Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01202-CR

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SHELDON LEON JORDAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd Judicial District Court
Harris County, Texas
Trial Court Cause No. 742,697

O P I N I O N

Sheldon Leon Jordan was convicted by a jury of manslaughter in the shaking death of twenty-month-old Desaray Hunter. Jordan pleaded "true" to an enhancement paragraph alleging a prior felony conviction. The jury found that Jordan had used a deadly weapon – namely, his hands – in the commission of the offense, sentenced Jordan to life in prison and assessed a fine of $10,000. In one point of error Jordan contests the legal and factual sufficiency of the evidence to support the deadly weapon finding . We affirm.

THE DEADLY WEAPON FINDING

A deadly weapon is defined as anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. TEX. PEN. CODE ANN. § 1.07(a)(17)(B) (Vernon 1994). Hands are not deadly weapons *per se*, but can become deadly weapons in the manner of their use depending on the evidence. *Turner v. State*, 664 S.W.2d 86, 89-90 (Tex. Crim. App. 1983); *Jefferson v. State*, 974 S.W.2d 887, 892 (Tex. App.–Austin 1998, no pet.). When the State alleges the use of a deadly weapon which is not deadly *per se*, it must prove beyond a reasonable doubt that the weapon alleged was used in a manner capable of causing death or serious bodily injury. *Hill v. State*, 913 S.W.2d 581, 583 (Tex. Crim. App. 1996). However, the State need not show that the instrument actually caused serious bodily injury so long as it shows that the instrument in the manner of its use was capable of causing serious bodily injury. *Hill*, 913 S.W.2d at 584; *Gillum v. State*, 888 S.W.2d 281, 288-289 (Tex. App.–El Paso 1994, pet. ref'd). If we find the evidence does not support a deadly weapon finding, the proper course of action is to reform the judgment by deleting the finding. *Turner*, 664 S.W.2d at, 91.

Jordan challenges the sufficiency of the evidence supporting the jury's deadly weapon finding. We will limit our detailed review of the record to that evidence which relates to the deadly weapon finding.

1. The Evidence

Eve Shaunda Gaines testified she was Desaray's mother and that Jordan was her live-in boyfriend. She said that on April 14, 1996, she left her twin daughters, Desaray and Deshay, in Jordan's care while she went to work. While at work, Gaines said she got a phone call from Jordan in which he told her "Something's wrong with Desaray." and that she had stopped breathing. Gaines said she ran to her car and drove home; she got there about the time paramedics were taking Desaray away to the hospital. She said Jordan told her at the apartment that Desaray had "just collapsed," that he had been watching a basketball game on television when he noticed her lying on the floor and she would not get up. Gaines said Jordan told her that he "picked her up and shook her very, very lightly to see if she would revive; but she never revived." Two or three days later, Gaines said, Jordan told her that he had tossed a sofa pillow at Desaray from across the

room; that she fell and hit her head; and that at that point he began his unsuccessful efforts to revive her.

Deanna McCullom testified that she was a social worker at Hermann Hospital who interviewed Jordan the day of the incident. She said Jordan told her that he found Desaray resting on the floor; that he unsuccessfully attempted to rouse her by gently shaking her; and that he then washed her face with cold water and put her in a tub of cold water in an effort to revive her.

Dr. Benjamin Oei testified he was the emergency room doctor at Southwest Memorial Hospital who first examined Desaray. Oei said he saw no external injuries on Desaray, and that she was helicoptered to Hermann Hospital less than two hours after she arrived.

Dr. Ralph Frates testified he was the physician on duty at Hermann Hospital's pediatric intensive care unit when Desaray arrived there. He said Desaray was essentially brain-dead when she arrived at Hermann. He said her brain was damaged and swollen and her retinas were bleeding; he said these injuries were consistent with what is known as "shaken baby impact syndrome."

Dr. Brad Alpert testified as an expert on child abuse injuries who examined Desaray at Hermann Hospital's pediatric intensive care unit. He defined "shaken baby syndrome" as when a child is shaken so violently that any reasonable person observing the act would know it would seriously injure the child. Alpert said the relatively weak muscles in a child's neck, combined with the relatively large head size, cause the head to whip about when the child is shaken, magnifying the force of the shaking.

Alpert said Desaray had extensive swelling of the brain and retinal hemorrhages in both eyes, which are hallmarks of shaken baby syndrome. He said the injuries suffered by her could not have been caused by her falling, or being hit by a sofa cushion, or from gentle shaking to revive her. He said her injuries were "relatively specific" to shaken baby syndrome; for example, he said retinal hemorrhages seldom occur in children who have been in major automobile accidents, but often occur when a child is shaken violently. Alpert also said such episodes are often accompanied by other physical abuse, such as hitting a child with an object or a hand, or slamming the child against a wall, which may increase the odds of retinal hemorrhaging developing.

Dr. Tommy Brown testified he was the deputy chief medical examiner who performed the autopsy. He said there were bruises to the back and the outside of the head consistent with blunt force trauma, such as a hand or a blunt object striking the back of the head. Brown said there were extensive hemorrhaging in the spinal cord and the eyes, as well as damage to the brain, and said that the damage was consistent with a baby being shaken violently. He said the cause of death was the swelling of the brain that resulted from this shaking.

Marshall Smith testified that he got to know Jordan in jail after Jordan was arrested. He said Jordan told him about his case, and told him the story about the pillow was a ruse. Smith said Jordan told him that the baby's injuries resulted when he hit her with his tennis shoe, that Desaray's head hit the rail of the couch and that she fell and lay motionless, and that he started shaking her, over and over again, in order to revive her.

Eric Thompson testified he also befriended Jordan in jail and that Jordan told him that he was angry about having to watch his girlfriend's children. Thompson said Jordan told him that the day of the incident, he was watching a basketball and smoking a mixture of crack cocaine and marihuana, and that Desaray was disturbing him by running around and making noise. He said Jordan told him he grew so angry that he grabbed Desaray and shook her until she became quiet.

2. Legal Sufficiency

Appellant's first point of error challenges the legal sufficiency of the evidence to support the jury's verdict. Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 320, 99 S.Ct. at 2789; *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993), cert. denied, 511 U.S. 1046, 114 S.Ct. 1579, 128 L.Ed.2d 222 (1994). The evidence is examined in the light most favorable to the jury's verdict. *Jackson*, 443 U.S. at 320, 99 S.Ct. 2781; *Johnson*, 871 S.W.2d at 186. The standard is the same in both direct and circumstantial evidence cases. *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991). All of the evidence is considered by the reviewing court, regardless of whether it was properly

admitted. *Johnson*, 871 S.W.2d at 186; *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991); *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988).

The jury is the trier of fact, and is the ultimate authority on the credibility of witnesses and the weight to be given to their testimony. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.04 (Vernon 1979); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [panel op.] 1981). It is for the jury as trier of fact resolve any conflicts and inconsistencies in the evidence. *Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). Even where there is no conflict, the jury may give no weight to some evidence, and thereby reject part or all of a witness's testimony. See *Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); see also *Chambers*, 805 S.W.2d at 461 (holding jury as judge of credibility may "believe all, some, or none of the testimony"). Because it is the province of the jury to determine the facts, any inconsistencies in the testimony should be resolved in favor of the jury's verdict in a legal sufficiency review. *Johnson v. State*, 815 S.W.2d 707, 712 (Tex. Crim. App. 1991) (quoting *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

Here, we believe there is legally sufficient evidence to justify the deadly weapon finding. Jordan admitted to two witnesses that he used his hands to shake the child. From that point forward, how hard he shook the child was a matter for the jury to determine. And unlike the defendant in *Turner*, there was significant testimony outlining the injuries which caused death and how the hands were employed to cause those injuries. *Cf. Turner*, 664 S.W.2d at 90 (where autopsy report was not introduced, and no evidence as to what injuries of deceased were due to the use of hands or fists, evidence found not sufficient to sustain a deadly weapon finding); *Slaton v. State*, 685 S.W.2d 773, 776 (Tex. App.–Houston [1st Dist.] 1985, pet. ref'd) (where no testimony described alleged assailant's hands, or the manner of their use, which would bring it within the definition in article 1.07, evidence held legally insufficient to sustain deadly weapon finding). Here we have the autopsy report and ample testimony describing the manner of use of these hands. We therefore find the evidence is legally sufficient to support the deadly weapon finding.

3. Factual Sufficiency

When reviewing a claim of factual insufficiency, the evidence is no longer viewed in the light most favorable to the verdict. *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996) (quoting with approval *Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.—Austin 1992, pet. ref'd,

untimely filed)). While the evidence is viewed without the prism of the light most favorable to the verdict, a reviewing court must be deferential to the fact finder, i.e., careful not to invade the province of the jury to assess the credibility and weight of the evidence. Id. at 133, 135; *De Los Santos v. State*, 918 S.W.2d 565, 569 (Tex. App.—San Antonio 1996, no pet.). We reverse only when the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust, i.e., when the jury's finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Clewis*, 922 S.W.2d at 135 (citing *Meraz v. State*, 785 S.W.2d 146, 149 (Tex.Crim.App.1990)). This standard grants the appropriate deference to the jury's verdict and prevents the reviewing court from substituting its judgment for that of the jury. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

In light of this standard, we cannot say that the jury's finding – that Jordan used his hands in a manner capable of causing serious bodily injury – is so contrary to the evidence as to be clearly wrong and unjust. We overrule Jordan's point of error and affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Sears, Cannon, and Lee.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee sitting by assignment.