NO. 12-17-00199-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

KALA HERNANDEZ, APPELLANT	***§***	***APPEAL FROM THE 349TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Appellant, Kala Hernandez, appeals from her conviction for injury to a child. In one issue, she challenges the admission of certain evidence at trial. We affirm.

BACKGROUND

The State charged Appellant with intentionally or knowingly causing serious bodily injury to M.G., a child fourteen years of age or younger, by hitting, shaking, pulling, or jerking M.G.[1] Appellant, the mother of M.G., pleaded "not guilty."

At trial, Lieutenant Lonnie Lum with the Crockett Police Department testified that, on October 10, 2015, he responded to the Houston County Medical Center (the Medical Center) regarding suspicious injuries to a three-month old child suffering from a possible hematoma. Deputy Thomas Shafer, who was with Crockett Police Department at the time, also responded to the call.

At the Medical Center, Marilyn Walker, a registered nurse, noticed that M.G.'s right cheek and eye were twitching and her mouth was open. Appellant told Walker that M.G. fell off the sofa while she was at work, but she told Shafer and Sergeant Alfredo Fajardo with the

[1] The indictment originally charged two counts of injury to child, but the State later moved to dismiss Count Two and the trial court granted the motion.

Crockett Police Department that M.G. rolled off the bed. Appellant told Fajardo, Brenda Snyder, a supervisor for the Texas Department of Family and Protective Services (the Department), and Kali Little, a supervisor with the Department, that M.G. fell off the bed on the evening of October 9. Appellant later changed her story to claim that M.G. fell off the bed on October 10. She gave conflicting accounts of whether there was a pillow between M.G. and the bed's edge and whether she contacted her grandmother when M.G. fell. Additionally, Appellant worked on both October 9 and 10 despite earlier claims to the contrary.

In addition to claiming that M.G. fell off the bed, Appellant told Fajardo that she dropped M.G. when she was a few weeks old. She both denied shaking M.G. and admitted shaking M.G. She demonstrated the manner in which she shook M.G. and stated that M.G.'s head went back and forth during the shaking. Appellant also told Snyder that she shook M.G. about a month before and pulled M.G. by the legs, and that her husband, Israel Gonzalez, shook M.G. and dropped M.G. three to four feet onto the bed. Little testified that she told Appellant that M.G.'s injuries were not consistent with falling off the bed. Using a stuffed toy, Appellant demonstrated shaking M.G. When she first demonstrated the shaking, Little told Appellant that the demonstrated shaking would not have caused M.G.'s injuries. Appellant then demonstrated a second time, shaking the toy more forcefully. Snyder and Little both saw the toy's head flopping. Appellant indicated that she shook M.G. four times on October 6.

Appellant told Dr. Angela Bachim that M.G. fell off the bed. Dr. Bachim testified that a CT scan revealed blood products and fluid collections on both sides of M.G.'s head, retinal hemorrhages, a fracture in her right ankle, and healing fractures in six ribs. She testified that all of these injuries can be caused by shaking and that the head injuries constitute serious bodily injury. She explained that the "amount of force that it would take to cause any of the injuries that [M.G.] had would be well above the force required for normal care of the infant or for playing with the infant…[a] reasonable person would know that that's damaging to the baby." Bachim testified that falling off the bed would not cause any of the injuries from which M.G. suffered.

Appellant testified that, on October 8, M.G. was crying and Gonzalez shook her with "so much force." On October 10, Appellant noticed the twitching in M.G.'s right eye, in addition to some vomiting on October 9 and 10, so she took M.G. to the hospital. She admitted lying about shaking M.G. and jerking her leg. She testified that M.G. fell off the bed on the morning of

October 10 before Appellant went to work, but she admitted lying about contacting her grandmother, placing a pillow between M.G. and the edge of the bed, not working on October 9, and M.G. falling off the bed on October 9. She denied telling Snyder that she shook M.G. four times on October 6 or telling Walker that M.G. fell off the sofa. According to Appellant, Gonzalez was abusive and threatened to kill her and the children if she told anyone about the abuse. She regretted not contacting the police, but testified that she was afraid. She lied to police because of Gonzalez's threat regarding what would happen if she did not tell police that she "did it." She also admitted lying when she told others that Gonzalez was not abusive. Appellant denied shaking M.G. and testified that she would never harm her.

At the conclusion of trial, the jury found Appellant "guilty" of injury to a child and assessed her punishment at imprisonment for eight years. This appeal followed.

ADMISSION OF EVIDENCE

In her sole issue, Appellant contends that the trial court abused its discretion by admitting evidence of injury to Appellant's other child, L.H., in violation of Texas Rule of Evidence 403.

Standard of Review and Applicable Law

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.

Evidence is relevant when it has a tendency to make a fact more or less probable than it would be without the evidence and that fact is of consequence in determining the action. TEX. R. EVID. 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. TEX. R. EVID. 403. A Rule 403 balancing test considers (1) the inherent probative force of the evidence; (2) the proponent's need for the evidence; (3) any tendency of the evidence to suggest a decision on an improper basis, to confuse or distract the jury from the main issues, or to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (4) the likelihood that

presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. ***Gigliobianco v. State***, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

The admission or exclusion of evidence does not result in reversible error unless it affects substantial rights. *See* TEX. R. APP. P. 44.2(b). 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.

Facts

At trial, the jury heard evidence that L.H. had a wrist fracture. During her testimony, Appellant admitted jerking L.H.'s arm. Dr. Bachim testified that L.H. had a healing buckle fracture to her right wrist, which is typically caused by axial forces, such as falling on an outstretched arm. She explained, "And so that fracture has very – it's really not concerning for abuse, because [L.H.] was, I believe, 17 months old at the time of that -- those x-rays...[a]nd although it didn't say in the records specifically, I assumed she was able to walk and fall on her own and cause that type of fracture to herself accidentally." She also testified that jerking a child's arm would not cause this type of injury. According to Dr. Bachim, a typical caregiver probably would have noticed the injury, but she was not aware of any record or sign of treatment. When asked if the injury could possibly have been caused by abuse, Dr. Bachim testified that "[a] lot of things could be possible, but it's not usually one of the fractures we see from abuse." She testified that the injury was probably not the result of abuse.

Outside the jury's presence, the parties discussed the admissibility of a recorded conversation between Appellant and Fajardo. Defense counsel argued that the recording contained extraneous offense evidence regarding L.H.'s injury and putting forth such evidence,

when Dr. Bachim would testify that the injuries did not result from abuse, was "very overly prejudicial" and the prejudice outweighed any probative value. The trial court allowed the recording into evidence, but gave the jury the following limiting instruction before playing the recording:

> If there is any testimony before you in this case regarding the Defendant's having committed offenses, other than the offense alleged against her in this indictment, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

During the recording, Fajardo stated that L.H. and M.G. had some "pretty bad" injuries and that L.H. had a healed distal radial fracture to her right wrist. Appellant appears to say that L.H. must have fallen and that she did not "do that" to L.H. when she jerked her about a week earlier.

Fajardo testified that he investigated and arrested Appellant on charges against both L.H. and M.G., and that he felt there was probable cause for the arrest. He also testified that Appellant was indicted for offenses against both children, but the indictment regarding L.H. was later dismissed. He was not aware of Dr. Bachim's conclusion that L.H.'s injury was not the result of abuse. Snyder likewise testified that she did not know Dr. Bachim ruled out child abuse with respect to L.H.'s wrist injury. The children's babysitter testified that she never dropped or abused either child, and never noticed that L.H. had an injured wrist.

During closing argument, defense counsel told the jury that Appellant was indicted for the injury to L.H. and she told officers "something that she thought she might have done[,]" but that Dr. Bachim stated the injury was an accident. The State argued as follows:

> And let's talk for just a second about [L.H.], even though the doctor doesn't believe the injuries to [L.H.'s] arm, which was a broken arm. How often do you see a broken arm in a 17-month old child? But even if that was accidental, you heard the doctor say that there was no evidence that the doctor -- that [Appellant] had ever taken [L.H.] to the doctor. There was no evidence that she had ever taken her in for treatment, even though any reasonable caregiver would have noticed that she was holding her arm differently.

Analysis

On appeal, Appellant maintains that the State's references to injuries sustained by L.H. were intended to invite the jury to conclude that Appellant abused L.H. and, therefore, must have

also abused M.G. According to Appellant, the challenged evidence was therefore more prejudicial than probative, and should not have been admitted.

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 L.H.'s injury constituted a small portion of the evidence presented to the jury. The State did not overemphasize or dwell on the injury during closing argument. *See* ***id.*** at 355–56. Additionally, the jury previously heard Dr. Bachim explain that L.H.'s injury was not the type normally seen as a result of abuse and she did not believe that the injury was caused by abuse. The jury also heard evidence that the State dismissed the indictment against Appellant as related to L.H.'s injury.

Moreover, independent of evidence regarding L.H.'s wrist injury, the jury heard evidence from which it could reasonably conclude that Appellant caused M.G.'s injuries. *See* ***id.*** at 358. The record demonstrates that (1) Appellant was M.G.'s primary caregiver, (2) Appellant gave inconsistent accounts on several matters, most importantly regarding how M.G. was injured and her actions following the injury, and admitted lying to officers, (3) Appellant admitted shaking M.G. and demonstrated to others the manner in which she shook M.G., (4) Dr. Bachim testified that the blood products and fluid collections inside M.G.'s skull, the retinal hemorrhages, the fracture in her right ankle, and the healing fractures in her ribs can all be caused by shaking and that her head injuries constitute serious bodily injury, and (5) Dr. Bachim explained that the amount of force required to cause M.G.'s injuries exceeded that required for playing or normal care and a reasonable person would be aware that such force is damaging to the baby. Also, the jury observed Appellant at trial and was in the best position to judge her credibility and determine whether she would be capable of causing the force necessary to create M.G.'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 M.G.'s injuries were caused by Gonzalez's actions rather than her own. *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:

> You are further instructed that if there is any testimony before you in this case regarding the Defendant having committed offenses other than the offense alleged against her in this Indictment, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the motive of the Defendant, the opportunity of the Defendant, the intent of the Defendant, the preparation of the Defendant, the plan of the Defendant, the knowledge of the Defendant, the identity of the Defendant, or the absence of mistake or accident on the part of the Defendant in relation to the offense on trial, and you may not consider these offenses for any other purpose.
>
> …
>
> 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 her trial. The law does not require a defendant to prove her innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt after a careful and impartial consideration of all the evidence in the case.
>
> 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.
>
> …
>
> You are the 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).

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 L.H.'s wrist injury 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 her only issue. *See* ***id.***; *see also* TEX. R. APP. P. 44.2(b).

DISPOSITION

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

BRIAN HOYLE
Justice

Opinion delivered June 6, 2018.
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

JUNE 6, 2018

NO. 12-17-00199-CR

KALA HERNANDEZ,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 349th District Court
of Houston County, Texas (Tr.Ct.No. 15CR-215)

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.

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