



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00762-CR

Audrey Rose **GUERRERO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-CR-6870
Honorable Jefferson Moore, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 31, 2016

AFFIRMED

Audrey Rose Guerrero appeals her conviction for causing serious bodily injury to a child. She argues there is legally insufficient evidence that she intentionally or knowingly caused her daughter, J.H., serious bodily injury. Guerrero further argues the trial court erroneously charged the jury by failing to instruct the jury (1) they must be unanimous as to J.H.'s bodily injury and (2) injury to a child is a result oriented offense. We affirm the trial court's judgment.

BACKGROUND

On July 9, 2013, a 911 call was placed after Guerrero found her forty-one-day-old daughter, J.H., unresponsive. After an investigation into J.H.'s death, Guerrero was indicted for intentionally, knowingly, and recklessly causing serious bodily injury to J.H. by omission. The case proceeded to a jury trial, during which the State presented evidence J.H. was malnourished, and the malnourishment contributed to her death. The State consistently argued the "serious bodily injury" Guerrero caused to J.H. was her death. The jury found Guerrero guilty, and the trial court sentenced Guerrero to twenty-five years' imprisonment and imposed a \$10,000 fine. Guerrero appeals.

SUFFICIENCY OF THE EVIDENCE

Guerrero challenges the legal sufficiency of the evidence that she intentionally or knowingly, by omission, caused serious bodily injury to a child, J.H. When conducting a legal sufficiency review, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on the evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We defer to the jury's determination of the weight and credibility of the evidence, and when the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of its verdict and defer to that determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Hooper*, 214 S.W.3d at 13. We determine whether the necessary inferences made by the jury are reasonable "based upon the combined and cumulative force of all the evidence when viewed in the

light most favorable to the verdict.” *Hooper*, 214 S.W.3d at 16-17. We now review the evidence in the light most favorable to the verdict. *See Jackson*, 443 U.S. at 319.

Evidence at Trial

Guerrero gave birth to J.H. on May 29, 2013. When J.H. was born, Guerrero tested positive for opiates and J.H. had drugs in her system. J.H. was admitted to the neonatal intensive care unit (ICU) for respiratory distress and observation of withdrawal symptoms. The hospital also contacted Child Protective Services (CPS), which sent an investigator to meet with Guerrero. The hospital records state that a safety plan was made whereby J.H. would be discharged to Guerrero’s grandmother, Rosalie DeLaRosa, and DeLaRosa would supervise all contact between Guerrero and her children, including J.H.

The State’s medical expert, Dr. James Lukefahr, is a pediatrician board certified in general pediatrics and child abuse pediatrics, and is employed by the University of Texas, where he teaches medical students specializing in pediatrics and teaches pediatricians in a fellowship program who are training in the child abuse pediatrics subspecialty. He also sees patients at several hospitals and clinics and consults with authorities in cases where children have been injured. This involves examining the child, case records, and medical records to determine whether injuries are due to accidents or are not accidental.

Dr. Lukefahr testified J.H. was born with some significant risk factors, one of which was a condition that caused some respiratory distress and caused one of her lungs to leak air into the chest wall area.¹ In the neonatal ICU, J.H. received oxygen and was closely monitored. She received daily chest x-rays and was initially fed using a tube because she was breathing too fast to take milk from a bottle. Dr. Lukefahr testified J.H.’s chest x-rays showed her lung issues had

¹ Dr. Lukefahr testified there was no direct link between Guerrero’s drug use and J.H.’s death.

completely resolved before the hospital discharged her. J.H. received her last tube feeding the morning of June 4, three days before she was discharged, and she was taking all of her feedings by mouth, using a bottle, before discharge. According to the hospital records, on June 7, when J.H. was discharged, she was bottle feeding well, had established weight gain, and although she had intermittent episodes of rapid breathing, it did not cause her distress or affect her oxygen saturation level. Dr. Lukefahr testified the hospital records showed J.H. was healthy and had no lingering issues at the time of discharge.

The record shows that prior to J.H. leaving the hospital, a nurse reviewed with both Guerrero and DeLaRosa a series of instructions on infant care and safety, including instructions about positioning the infant. The record shows they were told to place J.H. on her back after eating and to remove all soft items J.H. could pull toward her face. They were told never to leave the baby unattended on a couch or a bed. They were instructed that the baby could be placed on her stomach only while awake and only while being directly supervised by a caregiver for short periods of time. In addition, Guerrero and DeLaRosa were told to seek medical assistance if J.H. had difficulty breathing, very fast breathing, or labored breathing, or if she did not eat well for more than one feeding. Both Guerrero and DeLaRosa signed a copy of the instructions, stating they had received a copy and they understood the instructions.

Before leaving the hospital, Guerrero was instructed to see pediatrician Dr. Sergio Ramon on June 10 or June 11. Appointments were made for J.H. for a hearing screening the week of June 17 and for a follow-up appointment at the hospital on June 21. The hospital social worker also completed a referral, arranging for a nurse from Adventia Home Health to do weight checks in the home two times a week for three weeks. In accordance with CPS's safety plan, the hospital discharged J.H. to DeLaRosa.

Notwithstanding the safety plan, J.H. went home with Guerrero to Jennifer Reyes's home, not to DeLaRosa's. Reyes is Guerrero's mother. J.H. lived in Reyes's home with Guerrero and Guerrero's sons aged one and four. In addition, Ray Sanchez, the boys' father, stayed at the house at least two or three nights a week. Sanchez was on parole, and a condition of his parole was that he have no contact with the boys. J.H.'s father was incarcerated.

J.H. lived in the house from June 7, 2013, until she died on July 9, 2013. Reyes testified J.H. would have trouble breathing when they fed her, and they "constantly" had to stop feeding her or she would start throwing up. Nevertheless, J.H. was not taken to see the pediatrician on June 10 or 11, was not taken for her hearing screening the week of June 17, and was not taken to the follow-up appointment on June 21. Although DeLaRosa had a car and would have taken Guerrero and J.H. to the doctor, they never went.

Guerrero told police officers, investigators from the medical examiner's office, and CPS that she placed J.H. to sleep on the couch in the living room on the night of July 9 because J.H. enjoyed the background noise of the television. A video reenactment shows Guerrero positioned J.H. on her stomach, with her head directly face down on the couch cushion and with surrounding pillows, so she would not fall off the couch. Guerrero went to sleep in another room, leaving the child alone.

Guerrero said she got up to check on J.H. and fed her at 2:00 a.m., 4:00 a.m., and 8:00 a.m. After feeding J.H. at 8:00 a.m., Guerrero again left J.H. on the couch and went back to sleep in her own bedroom. Guerrero said that when she woke up at 11:00 a.m., she found J.H. cold and unresponsive. Guerrero said she carried J.H. to the bassinet in the bedroom and she and Sanchez performed CPR on J.H. Emergency medical services was called at noon. The statements given by Reyes and Sanchez, the other two adults in the home at the time, were generally consistent with what Guerrero told the officers.

Two EMS technicians responded to the call at 12:07 p.m. on July 9. When they arrived at the house, it was apparent to the technicians “almost instantly” nothing could be done for J.H. She was cold to the touch and had no pulse, and the technicians observed lividity, indicating she had “been down for awhile.” The technicians found no electrical activity in J.H.’s heart and, after consulting with their medical director by telephone, they determined resuscitation efforts would be futile. The San Antonio Police Department, the medical examiner’s office, and CPS were notified, and each agency sent personnel to the house.

James Akers, an investigator from the Bexar County Medical Examiner’s office, testified he was dispatched to the scene to conduct a preliminary investigation for the examining doctors who would determine the cause of death. Akers observed J.H. in the bassinet and testified she was small, had trauma to her face, numerous scratches, and areas of bruising on her leg. These observations were documented in photographs taken by a crime scene investigator that show a small thin infant with scratches and scabs on her ear, chin, and below her nose and bruising on her thigh were admitted into evidence. Akers testified it was standard practice in the case of a home death of a child to videotape a reenactment of how the child was put to sleep, where the child was last seen alive, and how and where the child was found deceased. This videotape was also admitted into evidence and published to the jury. Using a teddy bear to represent J.H., Guerrero reenacted how she placed J.H. to sleep on the couch—on her stomach, with her directly face down on the couch cushion. Guerrero told Akers this was also the position J.H. was in when she discovered J.H. unresponsive. The videotape further showed a bassinet in one of the bedrooms, a half full baby bottle on the kitchen table, a bottle in the refrigerator, and one and one-half containers of baby formula in the kitchen.

Sergeant Ricky Lopez was the lead detective who at the time was the SAPD homicide division detective assigned to death investigations. He testified he did not see any obvious major

external trauma on the child that would lead him to assume a homicide had occurred. Before leaving the house, Sergeant Lopez told Guerrero she should expect other agencies to contact her and that he would want to speak with her after the autopsy was complete and he consulted with the medical examiner.

CPS investigator Adam Jacobs spent several hours at the house on the day J.H. died. After leaving the house, Jacobs consulted with his supervisors. Jacobs's supervisors told him to take custody of Guerrero's two sons and place them in foster care based on the circumstances of J.H.'s death, the fact that Guerrero tested positive on a drug screen Jacobs gave her, and Sanchez's presence in the house in violation of a condition of his parole that he was to have no contact with the boys. However, when Jacobs returned, the boys were not at the house. Guerrero first told him she did not know where they were and then said they were with a relative. When Jacobs was unable to locate the boys or the relative, he filed a "missing persons" report. The next day, the Department of Family & Protective Services obtained a court order authorizing the police to pick up the boys and place them in the Department's custody.

On July 10, Bexar County Chief Medical Examiner Dr. Randall Frost performed J.H.'s autopsy. The autopsy report was admitted into evidence and stated the cause and manner of death was undetermined, there were significant unexplained healing injuries on the child, death by asphyxiation could not be excluded, and the child was quite small with "a near absence of subcutaneous and visceral fat." Dr. Frost testified J.H. appeared at first glance to be very thin and underweight. He found she had almost no subcutaneous fat, and her weight was "well below the bottom of the [weight] chart." He testified he did not find any problems with her digestive system that would prevent her from gaining weight if properly fed. He testified the child might have been eating some food because he found fecal material in the diaper. However, he noted the colon will produce fecal material to some degree even when one is not eating and he did not know how long

the fecal material had been in J.H.'s diaper. Given the child's weight and appearance, he was concerned the child was malnourished.

Dr. Frost documented abrasions on J.H.'s chin, under her nose, on one of her ear lobes, on her palms, on the back of her right hand, on one of her fingers, on each thigh, and several inside her mouth. He also found a bruise on her forehead and another on her left thigh. He testified these injuries were healing, and had not occurred on the date of her death. Dr. Frost testified these injuries concerned him because he would not expect to see them on a one-month old infant, and they caused him to suspect some kind of abuse. Dr. Frost testified he also found at least three lacerations on the inner surface of J.H.'s upper lip and one inside the bottom lip. The largest injury he found was a laceration where J.H.'s upper lip had been torn away from the gum. That small band of tissue that connects the underside of the lip to the gum—the frenulum—was gone; Dr. Frost described it as “obliterated.” Dr. Frost testified this injury would have caused pain, especially when the infant tried to feed, and might have prevented her from properly feeding. Photographs depicting all of these injuries were admitted into evidence.

Dr. Frost did not find any injury to the internal organs, skull, or skeleton. He did not find any evidence of medical disease or of internal or external injuries that would have directly caused her death. He found no problems with her lungs or heart that contributed to her death and no abnormal findings on the toxicology testing.

Dr. Frost testified he did not conclude J.H. died of natural causes. Rather, he concluded that because he could see competing possibilities for her death, he had to list it as undetermined. He noted that if the airways of an infant this size were obstructed in some manner for a few minutes, she could suffocate without leaving any marks or evidence that could be seen on an autopsy. He further testified that if an infant was malnourished, the autopsy examiner would not

necessarily use that word, but would reflect that the infant was thin and underweight and had no subcutaneous fat.

Dr. Frost further testified he had reviewed the hospital records from J.H.'s birth and one-week stay in the neonatal intensive care unit. It appeared to him the problems J.H. had at birth had mostly resolved when she was discharged, and he found nothing in the autopsy to suggest the problems had recurred.

In conducting his review of J.H.'s death, Dr. Lukefahr reviewed the autopsy report and photographs, spoke with Dr. Frost, and reviewed the medical records from J.H.'s birth and hospital stay. Dr. Lukefahr testified J.H.'s autopsy photograph, which the trial court admitted into evidence, was "a very alarming photo" of "a profoundly emaciated, wasted baby." The photograph showed that there was "no body fat on that baby," "the abdomen is sunken in," "the arms are very thin appearing, and the legs are not only very thin, but . . . all that loose, reductive skin."

Dr. Lukefahr's impression from photographs of J.H. that she was "essentially starved" was borne out by the records showing J.H. weighed less when she died than she did at birth. J.H. weighed six pounds and eleven ounces when she was born, but only weighed six pounds and four ounces when she died at forty-one days old. Dr. Lukefahr testified it is normal for babies to lose weight in the first few days of life. However, a baby should regain her birth weight within two weeks and then steadily gain weight at the rate of two thirds of an ounce to an ounce each day after that. The medical records reflected J.H. lost weight the first few days after she was born. However, she steadily gained weight the last four days before she was discharged from the hospital. Dr. Lukefahr found it "highly unusual and alarming" that more than a month after her discharge J.H. was still below her birth weight. He testified this meant J.H. was "not getting the nutrition that she needed, not just to grow and develop, but actually even to survive." He acknowledged the autopsy report reflected J.H. was being fed to some degree, but the absence of subcutaneous fat

indicates that she was not getting the nutrition she needed to sustain bodily function. His training and experience and review of the case led him to conclude J.H. was “severely malnourished by any measure and that that contributed to the child’s death.”

Dr. Lukefahr testified the injury to J.H.’s frenulum was caused by blunt trauma to the inside of the upper lip that was forceful enough to tear the frenulum away. The injury indicated that “something has been forced very, very hard into that space between the baby’s lip and gum.” Dr. Lukefahr testified that the pain from this injury and the swelling it would have caused would have made it “almost impossible” for J.H. to suck on a bottle or get a grip on the nipple. He stated none of the treatment J.H. received at the hospital would have caused the abrasion under her nose or the torn frenulum. He explained the tube used to feed J.H. was “very thin and very soft and flexible.”

Dr. Lukefahr stated “if a brand-new baby is having significant issues, it would be important that the parent seek medical attention for the baby.” He testified that if J.H. had been taken to the doctor, he or any competent pediatrician would have made a report to CPS and would have taken the necessary steps to ensure she was getting adequate nutrition. This probably would have meant admitting her into the hospital because she was unable to eat enough to sustain herself. In his opinion, J.H. “was clearly severely malnourished by any measure” and the malnourishment contributed to her death.

Dr. Lukefahr further explained that for the last twenty years, the recommended practice is to have babies sleep on their backs because even healthy babies may not have the ability to protect their airway on soft surfaces. He testified every hospital where he has ever worked provides counseling to new mothers and instructs them to place babies to sleep on their backs on a firm surface without any pillows, pads, blankets, or anything that could obstruct the infant’s airway. When shown a picture of how J.H. was positioned face down on the couch, Dr. Lukefahr testified even a healthy six-week-old baby would have had difficulty protecting her airway in that position

on such a surface. “And you add onto that the problem of the baby being profoundly weak and malnourished, and not having the energy to move even the normal amount for a six-week-old, greatly increases the risk for suffocation in this situation.”

After the autopsy was complete, Sergeant Lopez conferred with Dr. Frost and Dr. Lukefahr and determined that further investigation was necessary. He tried unsuccessfully to contact Guerrero and then learned that Guerrero and Sanchez had left town with their sons. They were located about a week later in Waco, and the boys were placed in foster care. Guerrero told CPS investigator Jacobs she had left with the boys because she “was scared.”

Guerrero’s mother Reyes testified J.H. was not taken to the doctor and J.H. was “fine” and “normal.” She stated a nurse came to the house periodically to weigh J.H. and take her vitals, but did not testify about anything the nurse may have said. Reyes denied ever having seen the injury under J.H.’s nose or the abrasions on her hands and ears that were apparent on the photographs admitted into evidence. She also testified she never noticed the severe injury inside J.H.’s mouth.

Guerrero did not testify.

Discussion

We measure the legal sufficiency of the evidence “by the elements of the offense as defined by the hypothetically correct jury charge.” *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). “Such a charge would be 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.” *Id.* As charged in this case, a person commits the offense of injury to a child if the person intentionally or knowingly, by omission, causes the child serious bodily injury. TEX. PENAL CODE ANN. § 22.04(a) (West Supp. 2016). An omission that causes serious bodily injury

to a child is conduct constituting the offense if the actor had a legal or statutory duty to act. *Id.* § 22.04(b)(1).

“Serious bodily injury” includes bodily injury that creates a substantial risk of death or that causes death. *See id.* § 1.07(a)(46). Death is included in the definition of serious bodily injury and proof that a person intentionally or knowingly caused the death of a child as a matter of law establishes the person intentionally or knowingly caused serious bodily injury to the child. *Williams v. State*, 294 S.W.3d 674, 682 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d). A person acts “intentionally” with respect to a result of her conduct when it is her conscious objective or desire to cause the result. TEX. PENAL CODE ANN. § 6.03(a) (West 2011). A person acts “knowingly” with respect to a result of her conduct when she is aware that her conduct is reasonably certain to cause the result. *Id.* § 6.03(b). Knowledge and intent may be inferred from the defendant’s statements, conduct, and the circumstances surrounding the defendant’s conduct. *Turner v. State*, 600 S.W.2d 927, 929 (Tex. Crim. App. 1980). Because injury to a child is a result-oriented offense, the required 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).

As charged in the indictment, Guerrero committed the offense of injury to J.H. by omission if she intentionally or knowingly by omission caused J.H. serious bodily injury when, having a legal duty to act, she either failed to provide adequate nourishment and did not seek and provide proper medical care, or failed to place J.H. in a proper sleeping position. Guerrero argues the evidence is legally insufficient to prove either (1) her omissions caused the death or (2) she intended to cause J.H.’s death or she was aware that her failure to act was reasonably certain to cause J.H.’s death. We address each element separately.

Causation

Guerrero argues there is no evidence her omissions caused J.H.'s death because Dr. Frost's autopsy concluded the cause of death was indeterminate and he was the "only witness competent to give an opinion on cause and manner of death." She contends the evidence shows only that a congenital defect was a likely cause of J.H.'s death. We disagree with Guerrero's characterization of the record.

Dr. Lukefahr testified about his qualifications, training, and experience. He also testified extensively about his review of J.H.'s autopsy report and medical records detailing J.H.'s physical condition when she was born and soon after she died. Dr. Lukefahr stated, "I would say that malnutrition contributed to the child's death. That is my opinion." He explained, "[I]n my opinion, my training and experience allows me to give an opinion about things that might have contributed to the child's death. In this death, the child was clearly severely malnourished by any measure and I do feel that that contributed to the child's death." He stated J.H. was receiving insufficient nutrition to sustain her bodily functions. Dr. Lukefahr testified that had medical care been sought for J.H., she would have been admitted to the hospital and been provided the nutrition she needed to live.

The State's evidence also supports its assertion that the health issues J.H. had at birth had fully resolved themselves by the time she was discharged from the hospital. Although defense counsel questioned Dr. Frost and Dr. Lukefahr extensively on the issue, the doctors testified they found no evidence of any congenital defect that contributed to J.H.'s death. Neither doctor testified that J.H.'s death was "unexplained." Dr. Frost testified that he could see competing possibilities for the cause of death and therefore listed the cause as undetermined. He advised Sergeant Lopez to continue his homicide investigation due to apparent abuse and weight issues.

Furthermore, when a child dies, a conviction for serious bodily injury to the child may be sustained even when “no specific, positive, anatomical cause of death” is determined. *See Galvan v. State*, 699 S.W.2d 663, 669-71 (Tex. App.—Austin 1985, pet. ref’d), *superseded on other grounds as stated by Wood v. State*, 299 S.W.3d 200, 212 n.8 (Tex. App.—Austin 2009, pet. ref’d). In *Galvan*, the parents were charged with knowingly or intentionally by omission causing injury to a child by failing to provide food or medical care. *Id.* at 665. No specific cause of death was found and the doctors testified the child died of a combination of active and passive neglect and abuse. *Id.* at 669. The child was severely malnourished, had bruises, and severe diaper rash. *Id.* at 669-70. On a challenge to the sufficiency of the evidence to support the parents’ convictions, the court of appeals noted the jury heard the State’s medical evidence “that the child’s conditions were readily treatable and should not have been present at the child’s death had they been so treated.” *Id.* at 671. The court held that although the jury could have believed their version of the events—that the child had been fed and cared for and died of “crib death” through a combination of ignorance and a chain of tragic events—the jury could, and did, reasonably conclude beyond a reasonable doubt that the child died due to criminal neglect. *Id.* at 670-71.

Similarly, in this case, the jury heard the State’s medical evidence that J.H.’s malnourishment could have been resolved had Guerrero sought medical treatment, the testimony that Guerrero did not seek medical treatment, and J.H.’s malnourishment contributed to her death. Although Guerrero suggests the jury could have disbelieved Dr. Frost’s and Dr. Lukefahr’s uncontroverted expert testimony that the problems at J.H.’s birth were completely resolved before she left the hospital, the jury could, and did, reasonably find beyond a reasonable doubt that J.H.’s death was caused by her severely malnourished and weakened condition and that had Guerrero taken J.H. to the doctor when she had difficulty eating and losing weight, the malnourishment

could have been resolved. We therefore hold there is sufficient evidence that Guerrero's omissions caused J.H.'s death.

"Intentional" or "Knowing" Omission

Guerrero argues there is legally insufficient evidence she intentionally or knowingly caused J.H.'s death. Guerrero points to evidence there was food in the house and both she and her mother fed J.H. Guerrero also asserts there is no evidence that her failure to put J.H. to sleep on her back played any role in J.H.'s death.

A jury may infer knowledge or intent from any facts that tend to prove the existence of the mental states, including the defendant's acts, words, or conduct and the circumstances surrounding the acts engaged in by the defendant. *Turner*, 600 S.W.2d at 929. Knowledge that failure to obtain medical care is substantially certain to result in serious bodily injury can be inferred from how apparent and obvious the condition is. *See Proenza v. State*, 471 S.W.3d 35, 46 (Tex. App.—Corpus Christi 2015, pet. granted); *Williams*, 294 S.W.3d at 684; *Baldwin v. State* 264 S.W.3d 237, 243 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

The jury saw photographs of J.H. that Dr. Lukefahr described as being "alarming" and showing a "profoundly emaciated, wasted baby." The photographs showed J.H. had a sunken abdomen, very thin arms and legs, and loose skin, as well as showing numerous abrasions and bruises of which Guerrero and her mother denied having any knowledge. The jury also had the autopsy report and medical records revealing J.H. weighed less when she died than she did either at birth or when she was discharged from the hospital. The jury also heard evidence the injury to J.H.'s mouth was so severe that it would have been painful and difficult for her to suck on a bottle. While Reyes and Guerrero denied being aware of the injury, Reyes acknowledged J.H. had trouble eating and would throw up. The jury also had evidence Guerrero was told when J.H. was discharged from the hospital to take J.H. to the doctor within three or four days and to seek medical

attention if J.H. had any difficulty breathing or eating. Guerrero not only failed to go to the scheduled appointments, but she also failed to seek medical care for J.H. when she had difficulty eating, had lost weight, and was clearly undernourished. The jury heard evidence Guerrero had already had two children and J.H. was not her first child.

Because the evidence shows J.H.'s condition was apparent and obvious, and should have been obvious to Guerrero, we hold a rational jury could have inferred that Guerrero was aware of J.H.'s undernourishment and that her failures to ensure J.H. received adequate nourishment and medical care would be reasonably certain to cause J.H.'s death. *See Proenza*, 471 S.W.3d at 45-46 (holding evidence sufficient to support finding defendant knowingly by omission caused child's death by failing to feed and failing to seek medical care where evidence showed four-month-old child had been losing weight and weighed only one pound three ounces more than he weighed when he was born, physician testified child appeared small and malnourished, autopsy report stated he had a sunken abdomen and sagging skin, and defendant acknowledge child had been throwing up); *Baldwin*, 264 S.W.3d at 243 (defendant's failure to obtain medical care or provide adequate food or nourishment in light of child's obviously malnourished condition was sufficient to support reasonable inference that defendant consciously desired or was aware that her conduct was reasonably certain to cause serious bodily injury). After reviewing the evidence in the light most favorable to the verdict, we conclude that the evidence and the reasonable inferences therefrom, was sufficient for a rational jury to have found beyond a reasonable doubt that Guerrero intentionally or knowingly caused J.H.'s death. We therefore overrule Guerrero's challenge to the legal sufficiency of the evidence.

CHARGE ERROR

In her other two issues, Guerrero argues the trial court erred in charging the jury by failing to require a unanimous verdict and by failing to properly instruct the jury regarding the intent

element of the offense. In reviewing claims of charge error, we must first determine whether the charge was, in fact, erroneous. *Almanza v. State*, 686 S.W.2d 157, 171-74 (Tex. Crim. App. 1985) (op. on reh'g). If we determine error exists, we must decide whether appellant was harmed sufficiently to require reversal. *Id.*

Unanimous Verdict

In her first point of error, Guerrero argues the trial court's charge violated her right to a unanimous verdict because it failed to instruct the jury it must be unanimous about which serious bodily injury she allegedly caused. She argues the State presented evidence she caused three distinct bodily injuries to J.H.—a torn frenulum, emaciation, and death. She contends the trial court erred by not instructing the jury it must unanimously agree which of these serious bodily injuries Guerrero caused and she was egregiously harmed by this error.

Error

In Texas, jury unanimity is required in all felony cases. TEX. CONST. art. V, § 13; TEX. CODE CRIM. PROC. ANN. art. 36.29 (West Supp. 2016). Unanimity requires every juror to agree the defendant committed the same specific criminal offense. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005). A trial court errs by not instructing the jury it must be unanimous about which instance of criminal conduct satisfied the charged offense when the State presents evidence of multiple offenses that would satisfy the charged offense. *Cosio v. State*, 353 S.W.3d 766, 769, 771-74 (Tex. Crim. App. 2011).

The State charged Guerrero with knowingly and intentionally causing serious bodily injury to a child under Penal Code section 22.04(a). *See* TEX. PENAL CODE ANN. 22.04(a). The gravamen of the offense of injury to a child is not the particular conduct or omission that caused the injury, but the resulting injury. *Stuhler v. State*, 218 S.W.3d 706, 718 (Tex. Crim. App. 2007). The jury must unanimously agree on the kind and degree of injury the defendant caused—"serious bodily

injury,” “serious mental deficiency, impairment, or injury,” or plain “bodily injury.” *Id.* at 718-19. However, the jury need not unanimously agree on the manner and means by which the injury was caused or on whether the injury was caused by an act or omission or by a combination of the two. *See id.* (holding jury had to unanimously agree on whether child suffered serious bodily injury or serious mental deficiency, impairment or injury, but was not required to agree on what caused the injury); *Jefferson v. State*, 189 S.W.3d 305, 312-13 (Tex. Crim. App. 2006) (holding the essential element or focus of section 22.04(a) is the result of the defendant’s conduct “and not the possible combinations of conduct that cause the result;” the conduct element of the offense can be committed by act or omission or by a combination of the two).

Although the State presented evidence J.H.’s torn frenulum was a serious bodily injury, the State did not present evidence attempting to prove Guerrero caused this injury and did so intentionally or knowingly. Guerrero acknowledges this fact in arguing her legal sufficiency issue. Because the State did not present evidence that Guerrero intentionally or knowingly caused J.H.’s torn frenulum, the evidence the torn frenulum was a serious bodily injury was not evidence of a separate offense that would satisfy the charged offense. *See Cosio*, 353 S.W.3d at 769, 771-74.

However, the State presented evidence Guerrero failed to adequately nourish J.H. and failed to seek medical treatment. The State also presented evidence that, as a result, J.H. became emaciated and died. The evidence was sufficient to show Guerrero intentionally or knowingly caused J.H.’s death. The same evidence was sufficient to show Guerrero intentionally or knowingly caused J.H. to become emaciated. Dr. Lukefahr testified “being this emaciated also entails being very weak. It means not having the muscle tissue, the normal amount of muscle tissue, and also the muscle tissue that is there isn’t going to function right because it doesn’t have the amount of energy it needs to function.” Because the jury could have rationally found Guerrero intentionally or knowingly caused J.H.’s emaciation, but not necessarily her death, the State’s

evidence appears to have presented more than one serious bodily injury that would satisfy the charged offense.

Any error in not instructing the jury it must be unanimous about the serious bodily injury is not reversible error unless it was harmful. *See Almanza*, 686 S.W.2d at 171-74. Because Guerrero failed to timely object to the charge, we will reverse only if the error caused egregious harm. *See id.* The egregious harm standard is high and difficult to meet, and must be demonstrated by the record at trial. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). We will not reverse unless the record establishes actual, as opposed to theoretical, harm. *Id.* A record establishes actual harm only if the charge error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). In examining the record to determine whether charge error has resulted in actual harm, we consider (1) the entirety of the jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the arguments of counsel, and (4) any other relevant information revealed by the trial record as a whole. *Id.*

The jury charge in this case permitted a non-unanimous verdict based on the evidence presented to the jury. Although the charge contained a general unanimity instruction, that instruction “failed to apprise the jurors that they had to be unanimous on which incident of criminal conduct they believed constituted each count in the indictment.” *See id.* at 840-41. Thus, this factor weighs in favor of finding egregious harm. *See id.* at 840. However, this factor alone is not sufficient to conclude Guerrero suffered actual harm. *See id.* at 845 (citing *Cosio*, 353 S.W.3d at 777-78).

We already set forth the state of the evidence in our legal sufficiency analysis. Although Guerrero argues on appeal J.H. died due to congenital defects, there was no evidence supporting this theory. Instead, Dr. Frost and Dr. Lukefahr both testified the medical issues with which J.H.

was born were completely resolved before J.H. left the hospital. Dr. Frost testified that other than J.H.'s malnourishment, the torn frenulum, and scrapes and bruises, J.H. had normally developed organs. Dr. Lukefahr testified J.H.'s malnourishment contributed to her death. Dr. Lukefahr testified his opinion was based on a clear lack of other health issues. This medical evidence was uncontroverted. This factor weighs against concluding Guerrero suffered egregious harm.

On this record, it is clear that the State sought to convict Guerrero solely for causing J.H.'s death. Throughout the trial, the State focused the jury on one serious bodily injury—the child's death. The prosecutor began explaining the unanimity requirement during voir dire, telling the prospective jurors that "The child was hurt once, okay, and there's different ways [sic] committed the crime. . . . [Y]ou're all allowed to come back and find guilty as long as all 12 of you agree it's one of the paragraphs or the other." The State expressly told the jury the only serious bodily injury it alleged Guerrero caused was J.H.'s death. The prosecutor again disavowed any contention that Guerrero caused the other injuries: "I'm not saying that Audrey Guerrero caused those injuries." "I want to be clear. . . . we don't know how those injuries occurred." Rather, the State argued Guerrero knew J.H. had the injuries and was not feeding correctly, but did not seek appropriate medical care because a doctor would have notified CPS, causing her to lose custody of her two boys:

you know what you do if the child has problems? You take them to a doctor. But she can't. You know why? Because the child has injuries that she can't explain without losing the kids. So she doesn't take the child to the doctor. The child is not feeding right because of this injury. And the child is put in an unsafe sleeping condition. And all these contribute to the death. And death is serious bodily injury, folks.

The State consistently argued that Guerrero intentionally or knowingly allowed J.H. to die. The State's case was focused almost exclusively on one injury caused by Guerrero—J.H.'s death. This factor weighs against concluding Guerrero suffered egregious harm.

We next consider the other parts of the record. *See id.* at 840. In its opening statement, the State emphasized it did not contend Guerrero caused any of J.H.'s visible injuries, including the torn frenulum. The State acknowledged the injury to J.H.'s frenulum was severe, but told the jury "this is an older injury. And we're not here to say Audrey Guerrero caused this injury. We don't know who caused this injury." Instead, the State argued that the torn frenulum would have caused J.H. obvious pain and caused her to be unable to take a bottle, resulting in her losing weight which Guerrero undoubtedly noticed and for which she should have sought medical care. Her failure to do so caused J.H.'s death.

Having considered the entire jury charge, the state of the evidence, the arguments of counsel, and other relevant aspects of the trial record, we conclude Guerrero was not actually harmed. *See id.* The record does not establish the trial court's failure to instruct the jury that it must be unanimous about what "serious bodily injury" affected the very basis of the case, deprived Guerrero of a valuable right, or vitally affected a defensive theory. *See id.* at 840. We therefore conclude Guerrero was not egregiously harmed.

Result of Conduct Instruction

Guerrero contends the trial court erred, causing egregious harm, by failing to instruct the jury in the application paragraph of the charge that injury to a child is a "result oriented offense," and the State must prove Guerrero omitted action with knowledge or intent to cause the injury.

Section 6.03 of the Texas Penal Code delineates three "conduct elements" that may be involved in a crime: (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct. TEX. PENAL CODE ANN. § 6.03 (West 2011); *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). "It is error for a trial judge to not limit the definitions of the culpable mental states as they relate to the conduct elements involved in the particular offense." *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).

Because injury to a child is a “result of conduct” offense, the required mental state relates to the result of the conduct, not to the specific conduct itself. *Jefferson*, 189 S.W.3d at 312; *Williams*, 294 S.W.3d at 684. Guerrero was thus entitled to definitions of the culpable mental states in the jury charge that were limited to the result of her conduct. *See Morales v. State*, 853 S.W.2d 583, 585 (Tex. Crim. App. 1993); *Haggins v. State*, 785 S.W.2d 827, 828 (Tex. Crim. App. 1990).

In this case, the abstract part of the jury charge instructed:

A person acts intentionally, or with intent, with respect to a result of her conduct when it is her conscious objective or desire to cause the result.

A person acts knowingly, or with knowledge, with respect to a result of her conduct when she is aware that her conduct is reasonably certain to cause the result.

These definitions precisely track the statutory definitions of the culpable mental states for result of conduct offenses. *See* TEX. PENAL CODE ANN. § 6.03(a)-(b). The definitional paragraph of the charge properly limited the jury’s consideration to the result of Guerrero’s conduct. The application paragraphs of the jury charge instructed:

Now, if you believe from the evidence beyond a reasonable doubt that on or about the 9th Day of July, 2013, in Bexar County, Texas, the defendant, Audrey Guerrero, did intentionally or knowingly by omission cause serious bodily injury to [J.H.], a child who was fourteen (14) years of age or younger, and Audrey Guerrero had a legal duty to act and failed to do so in that Audrey Guerrero failed to provide adequate nourishment for [J.H.], or did then and there fail to seek and provide proper medical care of [J.H.], . . . [or] placed [J.H.] in an unsafe sleeping condition, then you will find the defendant guilty of serious bodily injury to a child intentionally or knowingly by omission as charged in the indictment.

These paragraphs fairly tracked the applicable part of section 22.04(a) of the Penal Code.² Nevertheless, Guerrero contends the application paragraph authorized conviction if the jury found she “knowingly or intentionally omitted nourishment, medicine, or a safe sleeping position,

² “A person commits an offense if he . . . intentionally [or] knowingly by omission causes to a child . . . serious bodily injury.” TEX. PENAL CODE ANN. § 22.04(a)(1).

without requiring any proof or a finding that she specifically intended or knew that serious bodily injury would result.” We disagree. The words “intentionally” and “knowingly” in the application paragraph are adjectives modifying the verb phrase “cause bodily injury,” and therefore limited the culpable mental state to the result of her conduct. No further instruction was required.³ We therefore overrule Guerrero’s third issue and affirm the trial court’s judgment.

Luz Elena D. Chapa, Justice

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³ Moreover, when the definitional paragraph of the charge is correct and the application part of the charge tracked the statute, we presume the jury was guided by the definitions provided. *See Morales*, 853 S.W.2d at 585; 43 GEORGE E. DIX & JOHN M. SCHMOLESKY, *Texas Practice Series: Criminal Practice & Procedure* § 43:8 (2011).