MODIFY and AFFIRM; and Opinion Filed July 29, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00480-CR

No. 05-15-00481-CR

JARED ASSAVEDO, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-1333264 & F-1333333

MEMORANDUM OPINION

Before Justices Lang, Lang-Miers, and Brown
Opinion by Justice Brown

Following a jury trial, Jared Assavedo appeals his convictions for aggravated assault with a deadly weapon and child endangerment. In two issues on appeal, he contends the evidence is legally insufficient to support his conviction for child endangerment and contends that in the aggravated assault jury charge he was entitled to an instruction on the lesser included offense of assault. In a cross-point, the State asks us to modify the deadly weapon findings in the judgments to reflect that the deadly weapon used was a motor vehicle. We will modify the judgments and will affirm as modified.

BACKGROUND

Appellant was indicted for intentionally, knowingly, and recklessly causing serious bodily injury to Claudia Lopez by striking a motor vehicle owned and operated by Lopez with a

motor vehicle operated by appellant and by forcing Lopez's motor vehicle from the roadway. He was also indicted for intentionally, knowingly, recklessly, and with criminal negligence engaging in conduct that placed J.R., a child younger than fifteen years of age, in imminent danger of death, bodily injury, and physical and mental impairment, by striking a motor vehicle occupied by J.R. with a motor vehicle operated by appellant. Appellant pleaded not guilty and elected a jury trial. The jury found appellant guilty of both offenses. In each case it found that appellant used or exhibited a deadly weapon, a motor vehicle, during the commission of the offense. The jury assessed his punishment for aggravated assault at thirteen years and six months' confinement and a $10,000 fine. It assessed his punishment for child endangerment at ten years' confinement and a $10,000 fine.

At trial, Richard Rubio testified that on the night of January 18, 2013, he and Lopez, who is his fiancée, and their son J.R., who was eight months old, were driving to a restaurant. Lopez was driving, Rubio was in the front passenger seat, and their son was behind Rubio. They were heading west in the far right lane on Shady Grove, which was two lanes in each direction. Appellant was trying to turn right into an apartment complex from the lane beside them. He cut them off and came to a "stand still" in front of them. Lopez honked her horn. After a while, appellant turned into the apartments. Lopez and Rubio continued on their way, but appellant appeared again. He got in front of them and came to a complete stop on Shady Grove. Lopez honked again, and appellant stuck his middle finger out the window. Lopez put the car in reverse and drove around him. As they continued to drive on Shady Grove, appellant came up behind them and hit the back of their car "pretty hard." Rubio was scared and worried. Appellant pulled up next to them and started yelling. Rubio grabbed a beer bottle from the back seat and threw it, breaking appellant's back window. Rubio and Lopez took a right turn on Belt Line. Appellant nudged their car from behind a second time. Appellant was travelling at a

"pretty high speed" and nudged them much harder than the first time. Rubio and Lopez tried to get away from him. They turned left on Rock Island as it turned yellow, hoping appellant would stop for the red light. Rock Island was one lane in each direction. In the rear view mirror, Rubio saw appellant switch into the other lane of traffic. He felt contact on the side of the car and they spun out. Their car went sideways and crossed the left lane of traffic and wrapped around a tree. Appellant left the scene. From the time they first encountered appellant, the whole incident took less than five minutes. Lopez's spinal cord was fractured in the accident, and she has no movement below her waist.

Lopez gave testimony about the circumstances leading up to the accident that was similar to Rubio's testimony. She did not remember anything that happened between turning on Rock Island and waking up in the hospital. Her doctor testified that, absent breakthroughs in medical science, Lopez will never walk again.

Sergio Beltran and his wife were driving eastbound in their car on Rock Island on January 18, 2013. He heard his wife, who was driving, gasp for air and saw two vehicles coming toward them — one in the correct lane and one in their lane. They veered off to avoid a head-on collision. Beltran heard a crunch as if one vehicle hit another and then he heard a thump. He did not see the accident. Beltran got out of his car and saw that the passenger, Rubio, appeared to be unconscious. He soon regained consciousness.

Irving Police Officer Aaron Shook testified that on the night of January 18, 2013, he witnessed two vehicles run a red light at Rock Island and Belt Line. He sped to catch up to them and saw one vehicle strike the other, causing it to roll over and flip. Officer Shook called to report a hit-and-run and stayed at the scene to tend to the victims. Shook testified that he went to the driver first "because it appeared that she wasn't wearing her seatbelt and was kind of half in, half out of the vehicle." Dispatch called Shook and informed him that the person in the other

vehicle had called police and was going to return to the scene in a few minutes. When the person did not return, Shook got appellant's number from dispatch and called him. Appellant agreed to meet the officer. Appellant told Officer Shook that someone named Jordan had been driving and that he was a passenger.

The 911 call appellant made was played for the jury. Appellant called to report that someone had thrown a bottle in his car. He did not mention that someone else was driving. According to Shook, a few seconds into the call the sound of a crash is audible. Two minutes into the call, appellant stated he was at Shady Grove and McArthur. Shook testified it was not possible to go from Rock Island to the intersection of Shady Grove and McArthur in two minutes.

Tony Ruyle testified that on the night of January 18, 2013, he was having a cookout with some friends at a shop on Rock Island, where some of his friends work on their cars. Racing vehicles was a hobby of Ruyle's. Ruyle had known appellant for about two years and had hung out with him at the shop. Appellant was interested in racing. Ruyle heard the crash and ran to the scene. Later that night, appellant came to the shop and said he was in an accident. Ruyle saw that one of appellant's car windows was broken and there was damage to the right front bumper area. Appellant told Ruyle that someone threw an object through his back window where his son was sitting. Appellant tried to go around that car on Rock Island, but with oncoming traffic, he fell back in behind them, clipped the left rear of their car, and sent them into a ditch. Appellant asked if he could leave his car at the shop. Ruyle said no and appellant left.

Jeff Parsons, an Irving police officer, testified that he was an investigator and reconstructionist for fatality and hit-and-run crashes. Parsons reviewed the original officer's report. He found a person named Jordan that matched the description appellant gave. That person did not own a vehicle or live where appellant said he lived. Parsons could not place

Jordan at the scene of the accident. Parsons contacted appellant's father to tell him he wanted to see appellant's vehicle. Appellant's father later told Parsons where the car was, and Parsons impounded it. It appeared to Parsons that some sort of repair had been attempted on the car's right front bumper. All the windows were intact, but Parsons found glass inside the car on the floor. Based on his investigation and the evidence left on both vehicles, it appeared the right front corner of appellant's vehicle had struck the left rear corner of Lopez's vehicle. Parsons testified it looked like a pit maneuver had occurred in this case. He testified that a pit maneuver was a way for police to stop a chase that had gone on too long or become too dangerous. An officer would come up to the side of another vehicle and put his right front bumper against the vehicle. It takes very little pressure to make the other car begin to spin. Parsons testified a pit maneuver was considered deadly force and a motor vehicle using the maneuver would be a deadly weapon. According to Parsons, when you use a vehicle to push another car off the road or hit someone, it becomes very dangerous. A child in a car involved in an accident such as this one would be placed in imminent danger of death, bodily injury, and physical and mental impairment.

Officer Parsons issued an arrest warrant for appellant. Appellant was located some time later in Oklahoma.

Appellant was the sole witness in his defense. He testified that his young son was in the back seat of his car that day. According to his version of the events, he did not make contact with Lopez and Rubio's car until after Rubio threw the bottle at his car.

As appellant was waiting to take a right turn into his apartment complex, a vehicle pulled up behind him and hit the horn repeatedly. He gave them the middle finger and for two or three minutes there was nothing but honking and the finger sign. The car could have gone around him in the left lane, which was clear. After appellant pulled into the parking lot, the other car kept

honking and drove on. Appellant was moving out of that apartment and had planned to get some things from it. There were emergency vehicles in the parking lot, so he decided to go on to his new residence nearby. About a mile down the road, appellant saw the vehicle he had come across before. Appellant approached the car to pass it, but the driver cut him off. The other car swerved to the left, and appellant had to put on his brakes. Appellant went around the vehicle and got in front of it. He did what he called a "brake check," breaking early before the intersection. Appellant rolled down his window and began yelling at the other car. When the light turned green, appellant continued on his way home and thought the situation was over. Soon the car in question approached him again, and all of a sudden glass was everywhere. Appellant saw the car stop in the middle of the intersection to do a U-turn. Appellant had to hit the brakes and made contact "ever so slightly" with the vehicle.

Appellant testified he called 911 to report that someone had broken his window in a road rage incident. He planned to pass the other car and block them until police arrived. He testified that he and the other car were driving about 70 miles per hour. As appellant got beside their car, another vehicle was coming the other way and he did not have enough room to pass. Appellant let off the gas and got back into the right lane. After that car passed, appellant attempted to pass them again. He testified that he thought the driver of the other car anticipated his move and swerved to block him. When Lopez swerved, appellant saw her car turn sideways. Appellant testified that the two vehicles never made contact right before the crash. The two cars made contact only once at Shady Grove and Belt Line when the other car braked in front of him. Appellant indicated the crash was due to the other driver's sudden swerve at a high rate of speed.

Appellant testified that he could not see there was a child in the other car. Any buffing on his car had been there when it was purchased two weeks earlier. Appellant denied fleeing to Oklahoma; he testified that he and his wife had planned to move there before the accident.

Appellant admitted that on the 911 call, he had expressed surprise an accident had occurred when he had known about the accident. Appellant told police someone else had been driving because he had been pulled over quite a few times for no insurance and driving with a suspended license.

The State called Officer Parsons in rebuttal, who testified that the tire marks on the road contradicted appellant's testimony that he did not hit Lopez's vehicle right before the accident. Parsons stated the car had to have been struck to do what it did. Parsons testified he had seen situations where a person wearing a seatbelt is uninjured in a crash and a person not wearing a seatbelt is seriously injured. Parsons stated that wearing a seatbelt is the best thing to do to avoid serious injury.

CHILD ENDANGERMENT CONVICTION

In his first issue, appellant contends the evidence is legally insufficient to support the child endangerment conviction. As is relevant to this case, a person commits the offense of child endangerment if he intentionally, knowingly, recklessly, or with criminal negligence, by act, engages in conduct that places a child younger than fifteen years in imminent danger of death, bodily injury, or physical or mental impairment. *See* TEX. PENAL CODE ANN. § 22.041(c) (West 2011). Appellant specifically contends that there is no evidence he knew a child was in Lopez's vehicle and therefore he could not have knowingly endangered a child.

When reviewing the sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict to determine, whether, based on that evidence and the reasonable inferences therefrom, the factfinder was rationally justified in finding guilt beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *see Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Temple*, 390 S.W.3d at 360. We compare the elements of the offense as defined by a hypothetically correct jury charge to the evidence

adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). A hypothetically correct charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict its theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.*

Appellant contends he cannot be convicted of child endangerment without evidence he knew a child was present in the other car.[1] There appears to be a conflict in the courts of appeals regarding whether child endangerment is a "nature of conduct" or "result of conduct" offense. *Compare Walker v. State*, 95 S.W.3d 516, 520–21 (Tex. App.—Fort Worth 2002, pet. ref'd) (language of section 22.041(c) expresses a clear legislative intent that person commits child endangerment if he intentionally or knowingly "engages in conduct" that places a child in imminent danger of death, bodily injury, or physical or mental impairment), *with Millslagle v. State*, 81 S.W.3d 895, 897 n.1 (Tex. App.—Austin 2002, pet. ref'd) (notwithstanding phrase "engages in conduct," section 22.041(c) appears to be a "result of conduct" offense). For a result of conduct offense, the culpable mental state relates not to the nature or circumstances surrounding the charged conduct, but to the result of that conduct. *See Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003). Even if we assume child endangerment is a result of conduct offense, the evidence in this case is sufficient to support appellant's conviction.

Here, all four culpable mental states were alleged in the indictment. A person acts recklessly with respect to the result of his conduct when he is aware of a substantial and unjustifiable risk that the result will occur. TEX. PENAL CODE ANN. § 6.03(c) (West 2011). The

[1] In his brief, appellant relies on distinguishing this case from *Schultz v. State*, 923 S.W.2d 1 (Tex. Crim. App. 2014). The defendant in *Schultz* was charged under a subsection of section 22.041 that makes an offense for a person with custody, care, or control of a child younger than fifteen to intentionally abandon the child in any place under circumstances that expose the child to an unreasonable risk of harm. TEX. PENAL CODE ANN. § 22.041(b) (West 2011). The court of criminal appeals held that in the statute the word "intentionally" immediately precedes "abandons," which means the prescribed mental state is connected with the act of abandonment itself. *Id.* The court reasoned that had the legislature intended to require that the actor be aware of the risk of harm, it would have included language to that effect. *Id.* Appellant asserts this case is distinguishable from *Schultz* because he did not know a child was present. We find *Schultz* distinguishable because it involved a different subsection of 22.041 with different elements than the child endangerment subsection.

risk must be of such a nature and degree that its disregard 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. *Id.* "At the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct." *Trepanier v. State*, 940 S.W.2d 827, 829 (Tex. App.—Austin 1997, pet. ref'd) (quoting *Lewis v. State*, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975)). Generally, a person's mental state must be inferred from the circumstances. *Ledesma v. State*, 677 S.W.2d 529, 531 (Tex. Crim. App. 1984).

At the very least, viewing the evidence in the light most favorable to the verdict, there was evidence to show appellant was reckless regarding the result of his conduct. In a fit of road rage, appellant cut the car being driven by Lopez off in front of his apartment complex and then continued to pursue the car. He got in front of Lopez and came to a complete stop. When Lopez and Rubio went around him, he came up behind them and hit the back of their car. After Rubio threw a bottle at appellant's car, appellant hit them again from behind even harder. Then, as Rubio and Lopez attempted to speed away, appellant, admittedly going about seventy miles per hour, hit the side of their car causing them to spin out and hit a tree. Appellant's conduct after the accident, including lying about who was driving and whether he hit Lopez's car on Rock Island, attempting to drop his car off at the shop, and fleeing to Oklahoma, was circumstantial evidence of his recklessness regarding the results of his conduct. The evidence shows that, in his manner of driving, appellant created a substantial and unjustifiable risk and consciously disregarded the risk he created. Appellant did not need to be aware that there was a specific risk of imminent danger to a child in the vehicle. *See Trepanier*, 940 S.W.2d at 829–30 (rejecting defendant's argument that, because there was no evidence he knew cyclist was present on the roadway, evidence was insufficient to prove he committed manslaughter — recklessly causing a

death — when defendant struck cyclist with his vehicle). The evidence is sufficient to support appellant's conviction for child endangerment. We overrule appellant's first issue.

AGGRAVATED ASSAULT CONVICTION

In his second issue, appellant contends the trial court erred in the jury charge for aggravated assault by denying his request for an instruction on the lesser included offense of assault. He maintains that Lopez was not wearing a seatbelt and therefore an instruction on simple assault was warranted because she would not have sustained serious bodily injury if she had been wearing a seatbelt.[2]

As defined in section 22.01 of the penal code, a person commits assault if he intentionally, knowingly, or recklessly causes bodily injury to another. TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2015). "Bodily injury" means physical pain, illness, or any impairment of physical condition. *Id.* § 1.07(a)(8) (West Supp. 2015). A person commits aggravated assault if he commits assault as defined in section 22.01 and either (1) causes serious bodily injury to another, or (2) uses or exhibits a deadly weapon during the commission of the assault. TEX. PENAL CODE ANN. § 22.02(a) (West 2011). "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. *Id.* § 1.07(a)(46).

We review a trial court's decision to deny a lesser included offense instruction for an abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004). For a charge on a lesser included offense to be required, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser included offense. *Young v. State*, 283

[2] We note that Lopez and Rubio were not asked if Lopez was wearing a seatbelt at the time of the accident. The only evidence Lopez was not wearing one comes from Officer Shook's testimony that, at the scene of the crash, it appeared she was not wearing her seatbelt.

S.W.3d 854, 875 (Tex. Crim. App. 2009). Meeting this threshold requires more than mere speculation; there must be affirmative evidence that raises the lesser included offense. *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012).

Appellant asserts that Lopez would have suffered bodily injury, as opposed to serious bodily injury, if she had been wearing her seatbelt. He relies on the fact that the two other occupants of the car, Rubio and the baby, were properly restrained and did not have serious injuries. He also relies on Officer Parsons's testimony that the best way to avoid injury is to wear a seatbelt. Appellant's argument is based on speculation about what might have happened if Lopez had been wearing a seatbelt rather than on any affirmative evidence in the record. *Cf. Blea v. State*, 483 S.W.3d 29, 34–35 (Tex. Crim. App. 2016) (in determining whether bodily injury creates a substantial risk of death, courts should consider the quality of the bodily injury as it was inflicted; courts should not consider exacerbation of injury by actions not attributable to offender). We cannot conclude the trial court erred in refusing to submit a lesser included offense instruction.

Further, even if the court did err in refusing to submit a lesser included offense instruction, any error was harmless. A court's erroneous refusal to charge the jury on a lesser included offense is subject to a harm analysis. *See Saunders v. State*, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992). When, as here, the appellant has properly preserved error by objecting to the charge, he is entitled to relief if the record shows that he suffered some harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). This standard still requires the reviewing court to find that the defendant has suffered some actual, rather than merely theoretical, harm from the error. *Id.*

Under the facts of this case, there was no actual harm to appellant. The jury made an affirmative finding — one that appellant does not challenge — that he used or exhibited a deadly

weapon during the commission of the offense. Even if appellant caused only bodily injury, this deadly weapon finding elevated simple assault to aggravated assault. *See* TEX. PENAL CODE ANN. § 22.02(a). We overrule appellant's second issue.

CROSS-POINT

In a cross-point, the State asks us to reform the judgments. In the section titled "Findings on Deadly Weapon," each judgment incorrectly recites, "YES, A FIREARM." This Court has the authority to modify an incorrect judgment to make the record speak the truth when it has the necessary information to do so. *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd); *see* TEX. R. APP. P. 43.2(b). We therefore modify the "Findings on Deadly Weapon" portion of each judgment to recite, "YES, A MOTOR VEHICLE." We sustain the State's cross-point.

As modified, we affirm the trial court's judgments.

/Ada Brown/
ADA BROWN
JUSTICE

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TEX. R. APP. P. 47.2(b).

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JARED ASSAVEDO, Appellant

No. 05-15-00480-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1333264.
Opinion delivered by Justice Brown, Justices Lang and Lang-Miers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> In the section titled, "Findings on Deadly Weapon," "YES, A FIREARM" is deleted and replaced with "YES, A MOTOR VEHICLE."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of July, 2016.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JARED ASSAVEDO, Appellant

No. 05-15-00481-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1333333.
Opinion delivered by Justice Brown, Justices Lang and Lang-Miers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> In the section titled, "Findings on Deadly Weapon," "YES, A FIREARM" is replaced with "YES, A MOTOR VEHICLE."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of July, 2016.