**Opinion filed June 25, 2020**

**In The**

# Eleventh Court of Appeals

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**No. 11-18-00142-CR**

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**ABOLANLE ABIMBOLA AKPABIO, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 142nd District Court**
**Midland County, Texas**
**Trial Court Cause No. CR48181**

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## M E M O R A N D U M  O P I N I O N

The jury convicted Abolanle Abimbola Akpabio of abandoning a child. *See* TEX. PENAL CODE ANN. § 22.041 (West 2019). The jury assessed her punishment at confinement for a term of one year in the State Jail Division of the Texas Department of Criminal Justice. *See id.* § 22.041(d)(1) (offense is a state jail felony if the actor abandons the child with the intent to return for the child). After finding that Appellant was eligible for community supervision, the jury recommended that her

period of confinement be suspended and that Appellant be placed on community supervision. In accordance with the jury's recommendation, the trial court suspended the imposition of the sentence and placed Appellant on community supervision for a period of two years. Appellant challenges her conviction in two issues. We affirm.

*Background Facts*

The State charged Appellant with abandoning her two-year-old daughter, I.A., with the intent to return. The State alleged that she left the child alone for at least an hour.

Martin Galvan was working at the Andrews Square Apartments East as a carpet cleaner on September 24, 2016. He testified that he observed a young girl walking in the road at the apartment complex. Galvan estimated the girl to be two years old. He picked up the girl and called 9-1-1. Galvan testified that the girl was only wearing a shirt and that she had grass burrs on her hands and leg. He took the girl to the office of the apartment complex. He also took off his shirt and placed it on the girl to provide her with additional clothing while waiting on the police to arrive.

Sergeant Demetrius Lee and Officer Zachary McCammond of the Midland Police Department responded to the apartment complex. Sergeant Lee testified that the apartment complex is located in an area with very busy traffic. Since no one at the apartments knew the child, the officers contacted Child Protective Services. The officers testified that the child's mother, Appellant, eventually arrived approximately one hour after they had arrived at the apartment complex.

Officer McCammond interviewed Appellant. She told him that the child was asleep in her apartment and that Appellant did not want to wake her. Appellant decided to leave the child sleeping in the apartment while she walked to two stores. Appellant told CPS worker Josh Britton that the child was sick and that she left to

get medicine for the child. Sergeant Lee testified that one of the stores was a couple of miles away.

Officer McCammond arrested Appellant for abandoning the child. He testified that he believed that Appellant left the child in an unreasonable risk of harm for the following reasons:

> Well, she was left alone. I checked the lock on the front door of the apartment. It was real easy to manipulate, which is, I believe, how the child got out. It was a dead bolt.
>
> And then, outside the apartment, she was exposed to Midland Drive and Andrews Highway, which are both very -- they're roadways with a lot of vehicle traffic, as well as whoever was out in the apartment complex and the adjoining areas; and she didn't have food or water or clothing beyond the T-shirts.

Officer McCammond further noted that the apartment was located on the second floor of the apartment complex.

*Analysis*

In her first issue, Appellant challenges the sufficiency of the evidence supporting her conviction. We review a challenge to the sufficiency of the evidence under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the

sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict and defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

A person commits the offense of abandoning a child if, "having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm." PENAL § 22.041(b). Abandon means to "leave a child in any place without providing reasonable and necessary care for the child, under circumstances which no reasonable, similarly situated adult would leave a child of that age and ability." *Id.* § 22.041(a).

Appellant asserts that the evidence did not show that her actions were "per se dangerous" or that they were different than what a reasonable, similarly situated adult would do. She contends that, while she left the child home alone, it was to obtain medicine for the child. Appellant additionally asserts that there was no evidence that the child was actually in danger or that Appellant could have expected that the child would have been in a dangerous situation. She contends that there was no evidence that she was aware that her child could unlock the door, turn the doorknob, and walk outside.

We disagree with Appellant's assessment of the evidence. Section 22.041 is intended to protect vulnerable individuals. *Rey v. State*, 280 S.W.3d 265, 268 (Tex. Crim. App. 2009). Children under the age of six are particularly vulnerable. *See Henderson v. State*, 962 S.W.2d 544, 562 (Tex. Crim. App. 1997). This case involves a child that was approximately thirty-three months old. A child less than

three years old is incapable of caring for herself for an extended period of time if left home alone. Thus, we disagree with Appellant's contention that a reasonable, similarly situated adult would leave a child of that age and ability alone even if the adult did so to obtain medicine for the child.

Moreover, the child actually left the apartment and walked down a flight of stairs in a state of undress in a high-traffic area. Appellant and the child are quite fortunate that a Good Samaritan found the child before something much worse happened. Furthermore, at least an hour elapsed before Appellant returned to the child.

As the sole judge of the weight and credibility of the evidence, the jury could conclude that a reasonable, similarly situated adult would not have left a child of I.A.'s age and ability alone in her home. *See* PENAL § 22.041(a). Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the jury could have found, beyond a reasonable doubt, that Appellant intentionally abandoned I.A. in a place under circumstances that exposed her to an unreasonable risk of harm. *See id.* § 22.041(b). Because the evidence is legally sufficient to support the jury's verdict, we overrule Appellant's first issue.

In her second issue, Appellant contends that the trial court erred by denying her request to offer a definition of "neglectful supervision." The ruling occurred during the questioning of Britton. The trial court had previously permitted Appellant to ask Britton about the findings made by CPS with respect to the incident. Britton testified that CPS had "ruled out" neglectful supervision. Britton explained that CPS determined that it was an isolated incident and that the agency did not feel that further supervision by the agency was needed. He also stated that the standards that CPS uses are different than criminal standards. Appellant's trial counsel then asked Britton, "[D]o you know what the definition of neglectful supervision is?" The trial court sustained the prosecutor's objections on the basis of relevance.

Whether to admit evidence at trial is a preliminary question to be decided by the trial court. TEX. R. EVID. 104(a); *Tienda v. State*, 358 S.W.3d 633, 637–38 (Tex. Crim. App. 2012). We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Id.* (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)).

The State contends that Appellant did not preserve error because Appellant's trial counsel did not provide the trial court with the definition of negligent supervision that it sought to offer at trial. To adequately preserve error in a trial court's exclusion of evidence, the substance of the excluded evidence must be shown by an offer of proof unless it is apparent from the context of the questions asked. *See* TEX. R. EVID. 103(a)(2); *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009). We conclude that Appellant preserved error on this issue because it is apparent that Appellant wanted to admit the definition of neglectful supervision used by CPS. *See* TEX. FAM. CODE ANN. § 261.001(4) (West Supp. 2019); *see also* 40 TEX. ADMIN. CODE § 700.465 (2020) (Dep't of Family & Protective Servs., What is neglectful supervision?) (indicating that "neglectful supervision" for CPS investigations is a subset of neglect as defined in Section 261.001(4) of the Family Code).

To be admissible at trial, evidence must be relevant. TEX. R. EVID. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401.

The standard used by CPS for neglectful supervision is not the same standard used by the Penal Code to define the offense of abandoning a child, which is the offense for which Appellant was convicted. Furthermore, neglectful supervision is

different from abandonment as reflected in the Administrative Code. *Compare* 40 TEX. ADMIN. § 700.465 (entitled "What is neglectful supervision?"), *with* 40 TEX. ADMIN. § 700.463 (entitled "What is abandonment?"). The Family Code's definition of neglect as it relates to abandonment requires a showing that the parent or guardian did not intend to return. *See* FAM. § 261.001(4)(A)(i). Section 22.041(b) of the Penal Code does not have this requirement. *See also* PENAL § 22.041(d)(1).

Because the CPS standard for neglectful supervision and abandonment are not the same as the standard for abandonment set out in Section 22.041(b) of the Penal Code, the trial court did not abuse its discretion by sustaining the prosecutor's relevancy objections. We overrule Appellant's second issue.

*This Court's Ruling*

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

June 25, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.