. was comfortable with Amber, but

would "stiffen up and become very rigid[]" when handed to Appellant. Yarbrough also observed A.L. cry and tense up when given to Appellant. Skinner believed something was not right with A.L.'s behavior when with Appellant, who had been her primary caregiver.

Dr. Donaruma testified that A.L. had two metaphyseal fractures, which are "highly specific for child abuse[]" and that the liver injury, usually caused by blunt force trauma, is life-threatening. She explained that "violent and forceful" whiplash action typically causes the type of bleeding in the head that A.L. experienced. Dr. Alexander testified that it takes a lot of force to cause a metaphyseal fracture and rib fractures in a child. He testified that the symptoms of a traumatic brain injury occur immediately and may escalate over time, and that seizures can occur anytime after the injury. Dr. Donaruma agreed that although signs of abusive head trauma are almost immediate, it could be several days before seizures begin. Dr. Alexander explained that Appellant's account of what occurred on March 25 was a "description of a new brain injury that corresponds to the new blood" inside A.L.'s head. He further explained that the "shrill cry" Appellant described hearing from A.L. is an indication of a neurologic or brain injury. Dr. Alexander agreed that Appellant's account indicated that he was alone with A.L. when the injury occurred and she became symptomatic. Dr. Donaruma determined that A.L. had been physically abused on more than one occasion. She opined that when a child suffers from such injuries, she would conclude that the only person with the child is the one who caused the injuries, in this case Appellant.

After the State rested its case, it abandoned two of the remaining five counts. At the conclusion of trial, regarding counts one and two, the jury found Appellant "guilty" of the lesser included offense of reckless injury to a child. As for count three, the jury found Appellant "guilty" of intentional injury to a child. The jury assessed punishment at imprisonment for twenty years on counts one and two, and imprisonment for ninety-nine years on count three. The sentences were ordered to run concurrently. This appeal followed.

ADMISSION OF EVIDENCE

In his only issue, Appellant contends that the trial court abused its discretion by admitting evidence that he voluntarily relinquished his parental rights for the purpose of showing that he had a "guilty mind."

Standard of Review

We review a trial court's evidentiary rulings for abuse of discretion. ***Oprean v. State***, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). We must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. ***Willover v. State***, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). We will not reverse unless the trial court's ruling falls outside the "zone of reasonable disagreement." ***Oprean***, 201 S.W.3d at 726. "Exclusion of evidence does not result in reversible error unless the exclusion affects a substantial right of the defendant." ***Smith v. State***, 355 S.W.3d 138, 151 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *see* TEX. R. APP. P. 44.2(b).

Facts

At trial, the State sought to admit evidence that Appellant voluntarily relinquished his parental rights to A.L. Defense counsel objected under Rule 408 and explained that Appellant voluntarily relinquished his rights in order to settle the CPS case against him. Counsel later objected and requested a running objection for the following reasons:

> First, we object on the basis of improper character evidence under Rule 404(a), tending to show a trait of bad character to which they are acting consistent with as far as the charge that has been -- the crime that has been charged against them. As such, we believe it would be inadmissible for that purpose. We also object on the basis of Rule 408, which makes inadmissible, for most purposes, discussion of evidence of compromise or settlement of compromises. And this morning I think we had a stipulation, and correct me if I'm wrong, but the voluntary relinquishment was done in connection with the settlement of an ongoing civil litigation by CPS involving my client …. Finally, we would object under Rule 403, that whatever limited probative value this evidence may have of assistance to the jury to show guilty knowledge or whatever was the State's position on that, it is substantially outweighed by both the prejudice that it's likely to engender and the likelihood that this evidence will be used by the jury for an improper purpose, that is as character evidence. And the fact that it would also confuse them as to the issues that are involved. For that reason, we would object to that and ask for a running objection on all bases.
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> I object under all Rule 404, 404(a) and 404(b), and under Rule 408. 408 does say there's some limited purposes for which compromise evidence can be introduced. It is my position that none of those apply, but if they did, it would be substantially – the prejudicial value would be substantially outweighed.

The State argued that the evidence was admissible as a statement against interest and shows knowledge of guilt. The State likened the evidence to the admissibility of evidence regarding flight. Defense counsel responded as follows:

> I understand what [the State] is saying about a limited purpose to show guilty knowledge. I don't agree with him, but I understand that's a limited purpose, but to admit it as an admission against interest to show basically it's a bad act, that makes them bad people and they, therefore, committed a bad crime, that is not admissible. That is character evidence. It's not admissible for that purpose.

The trial court determined that evidence regarding Appellant's affidavit of relinquishment was admissible, but granted the defense's request for a running objection. When the affidavit was admitted into evidence, the trial court instructed the jury that the evidence is admitted for the limited purpose of showing Appellant's "intent, knowledge, motive or plan, if it does, and for no other purpose."

Skinner and Yarbrough testified that both Appellant and Amber filed affidavits voluntarily relinquishing their parental rights to A.L. Yarbrough denied telling the parents that they could avoid criminal prosecution by relinquishing their rights. Janae Wojasinski, a licensed professional counselor, testified Appellant and Amber told her that their attorneys advised them to relinquish their rights. During her testimony, Amber admitted voluntarily relinquishing her parental rights. She explained her impression from the attorneys that there would no longer be a criminal case and they might be able to see A.L. in the future if they relinquished their rights. Defense counsel asked Appellant about voluntarily relinquishing his rights. He testified to following his attorney's advice when relinquishing because he was told that he might still have a relationship with A.L. if he voluntarily relinquished as opposed to being terminated.

During closing, the State briefly mentioned the relinquishment:

> …The CPS ladies were concerned with protecting the child, with handling a civil case. They are not police officers. They have got a tape that runs, but they don't keep it ever unless they know that there's a reason to. And why would they think they would need to because these two defendants executed a voluntary relinquishment of their parental rights? They bailed out, so that case is over.
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> And here is the big thing. They executed a voluntary relinquishment of parental rights. It's in evidence. You can take it, hold it in your hand and look at it.
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> Somebody might get my watch. I would give it up. I would give up my deer rifle. I would give up my car. I wouldn't want to, if I had to, I could give my house up, but I will not give my child up and be left alive.

Analysis

On appeal, Appellant maintains that the trial court abused its discretion by admitting evidence that he voluntarily relinquished his parental rights to A.L. According to Appellant, the evidence of a different abuser was overwhelming, he denied harming A.L., he made no incriminating statements, and no one ever saw him abuse A.L. He contends that relinquishment does not demonstrate consciousness of guilt and is irrelevant absent evidence connecting the relinquishment to the elements of a criminal offense. He further contends that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Appellant also argues that admission of the evidence violated Texas Rule of Evidence 408, which limits the admissibility of compromise offers and negotiations. According to Appellant, the alleged error affected his substantial rights.

The erroneous admission of evidence does not affect substantial rights if, after examining the record as a whole, the appellate court has fair assurance that the error did not influence the jury, or had but slight effect. ***Motilla v. State***, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). When making this determination, we "consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, [and] the character of the alleged error and how it might be considered in connection with other evidence in the case." ***Id***. We may also consider the jury instructions, the State's theory, any defensive theories, closing arguments, voir dire if applicable, and whether the State emphasized the error. ***Id***. at 355-56. Evidence of the defendant's guilt must also be considered when conducting a thorough harm analysis. ***Id***. at 358.

Assuming, without deciding, that the trial court abused its discretion by admitting the complained-of evidence, the record does not demonstrate that any such error affected Appellant's substantial rights. Out of three days of testimony and numerous witnesses, evidence of the relinquishment constituted a small portion of the evidence presented to the jury. The State briefly mentioned, but did not overemphasize or dwell on, the relinquishment during closing argument. *See* ***id***. at 355-56. Additionally, the jury previously heard Appellant's explanation that guilt did not motivate his relinquishment. Rather, his testimony indicates that he relinquished his rights out of fear that he would never see A.L. again and that voluntary relinquishment was essentially a way to avoid involuntary termination so that he might still have

a relationship with A.L. in the future. Appellant further testified that he wished he had never signed the relinquishment.

Moreover, independent of Appellant's voluntary relinquishment, the jury heard evidence from which it could reasonably conclude that Appellant caused A.L.'s injuries. *See* ***id.*** at 358. The record demonstrates that (1) Appellant was A.L.'s primary caregiver and the person present when she became symptomatic, (2) symptoms of a traumatic brain injury occur immediately, (3) A.L.'s shrill cry on March 25 indicated a neurologic or brain injury, (4) a child struggles to swallow after a brain injury, but Appellant testified to being able to feed A.L. before she began seizing, (5) A.L. suffered from fractures and bleeding inside the head that could only be caused by a significant amount of force, and (6) A.L. exhibited odd behavior when handled by Appellant. A.L.'s tearful and tense behavior when being held by Appellant could lead the jury to reasonably conclude that her behavior was a product of fear resulting from abuse committed by Appellant. Also, the jury observed Appellant at trial and was in the best position to judge his credibility and determine whether he would be capable of causing the force necessary to create A.L.'s injuries. *See* ***Lancon v. State***, 253 S.W.3d 699, 705-06 (Tex. Crim. App. 2008) (jury is in best position to judge witness's credibility and demeanor because it is present to hear the testimony). As sole judge of the weight and credibility of the evidence, the jury was entitled to accept evidence of Appellant's guilt and reject Appellant's contention that he did not cause A.L.'s injuries. *See* ***id.*** at 707; *see also* ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) ("[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt[]").

We also note that, in its charge, the trial court including the following instructions:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant.
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> The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and, if it fails to do so, you must acquit the defendant. It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt.
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> You are exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony[.]

We presume the jury followed these instructions when determining whether the State proved Appellant's guilt beyond a reasonable doubt. *See* ***Resendiz v. State***, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003). In fact, despite hearing evidence of the relinquishment, the jury found Appellant "not guilty" of intentional or knowing injury to a child and "guilty" of reckless injury to a child on two of the three counts. *See* ***Casey v. State***, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007) (holding erroneous admission of photographs harmless, noting that jury convicted appellant of lesser-included offense rather than charged offense). This suggests that the jury adhered to the trial court's instructions and was not unduly influenced by evidence of Appellant's voluntary relinquishment of his parental rights.

Accordingly, based on our review of the record as a whole, we have fair assurance that any error stemming from the admission into evidence of Appellant's voluntary relinquishment of his parental rights did not influence the jury, or had but slight effect. *See* ***Motilla***, 78 S.W.3d at 355. Because this admission did not violate Appellant's substantial rights, we overrule his only issue. *See* ***id***.; *see also* ***Smith***, 355 S.W.3d at 151; TEX. R. APP. P. 44.2(b).

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered September 6, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 6, 2017

NO. 12-16-00319-CR

ANDREW LEWIS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2016-0335)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.