Affirmed and Opinion filed May 24, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00682-CR

ROY EUGENE IRVIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 802,831

O P I N I O N

Appellant was charged by indictment with the offense of injury to a child by omission, namely intentionally and knowingly by omission causing serious bodily injury. *See* TEX. PENAL CODE ANN. § 22.04. The indictment alleged two prior felony convictions for the purpose of enhancing the range of punishment. The jury convicted appellant of the lesser included offense of causing serious bodily injury by reckless omission. The jury found the enhancement allegations true and assessed punishment at forty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises ten points of error. We affirm.

I. Sufficiency Challenges.

In two separate points of error appellant challenges the sufficiency of the evidence to support the jury's verdict. Specifically, the eighth point of error contends the evidence is insufficient to support a finding that the complainant sustained serious bodily injury. The indictment alleged serious bodily injury resulted from a burn to the complainant's hand. The application paragraph required such a finding beyond a reasonable doubt. In determining whether the evidence is sufficient, we employ the standard announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and ask whether, viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the offense.

A. Factual Summary.

With the foregoing standard in mind, we set forth the evidence related to serious bodily injury. The complainant sustained a burn and was treated by three doctors. Collectively, their testimony established the following. On October 21, 1998, the complainant was taken to the emergency room for treatment due to second and third degree burns to the back of her left hand. The burn caused the complainant's fingers to lock in a backward position. Had this continued, contracture of the hand would have resulted. Without treatment, contracture will worsen and decrease the functional movement of the hand.

The injury required surgery to the hand and skin grafting from the complainant's leg. Skin grafting is the harvesting of skin from another part of the patient's body and that harvested skin is used to cover the wounded area. Without this surgery, the hand would have eventually healed, but would have been scarred and the complainant would not have had full function of the hand; the hand would have been stiff and the complainant would not have been able to close the hand enough to pick up a soda can. Without the surgery, the complainant would have suffered protracted loss of use of her hand.

B. Analysis.

Serious bodily injury is defined as bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of any bodily member or organ. *See* TEX. PENAL CODE ANN. § 1.07(a)(46). Appellant argues that because the surgery was successful

the evidence is insufficient to establish permanent disfigurement or impairment. However, the success or failure of the surgery is not controlling. The relevant issue is the "disfiguring and impairing quality of the bodily injury as it was inflicted, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment." *See Brown v. State,* 605 S.W.2d 572, 575 (Tex. Crim. App. 1980), *overruled on other grounds, Hedricke v. State,* 779 S.W.2d 837 (Tex. Crim. App. 1989). After viewing all of the evidence in the light most favorable to the prosecution, we find a rational trier of fact could have found beyond a reasonable doubt the complainant sustained serious bodily injury as a result of the burn to her hand. *See Jackson v. Virginia,* 443 U.S. at 318. The eighth point of error is overruled.

C. Analytical Construct.

The ninth point of error contends the evidence is insufficient because it does "not exclude every other reasonable hypothesis except that of the guilt of the defendant." The outstanding reasonable hypothesis construct is not employed by appellate courts in resolving sufficiency challenges unless the case was tried prior to the Court of Criminal Appeals decision in *Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991), *overruled on other grounds, Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000). The instant case was tried in 1999, therefore, the analytical construct does not apply. The ninth point of error is overruled.

II. Failure to Charge on Defenses.

In his first point of error, appellant claims the trial court erred in refusing to submit an instruction on mistake of fact. Appellant claims his mistake of fact was that he believed his girlfriend was providing proper medical treatment to the complainant's burn.

An accused has the right to an instruction on any defensive issue raised by the evidence. *See Hamel v. State,* 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). This rule is designed to insure that the jury, not the judge, will decide the relative credibility of the evidence. *See Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991). Therefore, the issue before us is whether there was sufficient evidence to show that appellant had reason to believe his daughter was receiving proper medical treatment. *See Granger v. State,* 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). If the evidence viewed in a light favorable to appellant does not establish a mistake of fact defense, an instruction is not required. *Id.* The defense

of mistake of fact, as codified in Texas Penal Code section 8.02(a) provides: "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense."

The evidence shows that the complainant suffered a severe burn to her hand. The doctors who treated the complainant testified that a reasonable layperson would have immediately, upon seeing the injury, taken the child to a doctor. In his videotaped statement, appellant stated he had seen the burn on the day it happened, but did not take the complainant to a doctor or hospital. He stated that he left town for several days and upon his return, noticed the complainant's hand "looked bad." Appellant still did not seek professional medical help for the complainant. Appellant now claims he mistakenly believed his girlfriend was properly treating the wound. That claim is not supported by the evidence at trial. The trial court properly denied appellant's mistake of fact instruction. The first point of error is overruled.

In his second point of error, appellant claims the trial court erred in refusing to submit his requested charge on a defense provided by Texas Penal Code section 22.04. Section 22.04(k)(1)(B) provides:

> It is a defense to prosecution under this section that the act or omission consisted of: emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

Under this point of error, appellant makes much the same argument as under point of error one, that is, that the complainant was receiving emergency medical treatment from appellant's girlfriend. The evidence, however, does not raise this defensive issue. Appellant's omission to seek professional medical care for his daughter does not consist of emergency medical care administered in good faith by a person not licensed in the healing arts. This is not a case in which appellant sought assistance, but was told treatment was unnecessary. The record contains no evidence that the complainant received emergency medical care by a person not licensed in the healing arts. Therefore, the trial court did not err in failing to give the instruction. The second point of error is overruled.

III. Failure to Charge on Lesser Included Offenses.

The trial court instructed the jury on the lesser included offense of causing serious bodily injury to a child by reckless omission. The jury convicted appellant of that offense. Appellant contends the trial court

should have instructed the jury on other lesser offenses. We now address the trial court's denial of those additional instructions.

A. Criminal Negligence.

Points of error three and six contend the trial court erred in denying appellant's requested instruction on criminally negligent injury to a child by omission. Section 22.04 of the Texas Penal Code provides for the offense of injury to a child by either commission or omission. The offense can be committed by *commission* by the culpable mental states of intentionally, knowingly, recklessly or with criminal negligence. However, the offense cannot be committed by *omission* with criminal negligence. Therefore, the trial court correctly refused to instruct the jury on the offense of injury to a child by omission with criminal negligence because there is no such offense. The third and sixth points of error are overruled.

B. From Omission to Commission.

The indictment alleged the offense of injury to a child by *omission*. The fourth point of error contends the trial court failed to instruct the jury on the offense of injury to a child by reckless *commission* of the injury.

The trial court does not have jurisdiction to authorize a conviction of an offense not alleged in the charging instrument. *See Jacob v. State*, 864 S.W.2d 741, 742 (Tex. App.— Houston [14th Dist.] 1993) *aff'd* 892 S.W.2d 905 (Tex. Crim. App.1995). However, the trial court's jurisdiction extends to all lesser "included" offenses as defined by article 37.09 of the Code of Criminal Procedure. Determining whether a charge on a lesser included offense is warranted presents a dual inquiry. First, is the lesser offense included within the proof necessary to establish the offense charged? *See Rousseau v. State,* 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). Second, if so, is there some record evidence from which a jury could rationally find that if the defendant is guilty, he is guilty only of the lesser offense? *See ibid.*

The first prong is governed by article 37.09, which provides an offense is a lesser included offense if:

> (1) it is established by proof of the same or less than all of the facts required to establish the commission of *the offense charged*;
>
> (2) it differs from *the offense charged* only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from *the offense charged* only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit *the offense charged* or an otherwise included offense.

See TEX. CODE CRIM. PROC. ANN. art. 37.09 (emphasis added). Each definition of a lesser included offense in article 37.09 is stated with reference to "the offense charged," and specifically states the manner in which the lesser included offense differs from the offense charged. If no subsection of article 37.09 applies, the lesser offense is not a lesser "included" offense as a matter of law and the inquiry is over.

In the instant case, the offense charged is by *omission*. However, the requested lesser offense was by *commission*. Since the requested charge was for an offense that would require different proof, differed in more than the seriousness of the injury, differed in more than the culpable mental state and does not involve an attempt to commit the charged offense, we hold the offense of injury to a child by reckless *commission* is not a lesser included offense of intentionally or knowingly causing injury to a child by *omission*. The fourth point of error is overruled.

C. Bodily Injury

The fifth point of error contends the trial court erred in not charging the jury on the lesser included offense of causing bodily injury by reckless omission. *See* TEX. PENAL CODE ANN. § 22.04(a)(3). Such an offense is a state jail felony. *See id.* at (f). As noted in part III. B, *supra*, to warrant a charge on a lesser included offense there must be some record evidence from which a jury could rationally find that if the defendant is guilty, he is guilty only of the lesser offense. *See Rousseau*, 855 S.W.2d at 672-73. As noted in part I, *supra*, there was sufficient evidence to support the jury's finding of serious bodily injury. However, we have carefully reviewed the record and find no evidence to support a conclusion that the complainant sustained bodily injury as opposed to serious bodily injury. While it is true that the successful surgery has ameliorated the impairment and disfigurement that would have otherwise accompanied the

injury, the effects of the surgery cannot raise the issue of bodily injury. Accordingly, the fifth point of error is overruled.

IV. Admission of Emergency Room Video.

The seventh point of error contends the trial court erred in admitting a videotape recording of the complainant receiving medical treatment in connection with her injury. Shortly after the complainant arrived at the emergency room, the police were notified. Houston police officer Laura Hinojosa and her partner were dispatched to the emergency room to photograph the complainant's injuries. Hinojosa video taped the removal of a bandage on the complainant's burned hand. Subsequently, the trial court entered a discovery order requiring the State to disclose "all photographs, videos, X-rays, or pictorial representations of any kind of the body or anatomy or any part of the body or anatomy of" the complainant. During Hinojosa's testimony, the State offered the videotape of the bandage removal. Defense counsel objected stating he had not seen the exhibit as ordered by the trial court and it was prejudicial. The prosecutor responded that she had offered defense counsel an opportunity to view the exhibit and that because of her open file policy, the video had been available for viewing. The trial court removed the jury and viewed the video. The trial court noted the competing versions of compliance/non-compliance of the discovery order, overruled appellant's objections, and the videotape was shown to the jury. We employ the abuse of discretion standard of review when reviewing a trial court's decision to admit or exclude evidence. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000) (citing *Prystash v. State*, 3 S.W.3d 522, 527 (Tex. Crim. App. 1999)). An abuse of discretion occurs when a trial court's decision is so clearly wrong as to lie outside the zone of reasonable disagreement, or when the trial court's acts are arbitrary and unreasonable without reference to any guiding rules or principles. *See Montgomery v. State*, 810 S.W.2d 372, 380 and 391 (Tex. Crim. App. 1990). Under this standard, the appellate court will uphold the trial court's evidentiary rulings unless there is no reasonable support for the evidentiary decision. *See Moreno v. State*, 22 S.W.3d 482, 487 (Tex. Crim. App. 1999).

Relevant evidence is admissible unless otherwise barred by Constitution, statute, or rule. *See* TEX. R. EVID. 401, 402. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. Simply because an

exhibit is disturbing due to the injuries to the complainant does not mean the exhibit should automatically be excluded as unfairly prejudicial. *See Williams v. State*, 958 S.W.2d 186, 196 (Tex. Crim. App. 1997); *Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App.1995).

Videotapes are admissible when they are properly authenticated, relevant to an issue, and not violative of the rules of evidence for the admissibility of photographs. *See Marras v. State*, 741 S.W.2d 395, 404 (Tex. Crim. App. 1987), *overruled on other grounds, Garrett v. State*, 851 S.W.2d 853 (Tex. Crim. App. 1993). Before being admitted, photographic evidence must ordinarily be shown, either by direct proof or by admission to be correct. *See Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988). The only identification or authentication required is that the exhibit properly represent the person, object or scene in question. *Id*. As a general rule, if testimony describing the subject of a photograph is admissible, the photograph is also admissible. *See Williams*, 958 S.W.2d at 195; *Dusek v. State*, 978 S.W.2d 129, 136 (Tex. App.—Austin 1998, pet. ref'd). And the Court of Criminal Appeals has said that "photographs [are] admissible if verbal testimony as to matters depicted in the photographs is also admissible ... [a]n abuse of discretion arises only when the probative value of the photograph is small and its inflammatory potential great." *Ramirez v. State*, 815 S.W.2d 636, 647 (Tex. Crim. App. 1991) (citation omitted); *Williams*, 958 S.W.2d at 195; *Emery v. State*, 881 S.W.2d 702, 710 (Tex. Crim. App. 1994); *Schielack v. State*, 992 S.W.2d 639, 641 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

The instant videotape is a visual depiction of a bandage being removed from the complainant's hand. As noted above in part I. A, *supra*, three doctors testified to the nature and extent of the injury. In this connection, each witness testified the complainant was in a great deal of pain. That testimony was both relevant and admissible, and, therefore, the videotape was also admissible unless "so horrifying or appalling that a juror of normal sensitivity would necessarily encounter difficulty rationally deciding the critical issues of this case after viewing them." *Fuller v. State*, 829 S.W.2d 191, 206 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 941 (1993). After viewing the complained of videotape, we do not find the exhibit to be so prejudicial as to substantially outweigh its probative value. *See* TEX. R. EVID. 403. Therefore, we hold the trial court did not abuse her discretion in admitting the videotape. The seventh point of error is overruled.

V. Admission of Extraneous Injuries.

The tenth point of error contends the trial court erred in admitting evidence of injuries other than the injury alleged in the indictment. The indictment specifically alleged the injury was a burn to the complainant's hand. Nevertheless, through the testimony of the first witness, the State was permitted, over appellant's objection, to introduce evidence of other injuries sustained by the complainant. The second witness, however, testified of the same extraneous injuries without objection.

Our law requires a defendant to object every time objectionable evidence is offered or he waives the opportunity to complain of the error on appeal. *See Johnson v. State*, 803 S.W.2d 272, 291 (Tex. Crim. App. 1990), *overruled on other grounds, Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991). Moreover, error in the admission of evidence is cured when the same is admitted elsewhere without objection. *See Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984). The ninth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed May 24, 2001.
Panel consists of Justices Hudson, Amidei and Baird.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird and Former Justice Maurice Amidei sitting by assignment.