Fourth Court of Appeals
San Antonio, Texas

OPINION

Nos. 04-18-00360-CR & 04-18-00361-CR

Deandre Jerome **DORCH**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2016-CR-9222B & 2016-CR-9223B
Honorable Laura Lee Parker, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Rebeca C. Martinez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: November 27, 2019

AFFIRMED

Deandre Jerome Dorch appeals his convictions for injury to a child by omission and abandoning a child in two related cases. We affirm the trial court's judgments.

BACKGROUND

At approximately 11:45 p.m. on Thursday, April 28, 2016, Bexar County Sheriff Deputies Luis Estrada and Juan Aldaco were called to Dorch's duplex for a welfare check based on a report of possible child abuse. Several minutes after they knocked on the front door, a child asked who was there without opening the door. After the officers announced their identity, there was no

further response from inside the home. The officers walked around the side alley of the home where they encountered two neighbors, Michelle Williams and Gregory Harris. Williams stated she called 911 because a child had been crying in the backyard next door since the afternoon. Harris told the officers he used a ladder to look over the fence and saw a child tied to the garage door. Deputy Estrada climbed the ladder and looked over the fence into the backyard. He saw a little girl standing up with her hands tied to a door in a position that prevented her from dropping to her knees or sitting down. The officers then decided to make a forced entry and Estrada kicked in the front door. They found six children inside the home, but no adults. When they asked where the parents were, the oldest child, who was 11 or 12 years old, refused to answer the officers.

After conducting a quick sweep inside the house, the officers walked through to the backyard. They found the little girl, N.T., tied to a back door with a pink dog leash with her hands "crisscross[ed] over her head," keeping her in a standing position. Another officer cut the leash and freed her while Deputy Estrada picked her up. N.T. appeared to be three or four years old. As they were taking the girl into the house, they noticed a little boy, J.T., also about three or four years old, lying on his side in the corner of the small yard; he was not moving, quiet, and seemed "really weak." His ankle was chained to a dog spike in the ground and his shorts were down around his knees; he was lying on gravel with feces all around him. A soaking wet stuffed animal was laying nearby. A third officer, Deputy Carrillo, freed J.T. and the officers carried both children, wearing wet clothes, into the house where they propped them up with pillows on a couch.[1] Deputy Estrada testified that after the children were placed on the couch they did not move, sitting there as if they were "stuffed animals." EMS arrived and began treating N.T. and J.T.

[1] While Deputies Estrada and Carrillo were in the process of freeing the children, Deputy Aldaco took a few photographs on his cell phone to document the scene and the children's circumstances.

Porucha Phillips, the mother of the six children inside the house, arrived home shortly. Sometime later, Dorch arrived home from work and told the officers he had received a call from his eldest daughter saying the police were at the house. Phillips was arrested at the scene. Dorch was detained and questioned at the Sheriff's Office but then released. One week later, investigators conducted a second interview with Dorch in which he stated that he was the person who took care of the children and disciplined them during the days because he worked at night; he had given N.T. and J.T. a bath in the morning of the day they were discovered. Dorch also stated that N.T. and J.T. had been left at his home by their mother, Cheryl Reed, who was Porucha's sister, in February or March.

In September 2016, Dorch was indicted in two separate cases, one for each child complainant, for injury to a child/serious bodily injury by omission and for abandonment of a child/risk of bodily injury.[2] Dorch pled not guilty and proceeded to trial. The jury found Dorch guilty on both counts in each case. After Dorch pled true to enhancement allegations, the trial court imposed a sentence of 65 years' imprisonment in each case to be served concurrently. Phillips and Reed were also indicted and pled guilty, receiving sentences of 50 years' imprisonment and 10 years' imprisonment, respectively.

DISCUSSION

Dorch raises four issues on appeal. First, he challenges the sufficiency of the evidence to prove he had the culpable mental state necessary to support his convictions for the injury to a child by omission offense and the abandonment offense in each case. Second, Dorch argues the trial court erred in denying his motion to suppress statements he made during a second police interview,

[2] The State originally indicted Dorch on a third count of injury to a child by affirmative conduct in both cases but waived that count before trial. As a result, the counts of the indictments were renumbered. We refer to the counts as renumbered in this opinion.

asserting it was a custodial interrogation and he was entitled to receive a *Miranda* warning. Third, Dorch argues the trial court erred in denying two requested jury instructions: (i) a specific intent instruction, and (ii) a lesser-included offense instruction. Finally, Dorch challenges the admission of expert testimony on a specific question, arguing the expert's answer was pure speculation and was unreliable.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Dorch argues the evidence is legally insufficient to support the jury's finding that he knowingly or intentionally committed the offense of injury to a child by omission and the offense of abandonment as charged in the indictments. Dorch contends the evidence showed it was Phillips who struck and otherwise abused N.T. and J.T., and there is no evidence to support an inference that he knew about her abuse or restraint of the children in the backyard.

Standard of Review

In reviewing the legal sufficiency of the evidence, we determine whether, viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). The essential elements of the crime are the elements of the offense as defined by a hypothetically correct jury charge, which is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). The law "as authorized by the indictment" consists of the statutory elements of the offense as modified by the charging instrument. *Id.*; *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

In determining whether the State met its burden under *Jackson v. Virginia*, we compare the elements of the offense, as defined by the hypothetically correct jury charge, to the evidence admitted at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). In conducting this analysis, we defer to the jury's assessment of the credibility of the witnesses and the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (jury may draw reasonable inferences from the basic facts to the ultimate facts). We determine whether the necessary inferences are reasonable based on the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). We presume that the jury resolved any inconsistencies in the evidence in favor of the verdict and defer to that resolution. *Id.* at 448-49; *Curry*, 30 S.W.3d at 406. In assessing sufficiency, we consider all of the admitted evidence, even if it was improperly admitted. *Thomas*, 444 S.W.3d at 8.

Injury to a Child By Omission

A person commits the offense of injury to a child if he "intentionally, knowingly, recklessly, or with criminal negligence, by act ***or*** intentionally, knowingly, or recklessly by omission, causes to a child . . . serious bodily injury." TEX. PENAL CODE ANN. § 22.04(a)(1) (emphasis added). With respect to an omission that causes serious bodily injury, which Dorch was charged with, the statute makes the omission an offense if: "(1) the actor has a legal or statutory duty to act; or (2) the actor has assumed care, custody, or control of [the] child . . . ." *Id.* § 22.04(b). Dorch was charged with having "assumed care, custody, or control" of N.T. and J.T. *See id.* § 22.04(d) (for purposes of an omission that causes serious bodily injury, the actor has "assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child"). Causing serious bodily injury by an omission, i.e., a failure to act, is a

first-degree felony when the actor "intentionally or knowingly" failed to act. *Id.* § 22.04(e) (if the actor was only "reckless," the offense is a second-degree felony). "Serious bodily injury" is defined in relevant part as "bodily injury that creates a substantial risk of death." *See id.* § 1.07(46); *see also id.* § 1.07(8) (defining bodily injury as "physical pain, illness, or any impairment of physical condition").

Count I of both indictments charged that,

> on or about April 28, 2016, Dorch did intentionally and knowingly, by omission cause SERIOUS BODILY INJURY to [J.T. and N.T.], a child who was fourteen (14) years of age or younger, and . . . HAD ASSUMED CARE, CUSTODY AND CONTROL OF [J.T. and N.T.] and FAILED TO PROVIDE PROTECTION, FOOD, SHELTER, AND MEDICAL CARE.

The jury charge tracked the language of the indictment. Thus, to convict Dorch as charged, the State had to prove that he: (1) assumed care, custody, or control of J.T. and N.T. and (2) intentionally or knowingly (3) caused them serious bodily injury by (4) failing to provide them with protection, food, shelter, or medical care. *Id.* § 22.04(a)(1). Although Dorch was charged with both "intentionally" and "knowingly" committing the offense of injury to a child, because the statute lists the culpable mental states in the disjunctive, the State was required to prove only "intentional" or "knowing" to satisfy the mens rea element of the offense. TEX. PENAL CODE ANN. § 22.04(a); *Tijerina v. State*, No. 13-11-00430-CR, 2012 WL 3525632, at *5 n.5 (Tex. App.—Corpus Christi-Edinburg Aug. 16, 2012, no pet.) (mem. op., not designated for publication). On appeal, Dorch challenges the sufficiency of the evidence to establish that he had the necessary mental state to cause, and did cause, N.T. and J.T. to suffer serious bodily injury rather than the lesser bodily injury.

"Intentionally" or "Knowingly" Caused "Serious Bodily Injury"

The relevant culpable mental states were defined in the jury charge in accord with the Penal Code definitions as follows:

> A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

See TEX. PENAL CODE ANN. § 6.03(a), (b). Injury to a child is a result-oriented offense; therefore, the culpable mental state relates "not to the specific conduct but to the result of that conduct." *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *Prescott v. State*, 123 S.W.3d 506, 510 (Tex. App.—San Antonio 2003, no pet.) (citing *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985)). The evidence is sufficient to support a conviction for injuring a child by omission "if the State proves ***either*** that a defendant intended to cause the injury through her omission ***or*** that she was aware that her omission was reasonably certain to cause the injury." *Tijerina*, 2012 WL 3525632, at *5 (emphasis added) (citing *Johnston v. State*, 150 S.W.3d 630, 636 (Tex. App.—Austin 2004, no pet.)); *see also Proo v. State*, No. 04-17-00645-CR, 2019 WL 1049338, at *14 (Tex. App.—San Antonio Mar. 6, 2019, pet. filed). "Stated another way, 'knowingly' causing the child's injury requires evidence that the defendant was aware with reasonable certainty that the result of serious bodily injury . . . would have been prevented had the defendant performed the act that was omitted." *Proo*, 2019 WL 1049338, at *14 (citing *Payton v. State*, 106 S.W.3d 326, 331 (Tex. App.—Fort Worth 2003, pet. ref'd)). The State must prove the child suffered the serious bodily injury ***because*** of the defendant's omission, e.g., failure to provide medical care. *See Payton*, 106 S.W.3d at 329 (the causal link may be proven through a reasonable inference based on the evidence) (emphasis added).

In conducting our review of the evidence, we therefore focus on whether the State presented sufficient evidence to prove that Dorch had the conscious objective or desire to cause N.T. and J.T. serious bodily injury through his omissions or was aware that his omissions were reasonably certain to cause the children serious bodily injury.

Neighbors' Testimony

In addition to the responding officers' testimony about the circumstances in which N.T. and J.T. were discovered, several neighbors testified that, during the two weeks prior to April 28, 2016, they heard children being hit and verbally abused in Dorch's backyard and heard the children crying outside during all hours of the days and nights. Rosemary Alvarado and her daughter Breanna lived in the duplex next door to Phillips and Dorch. Rosemary testified she generally got home from work at about 3:30 p.m. and she would hear "a lot of crying, [and] screaming" coming from little children next door from then on and into "all hours of the night"; she also heard the crying in the morning on her days off. Breanna testified that J.T. used to routinely come over to jump on the trampoline along with some of the other children from Dorch's house. Breanna did not see J.T. at all during the two to three weeks prior to April 28, 2016 and heard "a lot of crying" next door during that period. She described the crying as so loud she thought it was coming from her own daughter inside her house. Breanna stated she heard the crying at "midnight, 2:00 or 3:00 o'clock in the morning" and routinely during the daytime as well. Breanna explained that she remembered those specific times early in the morning because her boyfriend would come home from work and she would wake up.

Michelle Williams testified she "hung out" at Rosemary's house every day for "most of the day" and evenings during the two weeks before April 28, 2016. It was during that time that Williams began hearing "things that concerned her" from the backyard next door—children crying outside "day and night." Williams testified she heard a female voice yelling at a child while hitting the child and the child's crying in the backyard. Williams only heard the female voice once, which she recognized as Phillips's voice, and she never heard a male voice yelling in the backyard. The children's crying was "constant," "on a regular basis," "every other day" during the days and nights of the two-week period preceding April 28, 2016; the crying would sometimes stop but then start

up again. One time, when she was going home from Rosemary's at 2:00 a.m., Williams heard a child crying in the backyard.

With respect to April 28, 2016, Williams heard loud crying start at about 2:00 p.m. and continue in lower, weaker tones until late into the night; she never heard any adult go outside to check on the crying children. She testified it was "the same crying" she had been hearing for the past two weeks, but it lasted longer this time. Rosemary testified she had the day off and was sitting outside that afternoon with Williams and two male friends playing music and talking. They could hear the children next door getting hit and screaming. Even though Rosemary had tried to "mind her own business," she stated the crying lasted much longer than usual and "[t]he way they were screaming and crying and - - it sounded like they couldn't cry anymore." Although they were hesitant to get involved, Rosemary and Williams decided that night they had to call the police and did so from a nearby store. While they were waiting for the police to arrive, Gregory Harris, a friend of Rosemary's, climbed a ladder to look over the fence into the backyard and saw "a baby on the back door tied up . . . The other baby chained to the ground was laying down." The police arrived within five minutes and after being told about the crying children, they entered the Dorch house and rescued N.T. and J.T. Williams testified she told the officers she did not believe Dorch knew about the beatings because she never heard his voice outside. Williams also knew that Dorch worked nights and she thought he came home about 2:00 a.m. or 3:00 a.m. Williams testified she now believed the children had been tied up outside for the entire two-week period based on the consistent crying and "how they were found."

Dorch's Statements and Cell Phone

Bexar County Sheriff Detective Pete Gamboa initially interviewed Dorch in the early morning on April 29, 2016. He testified that Dorch was under investigative detention and was transported to the Sheriff's Office in handcuffs. Gamboa read him the *Miranda* rights. State's

Exhibit #220 (DVD) was admitted into evidence and played for the jury. Detective Gamboa stated the purpose of the interview was "information gathering" to establish who had care, custody, and control of the children and Dorch was released after the interview. Dorch had just gotten off work as a bartender and was wearing a striped uniform shirt. According to Detective Gamboa, Dorch's demeanor was "real lax" like "[h]e was really not concerned about anything"; he was very cooperative, not defensive, and answered all the questions. Dorch claimed no knowledge about "what was going on," stating that he had been at work. During the interview, Dorch stated that he and Phillips have been "steady" for three years, but he had known her for more than ten years. Three of the six children found inside the house are his biological children, but he "claims" all six children because he has raised them. Dorch did not mention the other two children, N.T. and J.T., but he did ask whether his dog was all right. Dorch indicated that he did not know what was going on because he had not talked to Phillips; he tried to call her and his eldest daughter that night but neither answered. He stated he did not go inside the house before he was handcuffed.

Dorch stated he typically drives to work and parks in the garage at home. Monday and Tuesday are his days off. On April 28th, a Thursday, Dorch drove to work but because his car was "acting like it wouldn't start," he asked a friend to drive him home. The friend dropped Dorch off at a nearby school and he walked home from there. When first told there were two children "in his backyard," Dorch denied knowing about any children other than his six children; he repeated that he had been at work. After being told that none of his six children were the ones in the backyard, Dorch replied, "[h]er sister's kids?" Dorch stated he last saw "Cheryl" three days earlier and only knew her by her first name. He then identified N.T. and J.T. by their first names. Dorch still did not express any concern about their welfare. Detective Gamboa did not tell Dorch the two children in his backyard were tied up and did not ask Dorch how long the children had been

outside. Dorch stated the last time he went in the backyard was Wednesday. Dorch was released at the end of the interview and transported home.

Sergeant Shawn Tobleman testified he conducted a second interview of Dorch on May 5, 2016 in order to "get a good timeline of events." Detective Gamboa was also present. The DVD of the recorded interview was admitted (SX #221) and played for the jury. The entire interview lasted for three hours and twenty-two minutes, including breaks. Dorch arrived voluntarily after his work shift and drove himself home after the interview ended. As discussed under the suppression issue, Dorch's cell phone was seized pursuant to a search warrant at the end of the interview.

During the second interview, Dorch explained his work schedule, stating he went to work at about 2:00 p.m. or 3:00 p.m. in the afternoon and the bar where he bartended closed at 1:00 a.m. or 1:30 a.m. He confirmed that his days off were Monday and Tuesday. Dorch admitted being the caretaker and disciplinarian for all the kids during the days before he went to work. Dorch stated that, "Porucha went to him if the kids really deserved a whipping." Dorch described his routine of feeding and bathing the children in shifts during the day and stated, "[a]ll the kids are in good health." He also described the sleeping arrangements of the six children in the house. According to Sergeant Tobleman, Dorch "made him[self] out to be kind of the Mr. Mom."

With respect to N.T., Dorch admitted noticing that her legs were swollen and stated he told Phillips it could be due to diabetes. Dorch stated he could not take N.T. to the hospital because he did not even know her last name. He also noticed that N.T. would "steal" food even though she had already been fed. As for J.T., Dorch noticed that he was behind in talking and counting for his age. During the last few days or weeks, J.T. "shut down" and would not talk; he also "pooped himself" as if he did not try or care. Dorch also stated that neither N.T. nor J.T. knew how to properly bathe themselves; they would just sit there when he placed them in the bathtub. He had

seen the old scars on N.T. and J.T. Dorch stated that when Cheryl was last there in March he caught her using a switch on her children; he stopped her and broke apart the switch. Dorch also stated that he knew N.T. and J.T. "needed better care." He wanted to take them to CPS, but he "left it up to P [Phillips]." Dorch explained his focus was on his own children and that N.T. and J.T. were "not my kids," and it was "not my place," "not my judgment call."

Dorch admitted last going outside into the backyard on Wednesday before he left for work. Dorch twice stated that he bathed N.T. and J.T. on Thursday morning, the day they were discovered, before he went to work. Dorch stated he did not notice any fresh wounds. When Sergeant Tobleman told him that N.T. and J.T. were found tied up in the backyard, Dorch simply stated that he did not want to get involved in a "he said, she said." Before Dorch was shown the photographs of N.T. and J.T. tied up in the backyard, he described the clothes J.T. was wearing that morning after his bath, which exactly matched those in the photograph of J.T. As for N.T., he stated she was wearing a different outfit after her bath than the sundress shown in her photograph. Dorch identified N.T. and J.T. in the photographs, and also identified the pink leash and the chain and eyebolt as items he recognized. Dorch was adamant that he did not use the chain and eyebolt for his dog, stating it was there in the backyard when he moved in. When Dorch was informed that a neighbor had said they heard children crying in his backyard, Dorch dismissed the credibility of the neighbor.

Deputy Mike Allen testified that the analysis of Dorch's cell phone confirmed that he called Phillips at 10:03 p.m. on April 28th and there was no answer. Contrary to Dorch's statement, the cell phone data showed that Dorch called and spoke with his eldest daughter several times that night before he arrived at the house: he called her at 10:04 p.m. and they talked for 1 minute, 5 seconds; he called her again at 10:06 p.m., with no answer; he called her at 10:59 p.m. and they talked for 44 seconds; and he called her at 12:03 a.m. and they talked for 1 minute, 51 seconds.

Dorch also made a series of short calls to his friend "Dro" in between the calls to his daughter until 12:28 a.m. Deputies Estrada and Aldaco testified they arrived at the house at about 11:45 p.m. and Dorch arrived "sometime later."

Weather Conditions

Meteorologist Alex Garcia testified that beginning on the Sunday prior to Thursday, April 28, 2016, the northeastern part of the city had rain "every day of that week, on and off." The area was under severe thunderstorm warnings as well, with heavy rain for at least three to four days, damaging winds of 45 to 60 mph and large 2.75-inch hail. Specifically, on Wednesday, April 27th, thunderstorms and rain moved across Bexar County from west to east and on Thursday, April 28th, there was some hail reported in Bexar County.

Deputy Janice Henry, a crime scene investigator, testified she collected the clothes from J.T. and N.T. at the hospital. Both sets of clothing were "exceptionally dirty and wet" and had "the smell from the rain." J.T. was wearing shorts and a sleeveless "mesh" tank top. N.T. was wearing a sundress. Deputy Henry was not asked to collect any underclothes; both children were wearing diapers in the hospital.

Medical Records, Photographs, and Expert Testimony

The two pediatricians who treated N.T. and J.T. in the hospital and at follow-up appointments testified that both children were malnourished and dehydrated, had scars as well as open wounds at risk of infection, and N.T. suffered from hypothermia from being left outside in the rain, all of which medical conditions placed them at "a substantial risk of death," i.e., amounted to serious bodily injury. Both children were also filthy and covered with insect bites. N.T. had severe edema in her legs and feet below her knees from being restrained in a fixed position which prevented her from sitting or lying down. Both doctors testified that, based on the duration and severity of N.T.'s edema, she was restrained in that manner for a period of "many, many hours, if

not days" and "more than seven hours and likely a few days." Photographs taken in the hospital and at follow-up visits along with the medical records for N.T. and J.T. were admitted through the doctors' testimony.

J.T.'s Physical Condition

Dr. James Lukefahr, a pediatrician specializing in child abuse, testified that he examined J.T. in the hospital on April 29, 2016. J.T. had "dozens upon dozens of scars from injuries . . . that had been inflicted with objects . . . looped [scars] as would be from belts or other objects like that" and "also a lot of straight line linear injuries . . . inflicted by flexible straight objects," indicating that J.T. had been "repeatedly physically abused over an extended period of time." He was "very dirty," with "caked on dirt in a lot of different parts of his body," and had insect bites. J.T. also had hair loss in patches consistent with hair being pulled out by himself or someone else. He was dehydrated and required IV fluids for about a day. The forensic nurse examiner who treated J.T., Betty Mercer, similarly testified to her observation of multiple scars, bruises, fresh wounds, and bug bites all over his body; his right ankle was also swollen where the chain was attached. When she asked J.T. questions, he talked in a low whisper that was hard to hear and understand and she could not get much patient history. Neither she nor Dr. Lukefahr obtained any information from J.T. about what had happened to him.

Dr. Lukefahr next examined J.T. two weeks later on May 13, 2016. He took more photographs of the healing injuries on J.T.'s face and body and documented the improvement in the swelling of his left hip. His final examination of J.T. was six months later in October 2016 after he had been in a stable, nurturing environment where he was "fed on a regular basis." Dr. Lukefahr testified that J.T. "had gained a tremendous amount of weight" even by the May 13th exam and "that pattern continued to October." In Dr. Lukefahr's opinion that indicated that J.T. "had been deprived of food prior to April 29th." He testified that J.T. exhibited "a lot of abnormal

behaviors around food that were characteristic of a child who has been deprived of food" and noted the foster mother reported on May 13th that both J.T. and N.T. "continually fished food out of the waste basket to eat, even though she was providing them with all the food they wanted." Dr. Lukefahr characterized that as an "ingrained behavior" pattern and noted the behavior continued for "quite some time, even after they were placed in foster care." Dr. Lukefahr also observed J.T.'s demeanor change from "very depressed and withdrawn" in the hospital to "a little bit more interactive and alert" by May 13th, and acting "like a normal little boy" at the October exam. His skin on his face and body was clear and healthy with no marks except for the remaining scars.

In his medical report, Dr. Lukefahr stated that based on his physical examination of J.T. he found "clear evidence of physical abuse and supervisional neglect" and concluded he was "likely a victim of emotional abuse, physical neglect and medical neglect." At trial, Dr. Lukefahr opined that, based on J.T.'s physical condition and the circumstances in which he was found, he suffered serious bodily injury with a substantial risk of death "but for" the medical intervention.

N.T.'s Physical Condition

Regarding N.T., Dr. Lukefahr testified he reviewed her hospital records and her exam "strongly suggested she had been through the same types of conditions" as J.T. She had "literally dozens of skin injuries, all - - all parts of her body, varying degrees of severity." N.T. also had hypothermia which occurs "when the body's temperature is abnormally low" and can cause death. In addition, N.T. had "very dramatic swelling of her legs and feet . . . below her knees" — edema, which is "fluid that's seeped out of the blood vessels into the soft tissues," causing swelling of the tissues. Dr. Lukefahr testified the edema was "from being restrained in a position where her legs and feet were dependent. In other words, immobilized so that her - - all of her body weight was above her legs and feet." Dr. Lukefahr explained, "[t]he most probable cause [of N.T.'s edema] was that she was restrained in a position where she couldn't lie down or sit down. She had to

remain with her body above her legs and feet for a very extended period of time, many many hours, if not days."

Dr. Sarah Northrup, a pediatrician in a child abuse fellowship under Dr. Lukefahr in 2016, testified that she examined N.T. in the hospital on April 29, 2016. N.T. was "very sick," hypothermic with a body temperature of "95, 96 degrees, which is cold for a child," and did not respond to questions. Dr. Northrup stated N.T. also had "multiple obvious injuries to her skin . . . of varying depths and . . . varying ages and various stages of healing," some of which had a loop pattern; the injuries were "not the type of injuries that kids get in the scope of normal childhood play," but rather from "forced trauma." N.T. was "head-to-toe covered" in these injuries, "front and back," including her "protected areas" of the pubis and buttocks which are normally covered by a diaper or underwear. N.T. also had "a lot" of insect bites on her arms and legs. N.T. appeared to be the appropriate weight for an 18-month old child, but she was twice that age. Her blood work showed she was anemic. Dr. Northrup explained that the most common cause of anemia in children is "nutritional status" such as not getting enough food or iron-rich food. Dr. Northrup further stated that when the body is repeatedly injured, it stays in an inflammatory state which can cause anemia in children. N.T. also had some hair loss, whether from pulling or malnutrition. N.T. was dehydrated, which indicates an extended period without fluids. Dr. Northrup confirmed that it would take longer for a child to become dehydrated if they were not active, "[f]or example, if they were restrained and couldn't be moving around."

With respect to N.T.'s edema in her legs and feet, Dr. Northrup stated it can be a result of restricted movement and is consistent with her being restrained. N.T. had "dependent edema" in which fluids flow downward to the bottom point, i.e., the feet, if the person cannot sit down or walk around. In Dr. Northrup's opinion, the most likely cause of N.T.'s edema was "due to her restricted motion for a prolonged period of time" consistent with the position in which she was

found with “her arms above her head and not able to sit down or lay down.” Dr. Northrup stressed that N.T.’s edema was “significant” due to its duration — it “lasted for weeks.” Dr. Northrup testified N.T.’s edema was not the type of edema that would occur after only seven hours. She went on to state that she felt comfortable opining that N.T. was restrained for “more than seven hours” and “more along the lines of days” because it was “truly remarkable edema and outside the context of regular routine activities.” Dr. Northrup also stated that children with malnutrition get edema much easier than children with appropriate nutrition.

At N.T.’s follow-up visit on May 13th, Dr. Northrup observed that she had gained about four pounds, which represented weight gain of 8.5 times normal weight gain for a three-year old; it was “catch-up weight.” Dr. Northrup explained that type of weight gain occurs when an infant or toddler has had weight loss or failure to thrive for any reason. It showed that N.T. was able to gain weight with proper food intake and that she had been subjected to a prolonged episode of malnutrition of weeks, not days. N.T. still had some edema in her lower limbs and feet at the May 13th exam, but by the October 28, 2016 exam her edema had fully resolved.

In conclusion, Dr. Northrup opined that when N.T. came into the hospital on April 29th, her overall condition posed a substantial risk of death and “but for” the first responders’ intervention, N.T. was at a substantial risk of dying. Hypothermia alone can cause death in a three-year old child. When asked whether she could opine on N.T.’s condition as far back as Wednesday April 26th, Dr. Northrup affirmed that she could in the context of this case, “[b]ecause we’re looking at a child that was exhibiting signs of being outside and tied up for an extended period of time. So that could include the 26th.” Dr. Lukefahr also opined that N.T., like J.T., suffered serious bodily injury and “but for first responders getting her medical help, . . . she was in substantial danger of dying.”

<u>Application of Law to Evidence</u>

Dorch argues the State failed to prove that he knew that Phillips was abusing J.T. and N.T. or that he "was otherwise culpable" for the offenses. Dorch stresses that the neighbors testified they often heard the children crying in the afternoon and at night when he was at work; no one testified they heard a male voice during the beating episodes, but one neighbor did identify Phillips's voice; and he was at work when the officers were called and had no knowledge of what was going on at home. He cites his first interview in which he "did not appear to know that there was any issue with the children, instead asking about his dog." With respect to the forensic analysis of his cell phone, he argues it naturally showed incoming and outgoing calls between him, his daughter, and Phillips that night. Dorch's argument that he lacked knowledge or intent focuses on the evidence favorable to him and ignores the jury's ability to believe or disbelieve witnesses, resolve inconsistencies in the evidence, and draw reasonable inferences from *all* the evidence, including the medical evidence and visual images of J.T. and N.T. *See Murray*, 457 S.W.3d at 448-49 (reviewing court determines whether the jury's inferences are reasonable based on the cumulative force of the evidence viewed in the light most favorable to the verdict).

Mental state is rarely proved through direct evidence and almost always depends on circumstantial evidence. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Smith v. State*, 56 S.W.3d 739, 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Thomas*, 444 S.W.3d at 8 (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)); *Fields v. State*, 515 S.W.3d 47, 52 (Tex. App.—San Antonio 2016, no pet.) (circumstantial evidence alone may be sufficient to uphold a conviction). Knowledge and intent may be inferred from any facts which tend to prove their existence, "including the acts, words, and conduct of the accused, [] the method of committing

the crime and from the nature of wounds inflicted on the victims." *Hart*, 89 S.W.3d at 64 (quoting *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)).

Here, Dorch's own statements revealed his "caretaker and disciplinarian" role with the children. He explained how he fed and bathed the children in the daytime before he went to work in the early afternoon; he knew their sleeping arrangements within the house. He admitted seeing the scars and injuries on N.T. and J.T. when he bathed them. He described how N.T. would sneak in the kitchen and "steal" food. Dorch's statement also provided the time period for how long N.T. and J.T. had been at his house and under his care — Cheryl left them there in "February or March". Dorch's statement that he wanted to take them to CPS and knew they "needed better care" goes to show his knowledge of their physical condition. He also admitted knowing about N.T.'s swollen legs and discussed the idea of taking her to the hospital. He further admitted knowledge of J.T. "shutting down" his communication and not controlling his bowels.

With respect to the week of April 28th, Dorch stated he was off work on Monday and Tuesday; last went into the backyard on Wednesday; and bathed N.T. and J.T. on Thursday morning. By his own admissions, he was caring for N.T. and J.T. during the same period of time the medical experts testified they were malnourished, dehydrated, injured by beatings, restrained outdoors for a prolonged period, and in need of medical care. According to the medical experts and meteorologist, N.T. and J.T. were restrained outside in unsafe, wet conditions for "more than seven hours" and likely "days" during the last week of April; they were covered in cuts and bruises and insect bites and caked in dirt. N.T. had severe edema and hypothermia. Yet, according to Dorch, he went into the backyard on Wednesday and bathed them on Thursday morning — and did not provide them with medical care. The jury could have resolved these inconsistencies in the evidence by finding Dorch's claim of lack of knowledge to be not credible. The photographs of N.T. and J.T. are relevant and probative evidence for the purpose of refuting Dorch's claim that

he had no knowledge that they needed food, shelter, protection or medical attention when he admitted last seeing them on the morning of their rescue. *See Sifuentes v. State*, No. 04-12-00607-CR, 2013 WL 3422916, at *5 (Tex. App.—San Antonio July 3, 2013, no pet.) (mem. op., not designated for publication) (citing *Madden v. State*, 799 S.W.2d 683, 696-97 (Tex. Crim. App. 1990)). As noted in *Sifuentes*, "[t]he photographs are strong evidence that [Dorch] must have known something was going on with [N.T. and J.T.] and chose to ignore it." *Id.* at *6.

In addition, both N.T. and J.T. were malnourished and dehydrated. These are conditions that require a prolonged period to develop. *See Proo*, 2019 WL 1049338, at *14 (recognizing that some crimes such as injury caused by failure to provide nourishment, by their nature, do not occur on a particular day, but rather occur over a period of time). J.T. required a day-long IV infusion to combat his dehydration. Both N.T. and J.T. exhibited "abnormal behavior" around food in their subsequent foster homes and both quickly gained a lot of weight within two weeks after their rescue. This evidence supports a reasonable inference that Dorch, as caretaker for the children, was aware of N.T.'s and J.T.'s malnourished conditions and that his failure to provide them with sufficient food or medical care was reasonably certain to cause them serious bodily injury, i.e., put them at a substantial risk of death. Dorch's admitted knowledge that N.T. and J.T. "needed better care" and his desire to take them to CPS also shows his knowledge that the omission of sufficient food and medical care would cause them serious bodily injury. Dorch argues his case is "entirely analogous" to *Louis v. State*, a capital murder case in which the court found no evidence that the defendant "knew that, after he left the house, the child's mother would repeatedly strike the child's head and hang him by his arms in a closet." *Louis v. State*, 393 S.W.3d 246, 251 (Tex. Crim. App. 2012). Here, however, the evidence did not show that the serious bodily injuries to N.T. and J.T. occurred during a particular, isolated event while Dorch was at work; to the contrary, the expert

testimony showed the childrens' condition was due to abuse and lack of care during a prolonged period of time.

The record contains sufficient evidence to support a reasonable inference that Dorch was aware that failing to provide N.T. and J.T. with protection from harm, shelter from the elements, food, or medical care was reasonably certain to cause them serious bodily injury. *See Proo*, 2019 WL 1049338, at *14; *Payton*, 106 S.W.3d at 331.

Abandonment of a Child

A person commits the offense of abandonment of 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." TEX. PENAL CODE ANN. § 22.041(b). An offense under subsection (b) is a second-degree felony if the actor abandons the child "under circumstances that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment." *Id.* § 22.041(e). To "abandon" means "to leave a child in any place without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability." *Id.* § 22.041(a). It is an "exception to the application" of section 22.041 if the actor voluntarily delivered the child to a designated emergency infant care provider under Family Code section 262.302. *Id.* § 22.041(h).

Count II of both indictments charged that,

> on or about April 28, 2016, Dorch, while having custody, care, and control of [J.T. and N.T.], a child who was younger than fifteen (15) years of age, did intentionally abandon [J.T. and N.T.] in a place under circumstances that exposed [J.T. and N.T.] to an unreasonable risk of harm, and under circumstances that a reasonable person would believe would place the child in imminent danger of DEATH AND BODILY INJURY, by RESTRAINING THE CHILD WITH A CHAIN [J.T.] [and] WITH A LEASH [N.T.] IN A BACKYARD; and the defendant did not voluntarily deliver the child to a designated emergency infant care provided [sic] under Section 262.302, Family Code.

The jury charge on abandonment tracked the language of the indictments. Thus, the essential elements of abandonment as charged against Dorch were that he (1) assumed care, custody, or control of J.T. and N.T. and (2) intentionally (3) abandoned them in a place (4) under circumstances that exposed them to an unreasonable risk of harm and (5) under circumstances that a reasonable person would believe would place them in imminent danger of death or bodily injury by restraining them in the backyard. *Id.* § 22.041(b), (e). The same definition of "intentionally" quoted above under the injury to a child offense was applied to the abandonment offense. *See id.* § 6.03(a).

On appeal, Dorch challenges only the sufficiency of the evidence to prove he "intended" to abandon the children under the specified circumstances; he does not contest the evidence establishing the dangerous circumstances in which they were found. As the State puts it in its brief, Dorch again argues that "he was simply oblivious to the abuse happening in his own backyard" and had no part in it. The jury could have assessed his credibility and chosen to disbelieve his claims that it was not him who restrained N.T. and J.T.

The trial evidence was clear that J.T. was restrained with a dog chain and N.T. was restrained with a dog leash, both of which were identified by Dorch, in his backyard for a prolonged period of time — "many, many hours if not days" and "more than seven hours and likely a few days." Combining the expert testimony, medical records, and photographs with the neighbors' testimony that the crying in the backyard happened day and night for the preceding two weeks, and Dorch's own statements that he was the caretaker and disciplinarian and cared for N.T. and J.T. the day they were found, the jury could have reasonably found that Dorch intended to abandon N.T. and J.T. in the dangerous circumstances charged in the indictment. The jury could have found that Dorch's claim that he bathed N.T. and J.T. on Thursday morning was not credible, given their filthy and soaked conditions when found, and considered the untruth as evidence of his

knowledge of their circumstances of imminent danger and his intent to abandon them by leaving them in such circumstances. We conclude that, based on the cumulative force of all the circumstantial evidence, there was sufficient evidence to support a reasonable inference that Dorch had the conscious objective or desire to leave the children in a place without providing reasonable and necessary care and under circumstances creating an imminent danger of death, bodily injury, or physical or mental impairment, in which no reasonable, similarly situated adult would leave a child of that age.

Conclusion on Sufficiency

Based on the medical testimony about N.T.'s and J.T.'s physical conditions, the photographs and testimony documenting the circumstances in which they were found, the neighbors' testimony of children crying in the backyard day and night for the last two weeks, and Dorch's own admissions about when he last saw N.T. and J.T., we hold the jury could have reasonably inferred that Dorch had the requisite mental state for the two offenses of conviction. We also hold that the evidence was sufficient to establish that N.T. and J.T. suffered serious bodily injury, not merely the lesser bodily injury.

MOTION TO SUPPRESS

In his second issue, Dorch asserts the trial court erred in denying his motion to suppress the statements he made during his recorded interview on May 5, 2016 at the Bexar County Sheriff's Office. It is undisputed that Dorch was not given the *Miranda* warning or the Code of Criminal Procedure article 38.22 warning before or during the interview. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.22. Dorch contends the interview was a custodial interrogation and the warnings were required; therefore, his statements should have been suppressed. *See Hines v. State*, 383 S.W.3d 615, 621 (Tex. App.—San Antonio 2012, pet. ref'd) (warnings pursuant to *Miranda* and Code of Criminal Procedure are required only when a

suspect is in custody). After an evidentiary hearing on the motion to suppress, the trial court ruled that Dorch was not "in custody" at the time of the interview and denied the motion to suppress. The trial court subsequently made written findings of fact and conclusions of law in support of its ruling.

Standard of Review

In reviewing the trial court's ruling on a motion to suppress, we afford almost total deference to the court's determination of historical facts, especially when it is based on assessment of a witness's credibility, as long as the fact findings are supported by the record. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We apply the same deferential standard when reviewing the court's ruling on mixed questions of law and fact where resolution of those issues turns on an evaluation of credibility. *Johnson*, 414 S.W.3d at 192. We review de novo the trial court's application of the law to the facts and its resolution of mixed questions of law and fact that do not depend upon credibility assessments. *Id.*; *Wade v. State*, 422 S.W.3d 661, 669 (Tex. Crim. App. 2013). The trial court's determination of whether the defendant was "in custody" presents a mixed question of law and fact. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). Finally, when the trial court makes express findings of fact, as it did here, we determine whether the evidence, viewed in the light most favorable to the trial court's ruling, supports the fact findings. *Johnson*, 414 S.W.3d at 192.

Analysis

At a suppression hearing, the defendant bears the burden to prove he was in custody before the burden shifts to the State to show compliance with *Miranda* and article 38.22. *Herrera*, 241 S.W.3d at 526. Whether a person is "in custody" is an objective determination; the subjective views of the interrogating officer and the person being questioned are irrelevant. *J.D.B. v. North*

Carolina, 564 U.S. 261, 270-71 (2011). The Court of Criminal Appeals has identified four general situations that may constitute custody for purposes of *Miranda* and article 38.22: (1) the person is physically deprived of his freedom of action in any significant way; (2) an officer tells the person he is not free to leave; (3) officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; or (4) probable cause to arrest the person exists and the officers do not tell the person he is free to leave. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009); *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). Dorch contends the fourth situation applied. Under the fourth situation, "the officers' knowledge of probable cause must be manifested to the subject, and such manifestation may occur if information sustaining the probable cause is related by the officers to the suspect or by the suspect to the officers." *White v. State*, 395 S.W.3d 828, 835 (Tex. App.—Fort Worth 2013, no pet.) (citing *Dowthitt*, 931 S.W.2d at 255). "Situation four, however, will not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest." *Id.* (citing *Dowthitt*, 931 S.W.2d at 255).

The evidence admitted at the suppression hearing consisted of the testimony by Detective Gamboa and Sergeant Tobleman. The officers testified that on May 5, 2016, they went to Dorch's workplace and asked him to come to the Sheriff's Office after his shift to answer more questions. Dorch drove himself to the station after his shift ended and later drove himself home. Dorch points out that for the interview he was escorted back into a secure area from which he could not leave on his own. However, Detective Gamboa testified that the Sheriff's Office is in a restricted facility that also houses the jail and any interviewee, whether a suspect or not, must be escorted back to the Criminal Investigation Division where the interview rooms with recording devices are located. Sergeant Tobleman confirmed that testimony, adding, "[n]o public is allowed back without [an]

escort." Detective Gamboa and Sergeant Tobleman testified they considered Dorch a witness at that time and the purpose of the interview was to ask more questions of Dorch in order to establish a timeline of events. Both officers testified the *Miranda* warnings were not given because Dorch was not a suspect at the time of the interview and he would have been allowed to leave the facility if he had asked. The officers testified that Dorch never asked to leave and proceeded to ask several questions of his own during the last thirty minutes of the three and one-half hour interview. Breaks were taken and Dorch was given coffee; he was allowed to use the restroom when he asked. He was never patted down, handcuffed, threatened, or restrained. Dorch never asked to make a phone call or have a lawyer present. At the end of the interview, Dorch was escorted out of the secure area and left in his own vehicle. The trial court's fact findings are consistent with this evidence in the record.

In arguing that the interview became custodial, Dorch relies on the fact that he was served with a search warrant for his cell phone at the end of the interview. However, Dorch cites no authority showing that the execution of the search warrant at the end of the interview was sufficient by itself to ***retroactively*** convert an otherwise voluntary interview into a custodial interrogation. In his post-submission brief, Dorch refers to the search warrant itself, which lists Dorch on the "suspect" line and recites the probable cause facts, and Detective Andis's trial testimony that he had the search warrant prepared before the interview began in support of his argument that the officers already considered him a suspect. However, none of that evidence was admitted at the suppression hearing. Because the trial court did not have the benefit of that evidence when it made its ruling on the suppression issue, we may not consider it in our appellate review of the trial court's ruling. *Black v. State*, 362 S.W.3d 626, 632 (Tex. Crim. App. 2012) ("Evidence adduced before the fact-finder at trial may not be taken into account in an appellate review of the propriety of the trial court's ruling on a motion to suppress . . . absent consent of the parties."). The record here

reflects the suppression issue was not reopened during trial. Sergeant Tobleman testified at the suppression hearing that he was notified during the interview that a warrant for Dorch's cell phone had been obtained. When asked whether Dorch would have been allowed to stop the interview and leave after the search warrant was obtained, Sergeant Tobleman stated Dorch would have been allowed to leave but his phone would have been seized under the warrant and, in fact, that is what happened at the end of the interview. After Dorch declined to voluntarily give his phone to the officers to download the call data, he was presented with the search warrant and it was made clear that he would not be allowed to go home with his phone. Tobleman noted that the cell phone could have been seized under the warrant at any time or place, inside or outside the building.

There is nothing in the record to suggest that probable cause arose to arrest Dorch for the injury to a child or abandonment offenses during the interview. *See Gardner*, 306 S.W.3d at 294; *see also Dowthitt*, 931 S.W.2d at 255. No information manifesting probable cause to arrest Dorch was conveyed by the officers to him or by Dorch to the officers. *See White*, 395 S.W.3d at 835; *see also Dowthitt*, 931 S.W.2d at 256. Dorch did not make a statement admitting to engaging in conduct underlying the later-charged offenses during the interview. To the contrary, he denied any knowledge of the conditions in which N.T. and J.T. were found. *Cf. Xu v. State*, 100 S.W.3d 408, 412, 413-14 (Tex. App.—San Antonio 2002, pet. ref'd) (defendant's admission during second interview that he "grabbed her by the throat" during an argument established probable cause for an arrest warrant where defendant's wife died by strangulation and interview then became custodial interrogation); *Fiedler v. State*, 991 S.W.2d 70, 83 (Tex. App.—San Antonio 1998, no pet.) (defendant's agreement with officer's description of events indicating that defendant killed the victim established probable cause to arrest defendant and interview became custodial interrogation from that point forward). The search warrant for his cell phone was not served on Dorch until the interview was over so, even if the search warrant served to manifest the existence

of probable cause for his arrest, that information was not conveyed to Dorch until his statement was completed; therefore, it had no bearing on the issue of whether his interview was a custodial interrogation. As noted, immediately after the seizure of his phone, Dorch left the Sheriff's Office and drove away in his vehicle.

In addition, even if probable cause to arrest arose before the end of the interview, none of the objective circumstances surrounding the interview show a significant restriction on Dorch's freedom of movement that would lead a reasonable person to believe he was not free to terminate the interview and leave. *See White*, 395 S.W.3d at 835; *see also Dowthitt*, 931 S.W.2d at 256-57 (objective factors include whether defendant arrived voluntarily, the length of the interrogation, whether defendant's requests to see relatives or friends were refused, and the degree of control exercised over the defendant). As noted, Dorch drove himself to and from the interview; the secured area in which the interview was conducted was where the interview rooms with the recording devices were located and all public visitors had to be escorted into and out of the area; the interview lasted three and one-half hours and included breaks and many of Dorch's own questions to the officers; Dorch was provided with coffee and permitted to use the restroom; and the search warrant for the phone was not served until the interview was over. We conclude that Dorch did not meet his burden to establish that he was in custody at the time of the interview.

Conclusion

Under the trial court's fact findings, which are supported by the record, we conclude that the May 5, 2016 interview of Dorch was not a custodial interrogation requiring *Miranda* and article 38.22 warnings. We therefore overrule Dorch's issue and hold the trial court did not abuse its discretion in denying Dorch's motion to suppress his statements.

JURY INSTRUCTION

Dorch next argues the trial court erred in denying his proposed instructions with respect to Count I (injury to a child by omission) on: (i) specific intent to cause serious bodily injury; and (ii) a lesser-included offense of "reckless bodily injury by omission."

Standard of Review

In considering a claim of jury charge error, the court first determines whether any error exists and, if so, whether the error caused sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The degree of harm required to obtain a reversal depends on whether the error was preserved. *Id.*; *Ansari v. State*, 511 S.W.3d 262, 265 (Tex. App.—San Antonio 2015, no pet.). If the defendant objected to the complained of portion of the charge, then he need only prove he suffered "some harm" as a result of the jury charge error. If there was no objection, the defendant must prove he suffered "egregious harm." *Ngo*, 175 S.W.3d at 743-44; *Ansari*, 511 S.W.3d at 265. Here, Dorch preserved the potential error by requesting the two proposed instructions.

Analysis

As to the denial of Dorch's requested instruction on "specific intent to cause serious bodily injury," he asserts that the application paragraphs (Sections V and VII) of the jury charge failed to inform the jury that it had to find he specifically intended to cause the result of serious bodily injury, not just that he intended to withhold protection, food, shelter, or medical care. Dorch requested that the jury be instructed that,

> It is the State's burden to prove beyond a reasonable doubt that the Defendant had the specific intent to cause serious bodily injury to [J.T. and N.T.]. It is insufficient for the State to prove only that the Defendant failed in his legal duty to provide care for serious bodily injury to [J.T. and N.T.]. Rather, the State must prove beyond a reasonable doubt that the Defendant specifically intended to cause the result.

As the State responds, the charge submitted to the jury *did* instruct that it was required to find that Dorch either knowingly or intentionally caused the children's serious bodily injury, applying the culpable mental states charged in the indictment. The application paragraph for Count I clearly instructed the jury to find Dorch guilty if it found he either intentionally or knowingly "by omission cause[d] serious bodily injury" to the children by the means of failing to provide them with protection, food, shelter, or medical care. The ambiguity that Dorch asserts exists, does not. The definitions of "intentional" and "knowing" incorporated into the application paragraph were properly limited to the "result of the conduct," i.e., serious bodily injury. *See Williams*, 235 S.W.3d at 750; *see also Proo*, 2019 WL 1049338, at *13.

Dorch also argues the court erred by denying his request for inclusion of a lesser-included offense instruction on "reckless bodily injury by omission" and a definition of "recklessness." *See* TEX. PENAL CODE ANN. § 22.04(a)(3), (e) (second degree felony). To be entitled to receive a lesser-included offense instruction, the defendant must show that (1) the lesser offense is "included within the proof necessary to establish the offense charged" and (2) some evidence exists in the record to show that if he is guilty, he is only guilty of the lesser-included offense. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). Assuming the requested offense is a lesser-included offense of the greater charged offense, Dorch did not establish the second prong. Dorch argues in his brief that the evidence only supported a finding of the less culpable mental state of "recklessness" and a finding of "bodily injury" rather than serious bodily injury. Based on our discussion of the evidence and reasonable inferences supporting the jury's findings that Dorch "intentionally" or "knowingly" caused the children "serious bodily injury" by withholding protection, food, shelter, and medical care, we conclude Dorch failed to establish that he could *only* be found guilty of the lesser mental state or the lesser injury. *See id.*

Conclusion

We hold Dorch was not entitled to either jury instruction he requested. Therefore, the trial court did not err in denying the instructions.

ADMISSION OF EXPERT TESTIMONY

Finally, Dorch asserts the trial court erred in permitting Dr. Northrup to testify to her opinion as to how long N.T. was restrained in a standing position. If potential error is preserved, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

Dorch argues that Dr. Northrup's opinion on the duration of N.T.'s restraint was not reliable because she provided no explanation of the scientific technique she used or how she applied it to extrapolate the duration of restraint from the severity of N.T.'s edema. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588-89 (1993); *see also Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). The relevant portion of Dr. Northrup's expert testimony and Dorch's objection was as follows:

> STATE: So based on what you saw and based on - - on what you've seen in edema generally and how long it took for [N.T.] - - for her edema to resolve, are we talking about the type of edema that would set on, say, [in] the course of seven hours?
>
> WITNESS: No.
>
> DEFENSE: Objection. I don't believe he has laid a foundation under Daubert for this witness to testify as to the amount of time.
>
> COURT: It's overruled.
>
> STATE: I'm sorry. What was your answer?
>
> WITNESS: No.
>
> STATE: Okay. So based - - based on your experience in pediatrics and in medicine in general and the observations you've made, are you able to opine at all how long you believe [N.T.] was restrained in order to cause that level of edema?

> DEFENSE: Objection . . . [t]he same objection, that is not a proper foundation under Daubert.
>
> COURT: It's overruled.
>
> ***
>
> WITNESS: It's hard to say exactly how long it would take her to develop this edema. I do feel comfortable saying it's over a seven-hour period . . . This was really just truly remarkable edema and outside the context of regular routine activities.
>
> STATE: Okay. So do you think she was restrained a matter of hours or a matter of days?
>
> DEFENSE: Objection, Daubert.
>
> COURT: Overruled.
>
> WITNESS: I think more along the lines of days.

The State argues that Dorch waived his complaint regarding admission of this opinion testimony because the same evidence came in through Dr. Lukefahr without objection; therefore, any error in its admission was cured. *See Valle v. State,* 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). We agree. During Dr. Lukefahr's expert testimony about his treatment of both N.T. and J.T., he was asked what can cause the type of edema displayed by N.T. and his answer included an opinion on the duration of her restraint. Dorch did not object. The testimony was as follows:

> STATE: Is being in kind of a fixed position where she [N.T.] can't sit down or really stand up, can that cause this type of edema?
>
> WITNESS: Yes, sir.
>
> STATE: And so based - - based on everything that was reported to you, right, what do you think was the most probable cause of her edema?
>
> WITNESS: The most probable cause was that she was restrained in a position where she couldn't lie down or sit down. She had to remain with her body above her legs and feet for a very extended period of time, many[,] many hours, if not days.

STATE: Okay. And - - and many hours, if not days?

WITNESS: Yes.

The record shows Dorch conducted a voir dire examination of Dr. Lukefahr on this issue prior to his testimony but did not obtain a ruling from the trial court at that time. Instead, the trial court instructed defense counsel, "I would suggest that you object when he says something that you think he shouldn't say and I'll rule on it." Dorch's counsel acknowledged the trial court's instruction but did not raise any objection to Dr. Lukefahr's testimony quoted above. *See* TEX. R. APP. P. 33.1(a) (preservation of error requires an objection and ruling from the trial court). Dorch argues that Dr. Northrup's testimony was different from Dr. Lukefahr's testimony because it was "more precise." However, the substance of the questions and answers were the same. Both doctors were asked whether the "fixed position" or "restraint" of N.T. probably caused her severe edema and, after answering affirmatively, both doctors estimated the length of time in restraint that would be necessary to cause the degree of edema suffered by N.T. Their opinions were substantially the same — Dr. Lukefahr stated it would require "many[,] many hours, if not days" while Dr. Northrup stated it would require "over a seven-hour period" and "more along the lines of days." Because the same evidence was admitted without objection through Dr. Lukefahr, any error in the admission of Dr. Northrup's testimony was cured. *Valle*, 109 S.W.3d at 509. We therefore overrule Dorch's last issue.

CONCLUSION

Based on the foregoing analysis, we overrule Dorch's issues on appeal and affirm the trial court's judgments.

Liza A. Rodriguez, Justice

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