

Affirmed and Opinion filed March 9, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00419-CR

BRYAN KEITH KANGAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Cause No. 9555**

OPINION

A Chambers County jury found Bryan Keith Kangas guilty of intentionally and knowingly causing serious bodily injury with a deadly weapon to D. K., a child younger than fifteen years of age and sentenced him to fifty years in the Texas Department of Criminal Justice–Institutional Division. Bryan appeals his conviction with eight issues. In his first six issues, Bryan argues the evidence is legally and factually insufficient to support the verdict. In issues number seven and eight, Bryan claims the submission of the deadly weapon issue during the punishment phase violated his state and federal due process. We affirm.

BACKGROUND FACTS

Dorrace and Bryan were married and had one child, D.K. who was four months old.

On the morning of the incident, the parents of the children Dorrace was baby-sitting, William and Sheri Kangas, came to pick up their children. At the same time, Bryan came home from working the graveyard shift.

While William and Sheri were at the house, D.K. was held by everyone. Each person later recalled D.K. had no bruises, bumps, or abnormalities.

As Dorrace was saying good-bye to William and Sheri's children, Bryan insisted on putting D.K. down for a nap. He and the baby were together for not more than ten minutes. When his wife came to bed, he was already there, underneath the covers and she noticed he had a really odd look on his face.

Shortly thereafter, D.K. began screaming.

Although he was in bed, and his wife was standing by the baby's bedroom, Bryan insisted on checking on D.K. He brought her to Dorrace, and there was a huge lump on the left side of her head. They rushed D.K. to the hospital.

Doctors discovered D.K. had suffered a subdural hematoma and a comminuted skull fracture, i.e., her skull was crushed into numerous pieces.

During their stay at the hospital, Bryan knelt in front of Dorrace and told her it was all his fault because he should have never put the baby down, and the baby would be taken away from him. Bryan also said his daughter would not have been hurt if he did not come home and his wife's parents were going to think he did it, and he was going to jail.

At trial, two pediatricians testified D.K.'s depressed comminuted skull fracture and subdural hematoma created a substantial risk of her death. These doctors testified D.K.'s injuries were the result of a significant amount of force. One doctor testified only six out of a thousand of skull fractures are as serious as D.K.'s injury. The other doctor testified that the force needed to cause this injury was similar to injuries from a highspeed car accident or a multiple story fall. These experts concluded D.K.'s injuries were inflicted when Bryan was in her room, immediately before she was taken to the hospital.

Neither the police nor the grand jury were able to determine what instrument Bryan used to cause D.K.'s injuries.

In his first six issues, Bryan argues the evidence is legally and factually insufficient to prove beyond a reasonable doubt he caused his daughter's serious bodily injury with a deadly weapon. *See* TEX. PEN. CODE ANN. § 22.04 (Vernon 1994). Section 22.04 of the *Texas Penal Code*, which makes it a crime to cause injury to a child, states:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . :

(1) serious bodily injury;

TEX. PEN. CODE ANN. § 22.04 (Vernon 1994). Additionally, "deadly weapon" means "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). "Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement" TEX. PEN. CODE ANN. § 1.07(a)(46) (Vernon 1994).

In reviewing Bryan legal sufficiency issues, we answer the question, "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." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis on "any" in original; other emphasis added); *Malik v. State*, 953 S.W.2d 234, 236-37 (Tex. Crim. App. 1997). This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986); *Myles v. State*, 946 S.W.2d 630, 636 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

The jury is the *exclusive* judge of the credibility of the witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). The jury is also permitted to weigh the evidence and draw reasonable inferences therefrom. *See Jackson*, 443 U.S. at 319. Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.*

When reviewing for factual sufficiency, we consider all of the evidence, without the prism of “in the light most favorable to the prosecution,” and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although we do not view the evidence favorable to the prosecution, we continue to give deference to the jury’s findings. *See Cain v. State*, 958 S.W.2d 404, 407-08 (Tex. Crim. App. 1998).

Bryan argues because there was no direct evidence of Bryan’s actions, there was no evidence he intentionally or knowingly caused his daughter’s injury. We disagree. Bryan’s mental state can be established by circumstantial evidence, and may be inferred from his acts, words, and conduct. *See Chambers*, 711 S.W.2d at 245; *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. [Panel Op.] 1982). Plus, the cause of the injury may be established by expert medical testimony and by circumstantial evidence. *See Hines v. State*, 515 S.W.2d 670, 673 (Tex. Crim. App. 1974). Thus, the medical testimony about the significant force used to inflict D.K.’s injuries will permit the jury to infer Bryan’s intent. *See Barcnes v. State*, 940 S.W.2d 739, 744 (Tex. App.–San Antonio 1997, pet. ref’d).

Bryan also argues the State did not prove he used or exhibited a deadly weapon during the crime. Bryan was indicted for injuring his daughter’s head “by manner and means unknown to the grand jury.” *See Matson v. State*, 819 S.W.2d 839, 847 (Tex. Crim. App. 1991). Because of this indictment, the State did not have to prove how Bryan inflicted his daughter’s injuries.

With the manner and the means of the injury unknown, Bryan argues there cannot be a deadly weapon finding. We disagree. Use of an unknown object will support a deadly weapon finding. *See Mixon v. State*, 781 S.W.2d 345, 346-47 (Tex. App.–Houston [14th Dist.] 1989) *aff’d* 804 S.W.2d 107, 108 (Tex. Crim. App. 1991) (The Court of Criminal Appeals expressly adopted this Court’s analysis); *see Regan v. State*, 7 S.W.3d 813 (Tex. App.–Houston [14th Dist.] 1999, no pet. h.). There is “nothing in the reasoning of prior deadly weapon cases that would preclude a deadly weapon finding simply because the weapon is not specifically known.” *Id.* “A deadly weapon is ‘anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.’” *Id.*; *see* TEX. PEN. CODE ANN. § 1.07(a)(46). “A weapon or instrument is deadly if by its use or intended use it is capable

of inflicting death or serious bodily injury.” *Id.* (citing *Parrish v. State*, 647 S.W.2d 8, 11 (Tex. App.–Houston [14th Dist.] 1982, no pet.)). D.K.’s pulverized skull was the result, according to the medical experts, of a substantial force, akin to a vehicle collision or a fall from a multiple story building. Thus, the evidence is legally and factually sufficient to find that a deadly weapon was used or exhibited to cause the child’s multiple injuries. Because we have found the evidence legally and factually sufficient to support the jury’s verdict, we overrule Bryan’s first six issues.

In his last two issues, Bryan argues he was denied his state and federal due process rights. We disagree. The trial court charged the jury with the following parole instructions during the punishment phase of the trial:

Under the law applicable in this case, if you have answered the preceding deadly weapon issue “Yes,” if the defendant is sentenced to a term of imprisonment, he will not be come eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

Under the law applicable in this case, if you have answered the preceding deadly weapon issue “No,” if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or 15 years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

Bryan argues the submission of this alternative parole instruction violated his due process guarantees because the instructions influenced the jury to answer the deadly weapon issue affirmatively.

To review alleged jury charge error, where, as here, there is no objection to the charge, we use a two-step process: (1) Does the jury charge contain error, and (2) Whether “egregious harm” resulted from the error to require reversal. *See Mann v. State*, 964 S.W.2d 639, 641 (Tex. Crim. App. 1998); *Abdnor v. State*, 871 S.W.2d 726, 731-32 (Tex. Crim. App. 1994). Under this review, “egregious harm” means “the error must have been so harmful that the defendant was denied ‘a fair and impartial trial.’” *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). In going through this two-step process, we must review the actual degree of harm in light of the entire jury charge. *See Hill v. State*, 881 S.W.2d 897, 905 (Tex. App.–Fort Worth 1994) *aff’d* 913 S.W.2d 581, 586 (Tex. Crim. App. 1996). We must also consider the state of the evidence at trial, including the contested issues and the

weight of the probative evidence, the argument of counsel and any other relevant information revealed by the trial record as a whole.

The evidence revealed D.K. suffered a depressed comminuted skull fracture as a result of being struck by some object. Also, the medical expert testimony supported the jury's conclusion that D.K. was injured, by an object, immediately before she was taken to the hospital. Therefore, we hold Bryan did not suffer "egregious harm" as a result of the submission of the alternative parole instructions. Accordingly, we overrule Bryan's seventh and eighth issues.

Having overruled all of Bryan's issues, we affirm the trial court's judgment.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed March 9, 2000.

Panel consists of Justices Robertson, Cannon, and Lee.*

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* Senior Justices Sam Robertson, Bill Cannon and Norman Lee sitting by assignment.