Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00379-CR

Manuel **ANAYA-VEGA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR9661
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: June 14, 2017

AFFIRMED

A jury found appellant, Manuel Anaya-Vega, guilty on one count of injury to a child, and the trial court assessed punishment at three years' confinement. In a single issue on appeal, appellant asserts he was denied his right to a unanimous verdict because the State alleged, in a single count, several bodily injuries that appellant asserts constitute separate offenses. We affirm.

DISCUSSION

The jury was instructed it could find appellant guilty of intentionally or knowingly causing bodily injury to B.E. if it found, beyond a reasonable doubt, that appellant struck B.E. with his

hand, pulled B.E.'s hair, or struck B.E. with a shoe. The jury charge stated a single date on or about which the injury occurred. On appeal, appellant argues each alleged act constituted a separate criminal offense; therefore, a conviction required jury unanimity.

In Texas, jury unanimity is required in all felony cases. TEX. CONST. art. V, § 13; TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (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). However, a jury need not unanimously agree on the particular manner and means by which the defendant committed the criminal act. *Young v. State*, 341 S.W.3d 417, 422 (Tex. Crim. App. 2011).

The *Young* Court distinguished three general categories of criminal offenses. "First, 'result of conduct' offenses concern the product of certain conduct." *Id.* at 423. "For example, murder is a 'result of conduct' offense because it punishes the intentional killing of another regardless of the specific manner (e.g., shooting, stabbing, suffocating) of causing the person's death. Thus, the death of one victim may result in only one murder conviction, regardless of how the actor accomplished the result." *Id.* "With the second category, 'nature of conduct' offenses, it is the act or conduct that is punished, regardless of any result that might occur." *Id.* "The most common illustration of this second category is that of many sex offenses, where the act itself is the gravamen of the offense." *Id.* "Finally, 'circumstances of conduct' offenses prohibit otherwise innocent behavior that becomes criminal only under specific circumstances." *Id.* "Unlawful discharge of a firearm is an example of this type of offense as it is the circumstances—the where, when, and how—under which a gun is fired that determines whether an offense was committed. A marksman

is blameless if he fires his rifle at a target down a firing range, but if he turns around and shoots into the crowded parking lot, he has committed an offense." *Id.* "No matter which category an offense falls into, the key concept remains the same. One looks to the gravamen or focus of the offense: Is it the result of the act, the nature of the act itself, or the circumstances surrounding that act?" *Id.* at 424.

Texas Penal Code section 22.04 states, in relevant part, that a person commits the offense of injury to a child if (with a particular culpable mental state) he causes "serious bodily injury," "serious mental deficiency, impairment, or injury," or "bodily injury" to a child by "act or omission." TEX. PENAL CODE ANN. § 22.04(a) (West Supp. 2016). "The Legislature has thus defined the offense of injury to a child according to the kind and degree of injury that results." *Stuhler v. State*, 218 S.W.3d 706, 718 (Tex. Crim. App. 2007). Accordingly, the Legislature intended the three separate types of injuries spelled out in the various subsections of section 22.04 to be elemental and thus require jury unanimity. *Id.*

However, the Legislature did not intend the "act or omission" by which the offense is committed to be an element of the offense of injury to a child. *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006).[1] "The essential element or focus of the statute is the result of the defendant's conduct (in this case, serious bodily injury to a child) and not the possible combinations of conduct that cause the result." *Id.* Therefore, the "act or omission" is not an element of an injury to a child offense about which a jury must be unanimous.

[1] In *Jefferson*, the issue was whether a jury instruction was required informing the jury it also had to unanimously agree on at least one of these three theories in order to convict: (1) appellant injured the child by commission (striking the child with his foot or with an unknown object), (2) appellant injured the child by omission by failing to prevent the child's mother from injuring the child, or (3) appellant injured the child by omission by failing to provide proper medical care for the child. 189 S.W.3d at 306. The Court concluded it would be "'absurd' to set appellant free because, for example, six jurors may have believed that he struck the fatal blow to the child while six other jurors may have believed that he failed to pick up the phone and call 9-1-1 to seek medical help for a child who was obviously very seriously injured and in great distress." *Id.* at 314.

In this case, the jury was required to reach a unanimous verdict on whether appellant caused injury to a child. Because the State sought one conviction for an injury to a child offense "on or about' a single occasion,[2] the jury was not required to unanimously agree on whether appellant caused the injury to B.E. by striking the child with his hand, pulling the child's hair, or striking the child with a shoe.

CONCLUSION

We overrule appellant's issue on appeal and affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

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[2] At trial, the State conceded the date of the injury was unknown. However, because the injuries were documented by photographs and the hospital the evening of January 10 through the next day, the indictment and jury charge gave the date as "on or about" January 10, 2013.