Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00827-CR

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DAVID EARL GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 785,389

O P I N I O N

David Earl Green, appellant, was convicted for the felony offense of injury to a child under § 22.04 of the Texas Penal Code. He was sentenced to forty years imprisonment and given a $10,000.00 fine. Appellant now challenges the verdict on four points of error: (1) the evidence is legally insufficient to prove intent or knowledge; (2) the court erred in overruling appellant's objection to the introduction of facts outside the record; (3) appellant was denied his right to effective assistance of counsel by his attorney's failure to object to an attack over the shoulder of defense counsel; and (4) appellant was denied his right to effective assistance

of counsel by his attorney's failure to object when the prosecutor gave her opinion of appellant's guilt and injected prejudicial unsworn testimony. For the reasons hereinafter set out, we affirm the conviction.

Background

On June 9, 1997, Rosalyn Barnett ("Rosalyn") went to work and left her fifteen month old daughter, Avigayil Barnett ("Avigayil") with appellant's mother, Daisy Green. Rosalyn sometimes left Avigayil alone with appellant. Rosalyn stated that, as far as she could tell, appellant was kind to her child.

On the day in question, Rosalyn came home during her lunch break, and the baby appeared happy and healthy. While Rosalyn was there, appellant's mother ran home to meet some delivery men. When Rosalyn left, appellant was babysitting Avigayil. Rosalyn called to check in around 3:00 p.m., and appellant said the baby was fine. Around 5:00 P.M., appellant called Rosalyn to tell her the baby was acting funny and did not appear to be breathing. He told her Avigayil had fallen off the bed. Rosalyn instructed appellant to call 911.

When the paramedics arrived at the house, appellant was waiting at the end of the driveway with the baby. He told the paramedics that the child had earlier stopped breathing for a while but was fine now. The paramedics noticed Avigayil was still not breathing and took her into the ambulance to check her out.

Avigayil did not suffer a skull fracture. She did suffer from subdural hemorrhaging, subarachroid hemorrhaging, retinal hemorrhaging, and hemorrhaging at the base of the brain. Several doctors testified that her injuries were consistent with "shaken baby" syndrome and not with falling a long distance.

At trial, appellant said he was playing with Avigayil in the bedroom by tossing her into the air. He accidently failed to catch the child on one toss and Avigayil hit the floor. Avigayil stopped breathing. Appellant blew on Avigayil's face and tapped his fingers on the wall to get

her to breathe. When these failed, he shook her gently. Appellant had made three prior conflicting statements to police and medical personnel about how the injuries occurred.

Legal Sufficiency

In his first point of error, appellant argues that the evidence is legally insufficient to prove that appellant intentionally or knowingly caused serious injury to Avigayil Barnett.

In determining whether the evidence is legally sufficient, we must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review applies to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 159 n.6 (Tex. Crim. App. 1991). In our review we do not re-evaluate the weight and credibility of the evidence but assess only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

To find a defendant has the culpable mens rea to satisfy Texas Penal Code § 22.04, involved here, the court must direct the jury's attention to the results of a defendant's conduct. *See Morales v. State*, 853 S.W.2d 583, 585 (Tex. Crim. App. 1993). The Court of Criminal Appeals has interpreted § 22.04 by addressing the allegations of an indictment which tracked the statute in *Beggs v. State*, 597 S.W.2d 375 (Tex. Crim. App. 1980). The Court held that the phrase "'[1] intentionally and [2] knowingly engage in conduct that caused serious bodily injury' was an allegation (1) that it was her conscious objective or desire to cause serious bodily injury and (2) that she was aware that her conduct was reasonably certain to cause serious bodily injury." *Id*. at 377. Therefore, injury to a child is a result-oriented offense. *See Haggins v. State*, 785 S.W.2d 827, 828 (Tex. Crim. App. 1990).

Ordinarily, intent must be inferred from the acts of the accused or the surrounding circumstances in the absence of a judicial confession. *See Ledesma v. State*, 677 S.W.2d 529, 531 (Tex. Crim. App. 1984); *Morales v. State*, 828 S.W.2d 261, 263 (Tex. App.—Amarillo

1992), *aff'd*, 853 S.W.2d 583 (Tex. Crim. App. 1993). Intent can be shown by evidence of severe injuries and the application of significant force. *See Morales*, 828 S.W.2d at 263; *Butts v. State*, 835 S.W.2d 147, 151 (Tex. App.—Corpus Christi 1992, pet. ref'd). The State argues that intent can be inferred from the severity of the injuries and the significant force that had to have been applied. Two doctors testified that Avigayil's injuries were consistent with shaken baby syndrome in which the shaking has to be extremely violent, not just gentle or even pretty vigorous shaking.[1] These doctors, as well as the doctor who performed the autopsy, testified that it was extremely unlikely that Avigayil would suffer these injuries from a long fall. Additionally, one of the doctors testified that these injuries could not be caused by throwing a child into the air or playing with the child. Similarly, in *Butts*, the court found that a rational juror could have found that appellant had intent when one doctor testified that based on the severity of the injury, the child was either picked up and slammed or thrown intentionally; this was found in spite of two doctors testifying that the injuries could have occurred accidentally in an automobile accident or by falling. 835 S.W.2d at 149-50.

Additionally, appellant told four different stories as to how Avigayil was injured. From this, a rational juror could infer that appellant was aware his conduct was reasonably certain to cause serious bodily injury so he attempted to cover it up.

After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found intent or knowledge beyond a reasonable doubt. Therefore, we find the evidence is legally sufficient to prove that appellant intentionally caused serious injury to a child. We overrule this point of error.

Improper Jury Argument

In his second point of error, appellant contends that the trial court erred in overruling his objection to the portion of the prosecutor's closing argument attributing a motive to

[1] One doctor said Avigayil would have to be shaken "as vigorously as humanly possible" to incur the injuries she sustained.

appellant.

A proper jury argument can only contain the following elements: (1) a summation of the evidence; (2) reasonable deductions from the evidence; (3) a reasonable response to arguments by opposing counsel; and (4) a plea for law enforcement. *See Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996). If it appears the State has departed from one of these areas and engaged in conduct calculated to deny the defendant a fair and impartial trial, reviewing courts should reverse. *See id.* (citing *Johnson v. State*, 604 S.W.2d 128, 135 (Tex. Crim. App.1980)).

Here, the prosecutor argued

> It's not required and in a case like this you wouldn't expect that David Green went to Rosalyn Barnett's house that day and said I'm going to go kill that baby. *Something set him off. He was angry at her for some reason and at that moment...He had to have been angry enough at that moment and knowing what he was doing, he shook that child, he hit her or hit her against something and then she stopped breathing.*

This part of the jury argument does not depart from the four permissible areas of arguments but is a reasonable inference the jury could have drawn from Dr. Alpert's testimony that appellant must have shaken Avigayil as "vigorously as humanly possible" to inflict the injuries she suffered. Three doctors concluded the injuries were caused by shaken baby syndrome. The evidence also showed that Avigayil was healthy and happy in the early afternoon. It is reasonable to infer from the medical evidence of shaken baby syndrome that appellant was angry. We reject appellant's argument that there was no direct or circumstantial evidence presented as to appellant's intent during the time he injured Avigayil. We find the trial court did not err in overruling appellant's objection to the portion of the prosecutor's closing argument which inferred from the evidence a motive on the part of appellant. We overrule this point of error.

Ineffective Assistance of Counsel

In his third and fourth points of error, appellant asserts ineffective assistance of counsel based on his attorney's failure to object to segments of the prosecutor's closing argument.

Claims of ineffective assistance of counsel are evaluated under the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). The first step requires appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695.

The second step requires appellant to show prejudice from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d at 770, 772 (Tex. Crim. App. 1999). To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* Appellant cannot meet this burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998) (inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.—Corpus Christi 1992,

pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim). S*ee also Beck v. State,* 976 S.W.2d 265, 266 (Tex. App.—Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim). A record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See id*.

In our case, the record is silent as to the reasons appellant's trial counsel chose the course he did. Appellant did not file a motion for a new trial and therefore failed to develop evidence of trial counsel's strategy. The first prong of *Strickland* is not met in this case because we are unable to conclude that appellant's trial counsel's performance was deficient without evidence in the record.[2] Because appellant did not produce evidence concerning trial counsel's reasons for choosing the course he did and thus, rebutting the presumption of sound trial strategy, we cannot find that appellant's trial counsel was ineffective under these circumstances. We overrule appellant's points of error in this regard.

The judgment is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed November 24, 1999.

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[2] Since the first step of *Strickland* is not met, it is not necessary to engage in the second step.

Panel consists of Justices Yates, Fowler and Draughn.[3]

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[3] Senior Justice Joe L. Draughn sitting by assignment.