COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

WAKESHA IVES,	§	No. 08-16-00026-CR
Appellant,	§	Appeal from
v.	§	384th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20130D04844)

O P I N I O N

On May 10, 2013, Wakesha Ives drove to Riverside High School where she works as a teacher. Tragically, she left her five-month-old daughter in the vehicle that morning, having forgotten to drop the child off at daycare. By the time she returned to the vehicle at the end of the workday, the infant had died of heat exposure. The sole issue before us is the sufficiency of the evidence to support the jury's guilty verdict for criminally negligent homicide. We reverse the conviction and render a judgment of acquittal.

FACTUAL SUMMARY

The State indicted Appellant for intentionally, knowingly, or recklessly causing serious bodily injury to the child by omission. In a second count, the State charged Appellant with criminally negligent homicide by leaving the child unattended in a motor vehicle. The trial court instructed a verdict on the intentional and knowing theories from the first count. The jury acquitted

Appellant of reckless bodily injury under the first count. The jury found Appellant guilty, however, on the charge of criminally negligent homicide. The trial court sentenced Appellant to 180 days, but suspended the sentence for two years and imposed only minimal conditions.

There is little disagreement regarding the evidence presented at trial. Appellant is the biological mother of three children. At the time of this incident, the youngest child, Janay, was five-months old. Appellant also had a four-year-old daughter living with her, and an older daughter who was away attending college. Appellant is also the stepmother to sixteen-year-old Kendall who was living in her household at the time of these events.

In 2013, Appellant's daily routine involved loading Janay, the four-year-old, and Kendall into her SUV. The children sat in the back row. Janay's car seat occupies the center seat and faces to the rear. The four-year-old's car seat was on the passenger side. Kendall sat on the driver's side rear seat. Appellant always placed Janay's diaper bag in the front seat floorboard. Appellant would first drop the four-year-old off at one daycare, and then take Janay to another daycare that was about two to three miles away. She would always bring Janay into the daycare with the car seat, and some days leave the car seat there, but some days she placed it back in the vehicle. She would always leave the diaper bag at Janay's daycare. Appellant and Kendall would then proceed to Riverside High School where she taught business and finance courses and Kendall attended as a student. Occasionally, Appellant would drop off Kendall first and then get a fast-food breakfast if she had not eaten at home.

Appellant developed health issues with the birth of Janay. Her husband believed that following the pregnancy, she at times became forgetful, irritable, emotional, tired, and stressed. Appellant recognized her own lightheadedness and forgetfulness. These issues also manifested in high blood pressure for which she took several medications. Near the time of these events, her

medical providers had changed the dosage of blood pressure medications. A school nurse had also noticed that Appellant's blood pressure had become very high and Appellant appeared very tired. A co-worker concurred that Appellant was struggling with her blood pressure, was tired, and she was "almost on autopilot." Her husband also believed these issues worsened in early May. The school was administering standardized tests starting on May 5 that are described in the record as "extremely stressful" on the teachers.

On May 9, the day prior to the tragedy, Appellant developed a bad headache. She came home tired and exhausted. At her husband's suggestion, she prepared Janay's diaper bag in advance. Appellant slept poorly that night and woke up feeling groggy. In an effort to make the morning commute easier, Appellant's husband loaded the car, and in doing so, placed the diaper bag in the rear-seat floorboard. Appellant was behind schedule as she left the house and got further behind as she needed to stop for gas. She also had nothing to eat at home, and knew she needed to eat when taking her medications.

Janay was sleeping in the car seat and was covered with a blanket. Per her routine, Appellant dropped the four-year-old off at one daycare. But rather than take Janay to her daycare, she went to the drive-through at McDonald's to get something to eat. From McDonald's she went straight to Riverside High School, arriving around 8:00 a.m. She and Kendall exited the vehicle, leaving Janay still sleeping in the back seat. She returned to the vehicle between 4:00 and 4:30 p.m. and found Janay still in her car seat. CPR efforts failed as the child was already dead.

The trial began with the State playing the recorded 911 call that reported the tragedy. On the recording, Appellant is heard screaming hysterically in the background, and reacting as one might expect a parent would who just realized she had made a terrible mistake.[1] She still appeared

[1] Various statements are ascribed to Appellant at the scene including: "Why my baby and not me?" "My baby. My baby. I can't believe it." "Help my baby." "Not my baby. "Oh, God." "My baby. My baby. I dropped her off at

to be in shock several hours later. A State CPS investigator concluded that the death resulted from an accident, but that based on a preponderance of the evidence, the Department had reason to believe that Appellant was neglectful in her supervision of Janay.[2] The investigator documented that Appellant had no past criminal record, there were no safety or threat concerns for her other children, and the home environment was appropriate. The State does not contest the conclusion of several witnesses that Appellant is otherwise a good parent.

Appellant sponsored the testimony of Dr. David Diamond, who researches the mechanisms and the effects of stress on memory. He described three areas of the brain that are active when performing a task such as driving. The basal ganglia engage when a person performs a task out of habit or routine, allowing a person to drive a familiar route without having to think about which turn to take. The frontal cortex allows a person to plan for future action. The hippocampus allows humans to learn new information and to store memories. These areas can work together, but they also can work against each other, and imaging studies show that when a person performs an action out of habit, the hippocampus is suppressed, hindering new memory or idea formation. According to Dr. Diamond, the competition between these parts of the brain explain why a parent who is interrupted while transporting a child to one destination might forget the child is still in the car as the parent then proceeds to their next destination.[3]

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day care" "No. My baby. It was an accident." Appellant was taken to the school nurse's office where her blood pressure was "out the roof." When she herself was being transported to the ER, an EMT heard her say she had only been gone for about ten minutes, and did not think it was too hot for the baby. In closing argument, the State never contended that this statement reflected what actually happened, but only that it demonstrated an irrationality in Appellant's reaction to the situation. To its credit, the State does not argue that this statement, which is far afield of any other testimony in the case, factually supports a theory of conviction.

[2] The terms "accident," "reason to believe" and "negligent supervision" are terms of art in CPS reporting.

[3] Another example might be the driver who places a soda can on the roof of the car while fishing out their car keys. When the person then performs the routine task of unlocking the car door, the basal ganglia suppresses the hippocampus which otherwise would alert the driver to retrieve the drink before driving off. Dr. Diamond referenced a survey of a thousand parents with children under three years of age in which about 25 percent admitted that at some point they had forgotten that their child was in the car. He also noted that beginning in the 1990s, many states began

Dr. Diamond theorized that after Appellant went to McDonald's, she lapsed back to her routine of then driving directly to the school, having created a "false memory" of already dropping Janay off at daycare. Stated otherwise, the "hippocampus is not going to be activated to be able to remind the individual to go to day care." He placed emphasis on the absence of the diaper bag in the front seat floorboard that would have been a cue that the baby was still in the car. He further reasoned from prior studies that stress adversely affects the hippocampus, and thus the mechanisms of memory.

STANDARD OF REVIEW

Appellant's sole issue for review is that the trial court erred by failing to enter a directed verdict on the negligent homicide count. We treat that complaint as a challenge to the legal sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex.Crim.App. 1996); *Cook v. State*, 858 S.W.2d 467, 470 (Tex.Crim.App. 1993). Evidence is legally sufficient when, viewed in the light most favorable to the verdict, *any* rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App. 2010)(establishing legal insufficiency under *Jackson v. Virginia* as the only standard for review of the evidence).

The jury is the sole judge of credibility and the weight attached to the testimony of each witness. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). It is the fact finder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App.

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to outlaw placing child seats in the front passenger seat to protect the child from air-bag deployment. But as child deaths from air bag impacts fell, deaths rose from hypothermic injury. Dr. Diamond claimed the absence of the visual cue of the child's seat increased the incidence of what is sometimes referred to in the media as "forgotten baby syndrome." He cited statistics that some thirty to forty children die each year from being left in vehicles.

2007), *quoting Jackson,* 443 U.S. at 319, 99 S.Ct. 2781. The jury also may choose to believe or disbelieve that testimony. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008); *Belton v. State*, 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Dobbs*, 434 S.W.3d at 170; *see also Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone may be sufficient to establish guilt. *Dobbs,* 434 S.W.3d at 170; *Carrizales v. State*, 414 S.W.3d 737, 742 n.20 (Tex.Crim.App. 2013), *citing Hooper v. State,* 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). 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. *Dobbs*, 434 S.W.3d at 170; *Hooper,* 214 S.W.3d at 13.

We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson.*" *Brooks,* 323 S.W.3d at 917 (Cochran, J., concurring). Nonetheless, if a rational fact finder could have found the defendant guilty, we will not disturb the verdict on appeal. *Fernandez v. State*, 479 S.W.3d 835, 838 (Tex.Crim.App. 2016). If we sustain a legal sufficiency challenge, it follows that we must render a judgment of acquittal. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996).

CRIMINALLY NEGLIGENT HOMOCIDE

A person commits criminally negligent homicide if she causes the death of an individual by "criminal negligence." TEX.PENAL CODE ANN. § 19.05(a)(West 2011). Texas defines the mental state for criminal negligence as:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding [her] conduct or the result of [her] conduct when [s]he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

TEX.PENAL CODE ANN. § 6.03(d)(West 2011). The most relevant Texas law applying this definition springs out of two cases involving traffic accidents.[4]

We begin with *Tello v. State*, 180 S.W.3d 150 (Tex.Crim.App. 2005), where the defendant caused a fatal traffic accident when the trailer he was pulling disengaged from his truck. In affirming the conviction for criminally negligent homicide, the court quoted at length the testimony showing the cause of the accident: the ball upon which the trailer hitch rested "wobbled" and was improperly installed. The hitch itself showed signs of wear, likely from hammer blows; the trailer lacked a safety chain required by law; and the trailer was loaded improperly which added stress to the ball and hitch connection. *Id*. at 151-55.

The *Tello* court noted that the State was required to prove the defendant's failure to perceive a substantial risk of death that resulted from the defendant's gross deviation from an ordinary standard of care. *Id.* at 156. The State met its burden in *Tello* given the evidence that the

[4] While many criminal negligence cases arise from fatal traffic accidents, these are not the only situations leading to indictments. Some of the varied circumstances include a parent accidentally spilling hot water on a toddler, *McKay v. State*, 474 S.W.3d 266 (Tex.Crim.App. 2015); a football coach overworking a player on a hot day, Zac DesAutels, *Changing the Play: Football and the Criminal Law After the Trial of Jason Stinson*, 8 Willamette Sports L.J. 29, 30 (2010)(discussing trial which eventually led to not-guilty verdict); a workplace accident resulting in a death, Kenneth M. Koprowicz, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?*, 52 Brook.L.Rev. 183, 184 (1986); a physician who overprescribed medicine, Christopher J. Kim, *The Trial of Conrad Murray: Prosecuting Physicians for Criminally Negligent Over-Prescription*, 51 Am. Crim. L. Rev. 517, 518 (2014); and recreational sports accidents. *See* Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 Hastings L.J. 1641 (2003)(noting trend in indictments for ski, watercraft, and recreational accidents resulting in a death). A law review article surveyed the cases around the country involving children who died from heat when left in a car. Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 Nw. U.L. Rev. 807, 826 (2006). The author concluded that prosecutors obtained indictments in about 60% of the cases, and the indictments resulted in a high incidence of conviction. *Id*.

defendant knew that the hitch on his trailer was faulty (it had been hammered a number of times to make it latch properly and the hitch's defects were obvious). *Id*. Additionally, the jury could have rationally found that the defendant "should have, but failed, to perceive a substantial and unjustifiable risk of death" from knowingly using a faulty trailer hitch without safety chains. *Id*. at 156. The court then cited a New York case, *People v. Boutin*, 75 N.Y.2d 692, 556 N.Y.S.2d 1, 555 N.E.2d 253 (1990), "to illustrate when there is insufficient evidence to support a finding of criminal negligence." *Tello*, 180 S.W.3d at 157.

Boutin also involved a fatal traffic accident -- a motorist ran into and killed a state trooper who had pulled behind a disabled vehicle in an active lane of traffic. The trooper had his emergency lights flashing but it was a foggy night. *Boutin*, 555 N.E.2d at 253. The *Boutin* court reversed a conviction for criminally negligent homicide, reasoning that:

> Our decisions construing these provisions have emphasized that criminal liability cannot be predicated on every act of carelessness resulting in death, that the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and that the carelessness must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong [citations omitted]. What, we believe, is abundantly clear from our decisions and from the governing statutory language is that criminally negligent homicide requires not only a failure to perceive a risk of death, ***but also some serious blameworthiness in the conduct that caused it.*** The risk involved must have been 'substantial and unjustifiable', and the failure to perceive that risk must have been a 'gross deviation' from reasonable care. [Emphasis added].

Id. at 254. The New York court found the "unexplained" failure to notice the parked vehicle failed to establish the serious blameworthiness needed for a conviction. *Id*. at 255-56. The evidence did not show that the defendant engaged "in any criminally culpable risk-creating conduct -- e.g., dangerous speeding, racing, failure to obey traffic signals, or any other misconduct that created or contributed to a 'substantial and unjustifiable' risk of death." *Id.* By comparison, the multiple

failures by the defendant in *Tello* involved "some serious blameworthiness in the conduct that caused it." *Id.* at 158, *quoting Boutin*, 555 N.E.2d at 254.[5]

Justice Cochran concurred in *Tello*, emphasizing, "criminal negligence does not require proof of the accused's subjective awareness of the risk of harm." *Id*. at 159 (Cochran, J. concurring). Instead "[i]t is a defendant's awareness of the attendant circumstances, not his subjective awareness of the risk of harm, that matters in criminal negligence." *Id*. Criminal negligence, however, is much more than ordinary civil negligence. "It must be a 'gross' or extreme deviation" from the civil standard of care. *Id*. at 158. Justice Cochran suggested that had there been only a single deviation from the ordinary standard of care (such as only a safety chain violation, or only a problem with securing the trailer) then the case might present only proof of simple negligence. *Id.* at 159.

The Texas Court of Criminal Appeals again addressed a conviction for criminally negligent homicide in *Montgomery v. State*, 369 S.W.3d 188 (Tex.Crim.App. 2012). There the defendant missed the entrance ramp to an interstate while talking on a cell phone. *Id.* at 191. She then swerved onto the on-ramp across a solid lane line, which led to a fatal collision with another vehicle. *Id*. The indictment charged her with criminally negligent homicide by making an unsafe lane change and failure to keep a proper lookout. A jury found the defendant guilty. The

[5] Part of *Boutin*'s discussion that *Tello* does not directly reference is the term "risk creation." In *People v. Cabrera*, 887 N.E.2d 1132, 1135, 10 N.Y.3d 370, 858 N.Y.S.2d 74 (2008), the court reviewed the sufficiency of evidence used to convict a young driver who, while speeding on a curve, lost control of the vehicle and wrecked, killing several of his passengers. The court explained that New York requires proof of the "creation," rather than just the "non-perception," of risk." *Id*. at 1136. Moreover, the State could not rely on only a showing of speeding, but would need to show "dangerous speeding" and any "blameworthiness" needs to be rise to the level of moral blameworthiness. *Id*. At least the risk creation concept appears at odds with a later statement from the Texas Court of Criminal Appeals that "[t]he key to criminal negligence is . . . the failure of the [defendant] to perceive the risk." *Montgomery v. State*, 369 S.W.3d 188, 192-93 (Tex.Crim.App. 2012). Some state courts have followed *Boutin*, while another has expressly declined to follow it. *See Gill v. State*, 474 S.W.3d 77 (Ark. 2015)(following); *State v. Littlefield*, 876 A.2d 712, 730 (N.H. 2005)(following); *State v. Lewis*, 290 P.3d 288, 295-96 (Or. 2012)(rejecting *Boutin* approach as adding requirements not found in statutory definition).

Montgomery court reinstated the conviction that had been reversed by the intermediate court of appeals.

The *Montgomery* court began with the State's burden. It must prove that the defendant (1) caused the death of an individual; (2) the defendant should have been aware that there was a substantial and unjustifiable risk of death from her conduct; and (3) the failure to perceive the risk constituted a gross deviation from the standard of care an ordinary person would have exercised under like circumstances. *Id*. at 192-93. "The circumstances are viewed from the standpoint of the actor at the time that the allegedly negligent act occurred." *Id*. The crime does not require proof of the defendant's subjective awareness of the risk of harm, but only an awareness of the attendant circumstances leading to such a risk. *Id*. The key to criminal negligence is the failure of the defendant to perceive the risk. *Id.*

The *Montgomery* court then distinguished ordinary civil negligence from criminal negligence:

> Conduct that constitutes criminal negligence involves a greater risk of harm to others, without any compensating social utility, than does simple negligence. The carelessness required for criminal negligence is significantly higher than that for civil negligence; the seriousness of the negligence would be known by any reasonable person sharing the community's sense of right and wrong. The risk must be 'substantial and unjustifiable,' the failure to perceive it must be a 'gross deviation' from reasonable care as judged by general societal standards. 'With criminal negligence, the defendant ought to have been aware of a substantial and unjustifiable risk that his conduct could result in the type of harm that did occur, and that this risk was of such a nature that the failure to perceive it was a gross deviation from the reasonable standard of care exercised by ordinary people.' *Williams v. State,* 235 S.W.3d 742, 750-51 (Tex.Crim.App. 2007). The degree of deviation from reasonable care 'is measured solely by the degree of negligence, not any element of actual awareness.' In finding a defendant criminally negligent, a jury is determining that the defendant's failure to perceive the associated risk is so great as to be worthy of a criminal punishment.

Id. at 192-93 [internal footnotes omitted]. The court supported many of its basic legal propositions by citation to majority and concurring opinions in *Tello*.

Montgomery concluded that the State met its burden of proving all of the elements of criminally negligent homicide. The abrupt lane change caused the fatal collision. A reasonable jury could have found that the defendant ought to have been aware that the lane change created a substantial and unjustifiable risk. The defendant was driving slower than the other traffic around her, and she abruptly moved from the access road to the interstate on-ramp by crossing a solid while line. She did not signal her lane change, did not look for on-coming traffic, and admitted her cell phone use distracted her. *Id.* at 193. Finally, the court reasoned that the jury could have found that this failure to appreciate the risk was a gross deviation from a standard of care. "The question of whether appellant's conduct was a 'gross deviation' is a question to be answered by the fact finder and here, a rational jury could conclude that it was." *Id*. at 195.

THE ADVENT OF "MORAL BLAMEWORTHINESS"

Appellant generally claims that the State failed to present legally sufficient evidence from which a reasonable jury could conclude Appellant's failure to appreciate the risk was a gross deviation from the standard of care. We discern two threads to her argument. First, she contends that Dr. Diamond's testimony negates the *mens rea* for the offense. The circumstances of her fatigue, stress, and change of routine made forgetting the child a part of "normal human processes of the mind" which was "completely out of her control." Second, she argues that by comparison with other cases where convictions have been upheld, the evidence here demonstrates the lack of any moral blameworthiness required for conviction.[6]

[6] Appellant uses the term moral blameworthiness in her briefing. Both *Tello* and *Boutin* used the term "serious blameworthiness." *Tello*, 180 S.W.3d at 158, *quoting Boutin*, 555 N.E.2d at 254. The Court of Criminal Appeals later, perhaps in dicta, used the term moral blameworthiness in describing criminal negligence. *Williams v. State*, 235 S.W.3d 742, 751 (Tex.Crim.App. 2007)("Criminal negligence depends upon a morally blameworthy failure to appreciate a substantial and unjustifiable risk while recklessness depends upon a more serious moral blameworthiness--the actual disregard of a known substantial and unjustifiable risk."). A later New York opinion in discussing *Boutin* referred to a moral blameworthiness. *Cabrera*, 887 N.E.2d at 1137. We assume the terms have a similar meaning.

During oral argument, the State agreed that this case is close to strict liability. It noted that guilt must be determined by two criteria. First, how are the relevant circumstances perceived from the point of view of the defendant? The circumstances must create a risk and under those circumstances what did the defendant do? The acts or omissions are then viewed to determine whether they were objectively reasonable. Second, was the conduct blameworthy? In this regard, the State argued Appellant failed to remember that the baby was in the car and she left the child unattended in the car.[7] In other words, "I forgot" is just not an excuse when it comes to a helpless infant. Any memory trigger that she needed occurred when the baby was first placed in the vehicle and her appreciation of the substantial risk was satisfied at that point in time. The State points to two prior Texas cases (and several out of state cases) where courts have upheld a conviction based on an adult leaving an infant inside a vehicle on a hot day.

We first dispense with Appellant's claim that Dr. Dickenson's theory of memory and stress absolves her of guilt in the sense that these events were completely outside her control. As the State correctly points out, the jury was free to discount all or a part of his theory, even if uncontradicted. *See Ex parte Flores*, 387 S.W.3d 626, 637-38 (Tex.Crim.App. 2012)(stating jury might have disbelieved highly qualified expert); *Graham v. State*, 566 S.W.2d 941, 951 (Tex.Crim.App. 1978)(noting that for a mixed medical and factual issue, such as insanity, the jury could disregard even uncontradicted expert testimony); *Jones v. State*, 984 S.W.2d 254, 257 (Tex.Crim.App. 1998)("The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side."); *Cf. City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005)(even uncontroverted expert testimony does not bind jurors unless the subject matter is one for experts alone). Even assuming there is a physiological reason for how one forgets

[7] The indictment alleged only that Appellant left the child in the car unattended.

a child in a car, in context Dr. Dickenson never testified that is what happened in this case. Rather, his ultimate opinion was given in response to a multi-page hypothetical containing facts that the jury might or might not have completely accepted. That ultimate opinion was that the assumed facts "fit" with his neuroscience theory and the outcome here was not "unexpected." The jury, however, was not compelled to accept that his theory is in fact what did occur.

The more germane issue before us is whether the State presented evidence such that a reasonable jury could find the "serious blameworthiness" that elevates tortious conduct to a gross deviation from the ordinary standard of care. The State in its briefing agrees that blameworthiness is required, but claims that forgetting a baby in the car would always meet that standard.[8] We cannot agree with that proposition because it conflates the results of the breach of the standard of care with the standard itself.

The negligence standard that Appellant may have breached is failing to lookout for the safety of her child. A parent might breach that standard in any number of ways, some minor, and some gross, either of which might lead to an accidental death. For instance, parents might momentarily fail to watch their child on a playground swing set with fatal results. Or, they might wholly fail to know their child's whereabouts for days on end, with the unsupervised child ultimately dying on the same swing set. The circumstances surrounding both situations will define whether the parent is merely negligent, or is sufficiently blameworthy to merit a criminal sanction. Similarly, it is not leaving the child in the car that defines the blameworthiness, but how that event came to pass.

This conclusion is compelled by *Tello* and *Montgomery*, where the court focused on the antecedent circumstances as determinative of whether there was a gross departure from the

[8] We do note that *Montgomery* does not use the term "blameworthiness" that the court had expressly referenced five years earlier in *Williams v. State*, 235 S.W.3d 742, 751 (Tex.Crim.App. 2007).

standard of care. *Tello* focused on the antecedent actions which led to the trailer becoming unhitched (how the ball was attached, evidence of prior banging on the hitch, the loading of the trailer).[9] Likewise, *Montgomery* focused on the defendant's actions prior to the accident, and not the accident itself (talking on the cell phone, driving slower than other traffic, crossing the safety line to the on-ramp, failing to look or signal).[10] It is from these antecedent circumstances that the jury might infer a gross departure from the standard of care. Otherwise, the focus becomes the death of a child, which *post hac* might always appear to arise from a gross departure of the duty of care.

The antecedent circumstances that culminated in Appellant leaving the child in the car include: (1) taking her children to daycare when she has uncontrolled high blood pressure (with a recent change in medication); (2) taking her children to daycare when she slept poorly the night before; (3) taking her children to daycare when she is suffering from some condition making her tired, forgetful, and stressed; (4) deciding to go to McDonald's before dropping Janay off at daycare.[11] At least in hindsight, each of these might be viewed as a departure from the standard

[9] "Thus, if an ordinary person in appellant's position would check to ensure that a trailer was properly secured to his truck with safety chains; that the ball on the bumper to which the trailer hitch was attached was secure and properly attached; that the trailer hitch itself locked properly onto the ball; and that a load of dirt was properly loaded toward the front of the trailer rather than over the rear axle, then appellant's failure to check these items for the ordinary safe hauling of dirt may suffice to establish a gross deviation from the ordinary standard of care." *Tello*, 180 S.W.3d at 159 (Cochran, J., concurring).

[10] "Criminal negligence does not require proof of appellant's subjective awareness of the risk of harm, but rather appellant's awareness of the *attendant circumstances leading to such a risk*." *Montgomery*, 369 S.W.3d at 193 [Emphasis added].

[11] The State's attorney cross examined Appellant on some of these points:

> Q. [STATE'S ATTORNEY] And so you're noticing that this medication that you're taking is causing more changes in your lifestyle, and your husband is telling you, you know, about some of the changes he's noticing in you, warning you about that, and you have colleagues at school that are also warning you about that, and you still take the risk of taking care of a toddler and a baby and taking them to school and driving them to school. Is that correct?
>
> A. Yes.

of care for a parent. We fail to see how a rationale jury could conclude, however, that these are *gross* departures from conduct expected by general societal expectations. Otherwise, we would effectively require any parent who was fatigued, under stress, or had experienced some forgetfulness to defer any parenting duty that might conceivably place their child at risk. Such a verdict would effectively require any person whose high blood pressure medicine was being adjusted to refrain from transporting or caring for children. Nor is it rationale to conclude that a parent, who alters their route while driving children back and forth, has committed morally blameworthy conduct. If there is a justification for such a Draconian rule, the record here fails to provide a reasonable basis to require it. Appellant and her husband testified she had problems with forgetfulness, but the extent and nature of that forgetfulness was never developed. The only example the jury heard was that several weeks prior to Janay's death, Appellant had forgotten to pack diapers in her diaper bag. That single example is hardly the sort of warning sign that would cause Appellant to turn over her parenting duties to another.

The State relies on several cases sustaining a conviction based upon a parent or caregiver leaving a child in vehicle. In *Vreeland v. State*, No. 13-04-368-CR, 2006 WL 3028065 (Tex.App.--Corpus Christi, Oct. 26, 2006, no pet.)(mem. op.)(not designated for publication) a mother loaded her infant into a car seat to run an errand in the early morning hours. *Id.* at *2. She returned to her house around, 6:50 a.m., and went inside until she left the house around lunchtime, running several more errands. Around 2:00 p.m., she discovered her then deceased infant still strapped in the car seat. *Id*. The court affirmed the conviction, noting that she had entered and left the small vehicle nine times without noticing the child. The car seat was "immediately obvious" and "clearly" visible from outside of the vehicle. *Id*. at *4. As here, the defendant claimed she thought she had dropped the child off at daycare on her first errand of the day. *Id.* Her routine,

however, was to drop the child seat at the day care. *Id*. Calling the circumstances suspicious, the court found a rational jury could have concluded that the mother recklessly or with criminal negligence placed the infant in imminent danger of death or bodily injury. *Id*. Each case necessarily stands on its own facts, and we find *Vreeland* distinguishable, particularly given that Vreeland entered and exited the vehicle nine times despite the fact that the clearly visible car seat should have been with the daycare.

The State also directs us to *Arteaga v. State*, 01-00-00481-CR, 2002 WL 1935268, at *4 (Tex.App.--Houston [1st Dist.] Aug. 22, 2002, pet. ref'd)(not designated for publication), a pre-*Tello* case, involving a mother, who along with her husband, took the couple's two children to a friend's house to drink and socialize. Given the amount of beer consumed, the friends asked them to spend the night, but the mother insisted (against the father's urging) on making the long drive back home. She loaded her older child into the car, and either she or the father also loaded the infant into the car seat. The mother then attempted to drive home, but had to stop at a convenience store and prevail on a third party to drive her and the older child the rest of the way home. When she returned to her car later the next afternoon, the infant was dead, still in the car seat. Even had the *Tello* serious blameworthiness standard been argued, it would likely have been met on these facts, given the role alcohol consumption played in the case.

The State also relies on a Virginia case where a daycare worker, whose job was to pick up and deliver children to a daycare, left one infant in the van when he went home to nap for the day. *Whitfield v. Com.*, 702 S.E.2d 590, 592 (Va. App. 2010). The court affirmed a finding of guilt for involuntary manslaughter and felony child neglect. Among the blameworthy actions of the defendant were that he had consciously decided for several months not to fill out a log that was designed to help him track the children. *Id*. at 594-95. The child was also in the first passenger

row of the van that would have made the child apparent as the defendant unloaded the other children. *Id.* Even if the Virginia legal standard perfectly mirrored the Texas standard, these facts differentiate the case.

Finally, the State directs us to an unpublished California opinion that held a trial court did not err in excluding evidence of the defendant's ADHD which was offered to explain how he forgot his child in a car. *People v. Gilbert*, No. H025418, 2004 WL 2416533 (Cal.Ct.App.--Sixth Dist., Oct. 29, 2004, no review hist.)(unpublished). The defendant drove to a friend's house to watch videos. He had his infant with him, but left the child in the car while he went inside. *Id.* at *2. Three hours later, he went back out to the car and found the child, who by that time died. The court upheld the verdict finding that the defendant should have known that his conduct posed a lethal risk to his son. Id. at *4. From our reading of the relevant standard in California, however, it does not include a requirement for serious blameworthiness as referenced in *Tello*. Given that difference, the court's discussion is not entirely persuasive.

The State may choose to criminally charge a person for some grossly negligent acts as a deterrent to others. *Williams v. State*, 235 S.W.3d 742, 768 (Tex.Crim.App. 2007); *see also Tello*, 180 S.W.3d at 159 n.6 (Cochran, J. concurring)(noting Model Penal Code commentary that one purpose of criminalizing negligent conduct is to "promote awareness and thus be effective as a measure of control"). Nonetheless, due process requires the State to produce evidence to prove the crime. The State agrees with the underlying evidence explaining why Appellant forgot the child in the car. We are not faced with a record where the jury had to choose between competing views of how Appellant forgot the child in the car. And even if the jury simply decided to disbelieve all of that evidence, it would be left with the "unexplained" failure by Appellant to remove the infant from the car. Under *Tello*, that unexplained failure would not support the

verdict. *Tello*, 180 S.W.3d at 157 (citing *Boutin* to illustrate when the evidence is insufficient; *Boutin* reversed a conviction for "unexplained" failure to stop).

Following appellate briefing and oral argument, the Texas Court of Criminal Appeals issued its opinion in *Queeman v. State*, 486 S.W.3d 70 (Tex.App.--San Antonio 2016), *aff'd.*, 520 S.W.3d 616 (Tex.Crim.App. 2017). Queeman was driving eastbound on a two-lane highway when he rear-ended an SUV that had slowed to make a left turn. The impact caused the SUV to roll into the westbound lane where it struck an oncoming truck. One of the passengers in the van died as a result of her injuries. Queeman was indicted for manslaughter and criminally negligent homicide. A jury acquitted him of the former charge and convicted him of the latter. He was sentenced to eighteen months in a state jail facility.

Queeman claimed that he was driving below the 40 m.p.h. speed limit and actually struck the van because it suddenly slowed to turn without utilizing the turn signal. The driver of the van was cited for failing to use her turn signal. Queeman was cited for failure to maintain control of his vehicle but he was not cited for speeding. The investigating officer, Trooper Welch, ultimately determined that Queeman was traveling "significantly" faster than 36 to 37 m.p.h. that Queeman claimed. But he conceded that he had no way of specifically knowing the actual pre-accident speed.

In reversing the conviction, the court of appeals noted that the evidence "could not have provided the jury a basis from which to reasonably infer that appellant was traveling at an 'excessive rate of speed'". *Queeman*, 520 S.W.3d at 621, *citing* 486 S.W.3d at 77. It emphasized that Welch could not quantify Queeman's pre-impact speed and he had not been cited for speeding. Consequently, the intermediate court found that "any inference by the jury that appellant was traveling at an excessive speed would be impermissible speculation." *Id.* The court reasoned that

there was legally insufficient evidence to show any criminally culpable risk-creating conduct or other serious blameworthy conduct like that discussed in *Boutin*. *Id.* at 77.

Before the Court of Criminal Appeals, the State argued that the intermediate court's reliance on *Tello's* adoption of *Boutin* "incorrectly shifted the central focus in criminal negligence -- the awareness of the circumstances creating the risk -- onto why the conduct occurred, which improperly burdened the State." *Queeman*, 520 S.W.3d at 627. The court then reviewed in detail the decisions in *Montgomery*, *Tello*, and *Boutin* and concluded:

> We compare the instant case to this Court's decision in *Tello*. . . . The evidence here established that a fatal accident occurred due to appellant's failure to stop his vehicle sooner, but not that appellant's failure to perceive the risk of such an accident occurring under the circumstances constituted a gross deviation from an ordinary standard of care. As in *Boutin*, therefore, the evidence here is sufficient to show carelessness, but it does not establish that appellant engaged in any criminally culpable risk-creating conduct or that his conduct was such that it posed a substantial and unjustifiable risk of death, or that the failure to perceive that risk was a gross deviation from reasonable care under the circumstances.
>
> Driving is a common activity that has risks about which a reasonable person would be cognizant. Failure to appreciate those risks and the circumstances that create them can support ordinary negligence. Criminal negligence, however, requires a greater showing -- that the risk is 'substantial and unjustifiable' and that the failure to perceive the circumstances creating the risk is a 'gross deviation' from the usual standard of care. . . . Tragic consequences, as here, do not elevate ordinary negligence to criminal negligence.

Id. at 629-30, *citing Williams*, 235 S.W.3d at 753.

We conclude that *Queeman* controls here. Because the evidence does not rise to the level of some serious blameworthiness, we reverse the conviction and sustain Issue One.

September 6, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.

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