Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-16-00502-CR

Antonio R. **FLORES**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CR0432
Honorable Sid L. Harle, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 15, 2017

AFFIRMED

Antonio R. Flores was charged with two counts of manslaughter after his car collided with a work truck pulling a long trailer and two passengers in his car died from injuries they sustained in the collision. After a jury trial, Flores was found guilty of both counts of manslaughter and was sentenced to ten years of imprisonment on each count to run concurrently. On appeal, Flores brings nine issues. His first two issues relate to the trial court's denial of his motion to set aside the amended indictment. In his third and fourth issues, Flores argues the trial court's jury charge did

not ensure a unanimous verdict. In his fifth through ninth issues, Flores complains of testimony by various witnesses. We affirm the judgment of the trial court.

BACKGROUND

On February 19, 2013, nineteen-year-old Flores and three other high school students left the school campus for lunch. Flores drove the car. Monique Castaneda sat in the front passenger seat. Gabriella Lerma and Georgina Rodriguez sat in the back. At the intersection of the access road to Loop 1604 and West Hausman, Flores's car veered into a left-turn only lane, allegedly in an attempt to go around a work truck that was pulling a long trailer. When the truck legally turned left from the middle lane, Flores's car and the truck collided. The two passengers in the back seat, Gabriella Lerma and Georgina Rodriguez, died.

At the hospital, Flores told officers that when the collision happened, he was attempting to turn left from the access road onto West Hausman Road. Flores admitted he and the other passengers had been listening to music in the car and that he was a little distracted, but he denied that he had been racing another car.

The driver of the truck, Rick Sandoval, had traveled to San Antonio from Crystal City so that he could pick up a load of pipe. His last memory before waking up in the hospital was turning left from the access road to West Hausman Road. He did not remember seeing the car that struck him. Oscar Rios, the passenger in Sandoval's truck, testified that just before the collision, Sandoval had exited Loop 1604 and had slowed down the truck as it approached a red light at the intersection of the access road to Loop 1604 and West Hausman Road. Sandoval's truck was in the middle lane. According to Rios, he was navigating and had told Sandoval to make a left turn on West Hausman Road, which he could legally do from the middle lane. As Sandoval approached the intersection, the light turned green. Rios testified,

> Well, we slowed down to give enough room for the cars to take off, the cars from in front of us. And as we were about to turn, Mr. Sandoval looks back; I look back towards my left side and we – so we didn't see anything. As soon as my head turned right, we got hit.

Witnesses traveling in other cars had different vantage points and offered different estimates of how fast Flores was driving in comparison to the 45 mile-per-hour speed limit on the access road. Five students who were traveling on the access road and saw Flores's car approach from behind all testified that Flores was driving very fast. Connor Shannon estimated Flores was driving 70 miles per hour and was driving "very fast" in comparison to the relative speeds of the other cars, which were slowing down as they approached the light at the intersection. Shelby Herr estimated Flores's car was going around 70 to 90 miles per hour on the access road. Benjamin Ludolph estimated 70 to 80 miles per hour. Max Feng estimated 65 miles per hour or higher. Hanzhi Guo estimated Flores was driving at least 70 miles per hour. These five witnesses also testified to seeing a blue car in the lane next to Flores that was traveling at about the same speed. Herr testified she believed Flores then moved from the middle lane into the left-turn only lane to "cut in front of the truck, but the truck had turned."

Ilene Hoyos, who was stopped at a red light on West Hausman Road facing Loop 1604 testified that she saw Flores's car collide with the work truck. She believed Flores was attempting to go straight through the left-turn only lane at a speed of 65 to 75 miles per hour. She described Flores's car as traveling "fast," "just flying through." Hoyos testified she did not know one way or the other whether Flores had been racing another car. Detective Mathew Murray testified about statements he had taken from various witnesses after the accident. According to Detective Murray, some of the witnesses told him they had not seen a blue car racing Flores on the access road.

Jillian Higgins, a teacher at the high school, testified she was a passenger in a car that was traveling on the access road and approaching the intersection of Loop 1604 and West Hausman

Road. She heard the sound of engines "revving" coming from behind her car. She looked out of the window and saw cars pass her going "very fast." The blue car went through the intersection, while Flores's car changed lanes to the left and collided with a work truck. Higgins testified she had told police that Flores car had been traveling "at least 50 miles per hour because [it was] going faster than we were and [she] estimated [she was] driving 45, which is the speed limit."

Flores was charged with two counts of manslaughter. In Count I, he was charged with the reckless killing of Gabriella Lerma. In Count II, he was charged with the reckless killing of Georgina Rodriguez. After a jury trial, Flores was found guilty of both counts of manslaughter and sentenced to ten years of imprisonment. Flores appeals.

MOTION TO SET ASIDE AMENDED INDICTMENT

After the two counts of the original indictment were filed, Flores moved to set the indictment aside. The State dismissed the original case and re-indicted. Flores then moved to set aside the new indictment. The State opposed Flores's motion, but also moved to amend the indictment. The trial court denied Flores's motion to set aside, and granted the State's motion to amend. Both counts of the amended indictment follow the same language:

> on or about the 19th Day of February, 2013, Antonio Flores, hereinafter referred to as defendant, did recklessly cause the death of an individual, namely, . . ., hereinafter referred to as complainant, by driving and operating a motor vehicle at an excessive rate of speed above the posted speed limit, or by driving and operating a motor vehicle straight through a left-turn only lane in an attempt to pass another motor vehicle, or by racing another motor vehicle in a public place, or by any combination of said three acts, thereby causing a motor vehicle to collide with another motor vehicle . . . .

Flores then moved to set aside the amended indictment, and the trial court denied his motion.

Flores brings two issues with respect to the trial court's denial of his motion to set aside the amended indictment. He argues the trial court erred in denying his motion to set aside the amended indictment because it denied him notice of the particular offense with which he was

charged in violation of the Sixth and Fourteenth Amendments to the Constitution. He further argues the amended indictment did not allege with reasonable certainty the acts relied upon to constitute recklessness in violation of article 21.15 of the Texas Code of Criminal Procedure. We review the trial court's denial of a motion to quash a charging instrument de novo. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004).

A. Sixth Amendment's Notice Requirement

Flores argues in a conclusory fashion that the trial court "erred when it denied [his] motion to set aside the amended indictment because it denied him notice of the particular offense with which he was charged in violation of the Sixth and Fourteenth Amendments to the United States Constitution." *See* U.S. CONST. amend VI, XIV. The Supreme Court has identified two constitutional requirements for an indictment. First, it must contain "the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend." *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (citation omitted). Second, it must "enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Id.* (citation omitted).

The court of criminal appeals has held that, generally, these constitutional notice requirements are met when a charging instrument tracks the statutory text of an offense. *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017). In this case, Flores was charged with manslaughter and the amended indictment tracked the statutory language of section 19.04(a) of the Texas Penal Code. S*ee* TEX. PENAL CODE ANN. § 19.04(a) (West 2011). And, the language of the amended indictment would enable Flores to plead an acquittal or conviction in bar of future prosecutions for the manslaughter of the two victims. *See Resendiz-Ponce*, 549 U.S. at 108. Thus, as a general rule, the amended indictment was sufficient to provide constitutional notice. *See Zuniga*, 512 S.W.3d at 907.

There are some exceptions to this general rule; that is, in some cases, an indictment that tracks statutory language may be insufficient to provide a defendant with adequate notice. *Zuniga*, 512 S.W.3d at 907. According to the court of criminal appeals, to determine whether such a charging instrument is sufficient, a reviewing court must "engage in a two-step analysis." *Id.* First, "the reviewing court must identify the elements of the offense." *Id.* Second, "it must consider whether the statutory language is sufficiently descriptive of the charged offense." *Id.*

First, the essential elements of manslaughter are (1) a person (2) recklessly (3) causing the death of an individual. *Ramos v. State*, 407 S.W.3d 265, 267, 271 (Tex. Crim. App. 2013) (rejecting appellant's argument that the essential elements of manslaughter would include the act or acts relied upon to constitute recklessness); *Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012). Second, in considering whether this statutory language sufficiently described the charged offense, we note that "recklessly" is defined by the Penal Code. *See Zuniga*, 512 S.W.3d at 907 (explaining that statutory language may not provide adequate notice when the statute "uses an undefined term of indeterminate or variable meaning requir[ing] more specific pleading in order to notify the defendant of the nature of the charges against him"). Section 6.03(c) provides that a "person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE ANN. § 6.03(c) (West 2011). "The 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.* We conclude this definition of "recklessly" is sufficiently descriptive to notify Flores of the manslaughter charge against him. *See Ramos*, 407 S.W.3d at 271 (holding appellant was put on notice of the specific offense of

manslaughter). Therefore, we hold the amended indictment provided Flores with notice as required by the Sixth Amendment.

B. Texas Notice Requirements: Does the amended indictment provide sufficient notice pursuant to article 21.15 of the Texas Code of Criminal Procedure?

Having determined Flores was provided with notice as required by the Sixth Amendment, we must now consider whether the amended indictment provided Flores with notice under article 21.15 of the Texas Code of Criminal Procedure. Like the United States Constitution, the Texas Constitution "guarantees an accused the right to demand the nature and cause of action against him, and to have a copy thereof." *State v. Mays*, 967 S.W.2d 404, 405 (Tex. Crim. App. 1998). "Thus, the charging instrument must be specific enough to inform the accused the nature of the accusation against him so that he may prepare a defense." *Moff*, 154 S.W.3d at 601.

The Texas Code of Criminal Procedure also gives a defendant statutory rights to notice. Articles 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure contain requirements that (1) "[e]verything should be stated in an indictment which is necessary to be proved," TEX. CODE CRIM. PROC. ANN. art. 21.03 (West 2009); (2) "[t]he certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense," *id.* art. 21.04; and (3) "[a]n indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment," *id.* art. 21.11.

Further, in cases where acts of recklessness are alleged, like they are here, article 21.15 of the Texas Code of Criminal Procedure provides an additional requirement:

> Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal

> negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, *with reasonable certainty*, *the act or acts relied upon to constitute recklessness* or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

TEX. CODE CRIM. PROC. ANN. art. 21.15 (West 2009) (emphasis added). Here, Flores argues that he was not provided sufficient notice pursuant to article 21.15.

The court of criminal appeals has interpreted article 21.15 "to mean that the State must allege circumstances which indicate that appellant was aware of the risk" and "acted in conscious disregard of that risk." *Smith v. State*, 309 S.W.3d 10, 15 (Tex. Crim. App. 2010) (citation omitted). For example, in *Townsley v. State*, 538 S.W.2d 411, 411-13 (Tex. Crim. App. 1976), the court of criminal appeals held that the following language in an indictment complied with article 21.15's reasonable certainty requirement:

> [The defendant] did then and there recklessly cause the death of [complainant] by driving a motor vehicle at an excessive rate of speed while attempting to elude a police officer and recklessly causing said vehicle to run off the roadway and roll over, thereby fatally injuring the said [complainant], who was a passenger in said vehicle . . . .

Townsley, 538 S.W.2d at 411; *see also Smith*, 309 S.W.3d at 15 (discussing *Townsley*). The State relies on this precedent in *Townsley* to argue that the amended indictment in this case should likewise be held to give adequate notice under article 21.15, arguing that both indictments alleged driving at an "excessive rate of speed." However, in *Townsley*, the indictment alleged more than just excessive speed. It alleged that the defendant drove "at an excessive rate of speed *while attempting to elude a police officer and recklessly causing said vehicle to run off the roadway and roll over*, thereby fatally injuring the said [complainant], who was a passenger in said vehicle." *Townsley*, 538 S.W.2d at 411 (emphasis added). The specific acts alleged in the indictment in *Townsley* satisfied article 21.15's reasonable certainty requirement. Here, however, no comparable allegations were made in the amended indictment.

In contrast to *Townsley*, the court of criminal appeals in *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988), held that the following language in an indictment charging indecent exposure did not meet article 21.15's reasonable certainty requirement:

> [The defendant] did then and there expose to [the complainant] his genitals with intent to arouse and gratify the sexual desire of the defendant, and the said defendant did so recklessly and in conscious disregard of whether another person was present who would be offended and alarmed by such act, to wit: exposition of his genitals by the defendant to complainant.

Gengnagel, 748 S.W.2d at 228. The court concluded this language did not "allege any act or circumstances which would show that this exposition was done in a reckless manner, as required by article 21.15." *Id.* at 230; *see also Smith*, 309 S.W.3d at 15 (discussing *Gengnagel*). Although "exposition of his genitals by the defendant to the complainant" constituted "part of the forbidden conduct, this 'act' was not something from which a trier of fact could infer recklessness because exposing one's genitals *is not by itself reckless*." *Smith*, 309 S.W.3d at 15-16 (discussing *Gengnagel*) (emphasis added).

In another indecent exposure case, the court of criminal appeals relied on *Gengnagel* and held that the following language in the charging instrument did not comply with article 21.15's reasonable certainty requirement:

> [The defendant] on or about April 12, 2007, did then and there unlawfully expose his genitals to [complainant] with intent to arouse and gratify the sexual desire of the defendant, and the defendant was reckless about whether another person was present who would be offended and alarmed by the act, to wit: the defendant exposed his penis and masturbated.

Smith, 309 S.W.3d at 12, 16. The court of criminal appeals criticized the court of appeals for concluding that article 21.15's requirement was "met by the assertion that appellant 'exposed his penis and masturbated' while he was 'reckless about whether another person was present who would be offended and alarmed by the act.'" *Id.* at 13. According to the court of criminal appeals, this conclusion was "flawed" and "did not cure the defect [it had] recognized in *Gengnagel*."

Smith, 309 S.W.3d at 16. The court of criminal appeals explained that "[t]he information would have sufficiently apprised [the defendant] of the act or acts constituting recklessness if the State had alleged that [the defendant] exposed his penis and masturbated in a public place." *Id.* The court noted that this circumstance "is what the State ultimately showed at trial." *Id.*

Similarly, in *State v. Rodriguez*, 339 S.W.3d 680, 685 (Tex. Crim. App. 2011), the court of criminal appeals held that in a reckless discharging of a firearm case, the charging instrument did not comply with article 21.15. The information alleged that the defendant recklessly discharged a firearm "by pulling the trigger on a firearm which contained ammunition and was operable." *Id.* at 681. The court of criminal appeals reasoned that "[e]veryone who discharges a firearm pulls the trigger, and every firearm that is discharged contains ammunition and is operable if it discharges." *Id.* Thus, the court explained the State had, "in essence, pled a tautology: The defendant recklessly discharged a firearm because he discharged a firearm." *Id.* at 681-82. The court explained that a person shooting at a robber or rapist climbing into his bedroom window could be prosecuted under the State's pleading. *Id.* at 682. "If he shoots at a rattlesnake lying in the bushes beside his home, he is liable to be prosecuted under this information." *Id.* "Surely that is not the law." *Id.* "These are not necessarily reckless acts." *Id.* "They may be entirely appropriate and lawful acts under the particular circumstances." *Id.* "It is only when the defendant is reckless in the manner or circumstances under which he 'pull[s] the trigger on a firearm which contained ammunition and was operable' that he is criminally liable." *Id.*

According to the court, "when recklessness is an element of the offense, the charging instrument must 'allege the *circumstances* of the act which indicate that the defendant acted in a reckless manner.'" *Id.* at 683 (quoting *Gengnagel*, 748 S.W.2d 229) (emphasis in original). Therefore, the State "must allege something about the setting or circumstances of discharging a firearm within city limits that demonstrates disregard of a known and unjustifiable risk." *Id.*

> For example, the State might allege "by shooting into the ground in a crowd of people," or "by shooting a gun in the air in a residential district," or "by shooting at beer bottles in his backyard in a residential district," or "by shooting a gun on the grounds of an elementary school," or "by shooting at a Stop sign in a business district," or "by shooting into the bushes at a city park."

Id. at 683-84. "These are the sorts of actions that might entail a known and unjustifiable risk of harm or injury to others, risks that the ordinary person in the defendant's shoes probably would not take." *Id.* at 684. Thus, the court held that "the State failed to allege with reasonable certainty the act or circumstance which indicates [the defendant] discharged the firearm in a reckless manner." *Id.* at 685.

Here, Flores argues the allegations of recklessness in the amended indictment are not pled with reasonable certainty pursuant to article 21.15. The amended indictment alleged that Flores was reckless by driving "at an excessive rate of speed above the posted speed limit, or by driving . . . through a left-turn only lane in an attempt to pass another motor vehicle, or by racing another motor vehicle in a public place, or by a combination of said three acts, thereby causing a motor vehicle to collide with another motor vehicle." Although Flores admits that disjunctive pleading in an indictment is generally permissible, he argues that the disjunctive pleading in this case did not give sufficient notice pursuant to article 21.15. Flores points out that driving "at an excessive rate of speed above the posted speed limit" is not "inherently reckless" behavior. Flores poses the question, "What constitutes 'an excessive rate of speed?'" and stresses that his motion to set aside the amended indictment specifically objected "to the failure to allege a speed at which he drove, or the posted speed limit, or why the speed was excessive under the circumstances then existing." Flores argues that "[e]very date, everywhere, drivers regularly speed and have collisions, but without more, it cannot be said that they were 'inherently reckless,' or that they were taking a 'known and unjustifiable risk of harm or injury to others.'" Flores urges that "[s]urely the Legislature did not intend to criminalize behavior that occurs every day on every highway in this

State." According to Flores, "criminalizing every day behavior is exactly what [the amended] indictment did when it charged him with the second degree felony of manslaughter based on different, disjunctively alleged acts, one of which was driving 'at an excessive rate of speed above the posted speed limit.'"

In response, the State emphasizes that all three acts alleged in the amended indictment were modified by the phrase "thereby causing a motor vehicle to collide with another motor vehicle." According to the State, "[t]o race another car, drive at an excessive speed above the speed limit, and/or go straight through a left-turn-only lane in such a way as to cause a collision with another car are all reckless acts." The State argues that the essential elements of manslaughter that must be pled and proven are recklessly causing the death of a person. The State argues that *how* the defendant behaved recklessly is a "manner or means" of committing the offense that may be alleged in more than one way.

In support of these assertions, the State cites *Ramos v. State*, 407 S.W.3d 265 (Tex. Crim. App. 2013). However, in *Ramos*, 407 S.W.3d at 270, the court of criminal appeals specifically stated that article 21.15 did not apply because the indictment did not include a charge of manslaughter. The defendant was indicted on one count of capital murder, one count of felony murder, and one count of injury to a child. *Id*. at 267. He was convicted of the lesser-included offense of manslaughter. *Id.* On appeal, he argued that because he was convicted of manslaughter, article 21.15's notice requirement applied and the State was required to plead acts relied upon to constitute recklessness. *Ramos*, 407 S.W.3d at 269. The court of criminal appeals, however, explained that article 21.15 did not apply "because the indictment did not include manslaughter, which was a lesser-included offense." *Ramos*, 407 S.W.3d at 270. In the instant case, however, Flores was charged in the amended indictment with manslaughter. Thus, with regard to article 21.15's reasonable certainty requirement, *Ramos* is distinguishable from the instant case.

We further note that in the context of a driving while intoxicated manslaughter case, the court of criminal appeals in *Hardie v. State*, 588 S.W.2d 936, 938 (Tex. Crim. App. 1979) (panel op.), held that article 21.15 did not apply because "proof of a culpable mental state is unnecessary where intoxication is an essential element of the offense." According to the court, "[b]y its own terms, article 21.15 applies only where 'recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of any offense." *Id.* The court explained that "a culpable mental state is not an essential element of involuntary manslaughter." *Id. Hardie* and other driving while intoxicated manslaughter cases are distinguishable from the facts presented here. Unlike intoxication manslaughter under section 49.08 of the Texas Penal Code, manslaughter under section 19.04 (with which Flores was charged in this case) *does* require proof of a culpable mental state. *See Cavazos*, 382 S.W.3d at 382. Thus, we conclude article 21.15's specificity pleading requirement applies in this case.

We agree with Flores that the amended indictment did not allege with reasonable certainty the act or acts relied upon to constitute recklessness. Driving "at an excessive rate of speed above the posted speed limit" is not inherently reckless behavior. Circumstances exist under which one could be driving at an excessive speed above the posted speed limit and not be engaging in reckless driving. *See Bartholomew v. State*, 871 S.W.2d 210, 213 (Tex. Crim. App. 1994) ("While we cannot say that speeding and racing are always lesser included offenses of reckless driving, we hold that under the facts of this case the offenses of speeding and racing are lesser included offenses of reckless driving."). We therefore hold that the amended indictment did not give sufficient notice pursuant to article 21.15.

C. Harm Analysis for Article 21.15 Violation

Having concluded that the trial court erred in failing to grant Flores's motion to set aside the amended indictment because it did not meet article 21.15's reasonable certainty requirement, we must now consider whether such error was harmful. Until the late 1980s, cases in which article 21.15 had been violated were reversed without a harm analysis because the indictment was considered to be fatally defective and the error was considered fundamental. *See Smith*, 309 S.W.3d at 16. Thus, the court of criminal appeals used "terms 'substance defect,' 'fundamental error,' and 'fatally defective' interchangeably when addressing unpreserved errors in charging instruments that could be raised for the first time on appeal." *See id*. It "called substance defects 'fundamental error' because a charging instrument with a substance defect deprived the trial court of jurisdiction" and a "conviction based on such a charging instrument was void." *Id*. at 16-17; *see Gengnagel*, 748 S.W.2d at 229; *Ex parte Cannon*, 546 S.W.2d 266, 268 (Tex. Crim. App. 1976). In 1985, frustrated over the ability of a defendant to raise substantive defects in the indictment for the first time on appeal, the 69th Legislature proposed, and the voters approved, an amendment to section 12 of article V of the Texas Constitution. *Smith*, 309 S.W.3d at 17. Pursuant to the amendment, once an indictment or information is presented to a court, the court has jurisdiction over the case. *Id.* Further, the Legislature amended the Code of Criminal Procedure to provide that if a defendant did not object to a defect, error, or irregularity of form or substance in the indictment or information before the date on which trial commences, he waived and forfeited the right to object to the defect, error, or irregularity. *Id.* Thus, if an indictment is held to be defective, it is no longer fundamental error and considered void. *Id.*

Instead, harm resulting from a trial court's erroneous denial of a motion to set aside a charging instrument for failing to comply with article 21.15 is now analyzed under Texas Rule of Appellate Procedure 44.2(b) for non-constitutional error. *See Mercier v. State*, 322 S.W.3d 258,

264 (Tex. Crim. App. 2010); *Smith*, 309 S.W.3d at 17. In applying rule 44.2(b), we must disregard non-constitutional error unless it affects the appellant's substantial rights. TEX. R. APP. P. 44.2(b).

Flores argues that he was harmed because the description of the allegedly reckless act regarding speed was so vague, indefinite, and uncertain that it did not properly allege reckless activity and therefore hindered his ability to prepare his defense. At oral argument, when pressed on how he was harmed by the amended indictment's failure to comply with article 21.15, Flores argued that his defense suffered from his lawyers having to prepare, address, and argue each one of the possible permutations alleged by the amended indictment. According to Flores, there were "too many moving targets to have to address," and his defense suffered as a result.

However, the record does not reflect that Flores's defense suffered from too many moving targets. Flores admits in his brief that the amended indictment in this case would have complied with article 21.15 if it had alleged the three acts of reckless behavior conjunctively, instead of disjunctively. That is, the amended indictment would be adequate if it had alleged Flores was reckless by "driving and operating a motor vehicle at an excessive rate of speed above the posted speed limit **and** by driving and operating a motor vehicle straight through a left-turn only lane in an attempt to pass another vehicle, **and** by racing another vehicle in a public place." Thus, Flores knew before trial that his defense needed to concentrate on these three areas. The record reflects that at trial, the State focused its opening argument on Flores driving at a high rate of speed, racing another car down the frontage road, and driving through a left-turn only lane:

> Shortly after leaving the campus [Flores] turns on to the access road of [Loop] 1604. And while on the access road, he begins driving fast. He's driving fast and right next to him is a blue car. And this blue car is also driving fast. They're driving fast and they are neck and neck, and they are side-by-side. They are driving so fast that the two cars fly by the other cars on the access road. But the cars are quickly approaching the intersection of West Hausman and [Flores] approaching a truck that is there waiting at the light. So [Flores] moves over into the left lane. He changes lanes and he moves into that left-turn only lane and he is still driving fast.

> He is driving fast and he is driving straight. He is not going to turn. He is driving dangerously fast into that intersection and he is going straight, he is not going to turn left. As [Flores] barrels towards that intersection, bam, he collides with that truck; he slams into that truck. Gabby [Lerma], she dies instantly. Gina [Rodriguez], she suffers a massive brain trauma. . . .

The State pursued its theory that Flores engaged in all three acts through its questioning of witnesses. And, during closing, the State again argued that Flores engaged in reckless behavior by driving "70, 80, 90 miles an hour on an access road," "rac[ing] another motor vehicle on an access road at that speed," and by driving "straight through a turn only lane at that speed to keep racing." The State argued that Flores "chose to take all of those risks" and "because of the risks that he took, two people died out there that day."

The record reflects that Flores's attorney capably and effectively responded to all three of these claims by the State. In opening statement, defense counsel explained to the jury why Flores did not commit any of the three allegedly reckless acts claimed by the State:

> We said yesterday that every tragedy is not a crime. Y'all agreed. We said that every accident is not reckless. Y'all agreed. What we have here is a tragedy. We don't have a crime. The prosecutors have alleged that [Flores] was reckless because he was racing. But you'll hear from their own witnesses who say and said at the time there were no other cars to be racing. The prosecutors allege that [Flores] drove straight through a turn only lane attempting to pass a truck. She said you won't hear any evidence to the contrary, but you will. And finally, the prosecutors have alleged that [Flores] was reckless because he drove in an excessive rate of speed above the posted limit in a reckless way. What you're going to hear about that is anything about speed are estimates and opinions. Those estimates and opinions are all over the map from 40 miles an hour on up. And whatever the speed or speeds prosecutors attempt to prove will not show that [Flores] was reckless; that is, they will not show that he was driving in conscious disregard of a substantial and unjustifiable risk that the death of those two girls would result. Or and that his conduct was a gross deviation from the standard of care an ordinary person would exercise under the same circumstances as he was in that day. . . .

The record reflects that during the questioning of witnesses, defense counsel was able to cross-examine effectively and reasonably. In closing argument, defense counsel eloquently argued to the

jury about the different vantage points of witnesses, the discrepancies in their testimony, faulty memories of some witnesses, and why it could not find Flores guilty of the crime beyond a reasonable doubt. The record simply does not reflect that defense counsel was unprepared. Instead, it reflects that defense counsel was prepared and ready to defend Flores. In reviewing the entire record, we hold that the trial court's error in denying Flores's motion to set aside the amended indictment was harmless. *See* TEX. R. APP. P. 44.2(b).

CHARGE OF THE COURT

A. Jury Unanimity Under Texas Constitution and Texas Statutes

In his third issue, Flores argues the court's charge violated article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure because it authorized Flores's conviction for manslaughter without ensuring that the jury unanimously agree on which specific acts of recklessness he committed. The charge in this case instructed the jury the following with respect to both counts of manslaughter:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 19th Day of February, 2013, in Bexar County, Texas, the defendant, Antonio Flores, did recklessly cause the death of an individual, namely, *** , by driving or operating a motor vehicle at an excessive rate of speed above the posted speed limit, or by driving or operating a motor vehicle straight through a left-turn only lane in an attempt to pass another motor vehicle, or by racing another motor vehicle in a public place, or by an combination of said three acts, thereby causing a motor vehicle to collide with another motor vehicle, then you will find the defendant guilty of manslaughter as charged in Count * of the indictment.
>
> If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty in Count * of the indictment.

In analyzing jury-charge issues, we must first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). "[I]f we find error, we analyze that error for harm." *Id.* "The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection." *Id.* When the defendant properly objected to the charge, we must reverse if we

find "some harm" to his rights. *Id.* "When the defendant fails to object or states that he has no objection to the charge, we will not reverse for jury-charge error unless the record shows 'egregious harm' to the defendant." *Id.* at 743-44. In this case, Flores properly objected to the charge in the trial court.

"[J]uror unanimity is required in felony cases by the Texas Constitution and in all criminal trials by state statutes." *Young v. State*, 341 S.W.3d 417, 422 (Tex. Crim. App. 2011). Thus, the trial court must submit a "charge that does not allow for the possibility of a non-unanimous verdict." *Cosio v. State*, 353 S.W.3d 766, 776 (Tex. Crim. App. 2011). "Put simply, the jury must unanimously agree about the occurrence of a single criminal offense, but they need not be unanimous about the specific manner and means of how that offense was committed." *Young*, 341 S.W.3d at 422. "This rule is not as clear as it might seem at first blush, however, as [the court of criminal appeals] continue[s] to address questions over precisely what it is the jury must unanimously agree on." *Id.* at 422-23. "To clarify some of the difficulty surrounding the unanimity issue, [the court of criminal appeals] has distinguished the three general categories of criminal offenses." *Id.* at 423.

"First, 'result of conduct' offenses concern the product of certain conduct." *Id.* "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." *Id.* "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 the 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." *Id.*

"Generally, the statutory language determines whether a crime is a 'result of conduct,' 'nature of conduct,' or 'circumstances of conduct' offense." *Id.* "A 'result of conduct' offense generally requires a direct object for the verb to act upon: in the statutory language punishing murder, 'causes' is the verb, and 'death'—the result—is the direct object." *Id.* at 423-24. "Further different subsections in a 'result of conduct' statute may punish distinctly different acts that cause the same result, and it is the result rather than the specific act that is the focus of the offense." *Id.* at 424. "'Nature of conduct' offenses, on the other hand, generally use different verbs in different subsections, an indication that the Legislature intended to punish distinct types of conduct." *Id.* "For example, the credit-card-abuse statute criminalizes a wide range of different acts—stealing a credit card, receiving a stolen credit card, using a stolen credit card, and so forth." *Id.* "With an offense whose criminality depends upon the 'circumstances surrounding the conduct,' the focus is on the particular circumstances that exist rather than the discrete, and perhaps different, acts that the defendant might commit under those circumstances." *Id.* "For example, in the failure to stop and render aid statute, the focus is upon the existence of an automobile accident." *Id.* "That circumstance gives rise to a driver's duty to stop, return to the scene, and render aid to any injured people." *Id.*

"Thus, in 'result of conduct' offenses, the jury must be unanimous about the specific result required by the statute." *Id.* "With 'nature of conduct' crimes, the jury must be unanimous about the specific criminal act, and with 'circumstances surrounding the conduct' offenses, unanimity is required about the existence of the particular circumstance that makes the otherwise innocent act

criminal." *Id.* "No matter which category an offense falls into, the key concept remains the same." *Id.* "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.*

B. Manslaughter – Result of Conduct Offense

A person commits manslaughter "if he recklessly causes the death of an individual." TEX. PENAL CODE ANN. § 19.04(a) (West 2011). As in the murder statute, the statutory language of manslaughter requires a direct object for the verb to act upon: "causes" is the verb, and "death"–the result–is the direct object. *See Young*, 341 S.W.3d at 423-24. Also like murder, the death of one victim may result in only one manslaughter conviction, regardless of how the actor accomplished the result. *See id.* at 423. Therefore, "manslaughter is a 'result of conduct' crime where the 'focus' or gravamen is the 'death of the individual.'" *Ramos*, 407 S.W.3d at 270; *see also Ervin v. State*, 991 S.W.2d 804, 816 (Tex. Crim. App. 1999) (explaining that "manslaughter and intoxication manslaughter have a common focus: the death of an individual" and that "[b]oth crimes are result of conduct crimes with death being the result"). That is, Flores could only be found guilty of one count of manslaughter for each complainant. The State could not rely on the three allegations—excess speeding, racing, and driving through a left-turn-only lane—as separate counts of manslaughter for each complainant. Those three allegations constitute *how* Flores was reckless; they are the manner and means of how he committed manslaughter.

We therefore hold that because jury unanimity is not required on the manner and means of how Flores committed manslaughter, the jury charge did not violate Flores's right to a unanimous verdict. *See Pizzo v. State*, 235 S.W.3d 711, 714 (Tex. Crim. App. 2007) ("Jury unanimity is required on the essential elements of the offense but is generally not required on the alternate modes or means of commission.") (internal quotation marks omitted); *see also Young*, 341 S.W.3d at 422 ("Put simply, the jury must unanimously agree the occurrence of a single criminal offense,

but they need not be unanimous about the specific manner and means of how that offense was committed."); *Rubio v. State*, 203 S.W.3d 448, 452 (Tex. App.—El Paso 2006, pet. ref'd) (noting that if the disjunctive paragraphs merely inform the jury of different means of committing a single offense, then the jury need not unanimously agree on which alternative means the defendant used to commit the offense).

C. Jury Unanimity under Federal Constitution

In his fourth issue, Flores argues the court's charge also violated the Sixth and Fourteenth Amendments to the Constitution because it authorized his conviction for manslaughter without ensuring that the jury unanimously agree on which specific acts of recklessness he committed. Flores admits that the Supreme Court in *Apodaca v. Oregon*, 406 U.S. 404, 411-12 (1972), held that the Sixth Amendment does not require a conviction by unanimous verdict in state court. Flores explains that "the right to a unanimous jury verdict is the only right encompassed by the Sixth Amendment that has not yet been incorporated into the Due Process Clause of the Fourteenth Amendment." Nevertheless, he wishes to preserve the issue for review by the higher court. We therefore overrule his fourth issue.

ADMISSIBILITY OF EVIDENCE

In his fifth through ninth issues, Flores complains of the trial court allowing witnesses to testify to certain facts over his objection. We review the trial court's decision to admit evidence for abuse of discretion. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007).

A. Testimony of Detective Dimmick

In his fifth issue, Flores argues that the trial court erred when it overruled his objection to Detective Dimmick testifying to the factors he uses to decide whether conduct is criminal because such testimony was irrelevant, in violation of Rules 401 and 402 of the Texas Rules of Evidence. Over a relevancy objection, Detective Dimmit testified to the following:

> Q: So you said of that small percentage that become criminal cases versus the non-criminal cases, I think you talked about driving factors. I just want to know in general what are some of the driving factors that you look at in your investigation when you're deciding whether you're investigating it as a criminal case or not?
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> A: Well, obviously speed is the main thing. And I guess the best way to describe it is we – I mean, everybody has been driving somewhere and seen that person, that guy and you're wondering, you know, where are the police at to write that guy a ticket. It's aggressive, the speeding, the lane changing, the following too close. When that guy is involved in an accident, someone is killed, that's typically the type of case that we file on.

Flores argues this testimony was irrelevant because no witness is "competent to voice an opinion as to guilt or innocence." *Boyde v. State*, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974).

The State responds that Detective Dimmick was an experienced traffic investigator who had investigated more than a thousand crashes and had specialized training. The State distinguishes *Boyde*, arguing that Detective Dimmick did not comment about Flores's guilt or innocence, but only testified briefly to the factors that turn a crash from a car accident into a crime. We agree with the State and find no abuse of discretion by the trial court.

B. Evidence of Rick Sandoval's and Monique Castaneda's injuries – Rule 401 and 402

In his sixth issue, Flores argues the trial court erred in overruling his objection to evidence of injuries received by witness Rick Sandoval, who was not a complainant in this case. Flores argues such evidence was irrelevant under Rules 401 and 402. *See* TEX. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."); TEX. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States or Texas Constitution; a statute; these rules; or other rules prescribed under statutory authority. Irrelevant evidence is not admissible.").

Sandoval was the driver of the truck that collided with Flores's car. Sandoval testified that he remembered turning left from Loop 1604 to West Hausman Road and then he "was knocked

out—completely unconscious." He testified he had "an out of body experience" and then woke up in the hospital: "I don't exactly remember what the doctors told me. I just know that I had suffered a broken 4th and 3rd lumbar, I believe, and then a dislocated tailbone from the injury. And some serious head injury." He testified he was bleeding in his stomach and that it was several months before he could drive again.

Flores also complains the trial court overruled his objection to Oscar Rios testifying about Sandoval's injuries. Rios testified that he "almost lost [his] friend" and that after the collision, Sandoval was choking on the seatbelt and not breathing.

Similarly, in his eighth issue, Flores complains about the trial court overruling his objection to evidence of Monique Castaneda's injuries, arguing such evidence was irrelevant pursuant to Rules 401 and 402. Castaneda was a passenger in Flores's vehicle. At trial, she testified she has no memory of the accident and that her first memory was waking up in the hospital "in a lot of pain." She testified she "had a neck brace on because of whiplash" and that she had broken her hand and nose. She testified that as a result of the collision, she suffered from a concussion and had been knocked out.

In response to Flores's arguments, the State urges that "[e]vents do not occur in a vacuum." It argues it was entitled "to set the whole scene of a crime, and jurors are entitled to hear that context." According to the State, evidence of Sandoval's and Castaneda's injuries were relevant to setting the whole scene of the crime. We agree with the State.

"It is well-settled that where one offense or transaction is one continuous episode or another offense or transaction is a part of the case on trial or blended or closely interwoven with it, proof of all the facts is proper." *Cunningham v. State*, 982 S.W.2d 513, 521 (Tex. App.—San Antonio 1998, pet. ref'd); *see also Camacho v. State*, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993) (holding that same transaction contextual evidence is admissible for the purpose of "illuminat[ing] the

nature of the crime alleged"). The evidence of injuries sustained in the collision by Sandoval and Castaneda were admissible for this purpose. Further, both Sandoval and Castaneda testified to a lack of memory of the events surrounding the collision. Evidence of their injuries, sustained even though they were wearing seat belts and the air bags had deployed, were relevant to explain their lack of memory. We therefore find no abuse of discretion by the trial court.

C. Evidence of Sandoval's and Castaneda's Injuries – Rule 403

In his seventh issue, Flores argues that the trial court erred in overruling his objection to evidence of Sandoval's injuries because such evidence was substantially more prejudicial than probative under Rule 403. Similarly, in his ninth issue, Flores argues that the trial court erred in permitting evidence of Castaneda's injuries over his objection that such evidence also violated Rule 403.

Rule 403 provides that the court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. In determining whether the admission of relevant evidence violates Rule 403, a trial court must balance the inherent probative force of the proffered item of evidence along with the proponent's need for that evidence against

- any tendency of the evidence to suggest decision on an improper basis,
- any tendency of the evidence to confuse or distract the jury from the main issues,
- any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and
- the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.

Gigliobianco v. State, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

As noted, the evidence of the witnesses' injuries was relevant to explain the witnesses' lack of memory and to give context to the offense. The State also argues the evidence of injuries sustained even though the occupants were wearing seatbelts and the airbag deployed was necessary to show Flores's speed. We agree with the State that the evidence of the witnesses injuries was not substantially more prejudicial than probative under Rule 403. In reviewing the record, the time to develop this evidence was minimal. In a trial lasting days, the development of this evidence took a few minutes. Further, there was no potential to impress the jury in some irrational way. In this case, many witnesses testified about the death of two people in the collision. Given this testimony, evidence about injuries sustained in the same collision by witnesses was unlikely to have much effect on the jury. We therefore find no abuse of discretion by the trial court.

CONCLUSION

Although we hold the amended indictment did not comply with article 21.15 of the Texas Code of Criminal Procedure and the trial court should have granted Flores's motion to set aside the amended indictment, we cannot conclude that Flores suffered any harm under Texas Rule of Appellate Procedure 44.2(b). Having found no error by the trial court with respect to Flores's other eight issues, we affirm the judgment of the trial court.

Karen Angelini, Justice

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