Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-17-00645-CR

Gloria R. **PROO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 379th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR2757A
Honorable Ron Rangel, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

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

Delivered and Filed: March 6, 2019

AFFIRMED

Gloria Proo appeals her conviction for injury to a child by omission by failing to provide adequate nutrition or failing to obtain and provide medical care to J.W., which resulted in serious bodily injury and ultimately J.W.'s death. On appeal, Proo raises multiple issues challenging the sufficiency of the evidence and the trial court's rulings admitting and excluding certain evidence. We overrule Proo's issues and affirm the trial court's judgment.

BACKGROUND

J.W. alternately lived with his biological mother and his maternal grandmother Patty from the time he was born until he was five years old. He was born healthy. According to Patty, J.W. was attending school during the spring of 2012 and receiving good conduct marks in his folder. Several preschool photographs of J.W. taken when he was three and four years old were admitted into evidence showing him looking healthy and smiling. In April 2012, J.W.'s biological mother went to prison and his grandmother Patty became his full-time caretaker. According to Patty, J.W. ate everything she cooked for him, and had no trouble digesting his food and liquids. J.W. was potty-trained and had no accidents while living with Patty. She described J.W. as a "big boy," stating he weighed 75 pounds in April 2012.

In June 2012, J.W.'s biological father, Charleston, obtained custody of him. Without informing Patty that he had obtained custody, Charleston picked up J.W. for a weekend visit on June 29, 2012 and did not return him. Patty testified that J.W. had no marks on his body when she last saw him in June 2012, although he was born with a bump on his forehead that turned red when he exercised. J.W. lived in his father's home on Gayle Street from June 29, 2012 until his death six months later on December 27, 2012. Also residing in the home were Charleston's wife Crystal, their two-year old daughter K.W., and Crystal's eight-year old son N.P. Appellant Gloria Proo is Crystal's biological mother. At the time of his death, J.W. weighed 38 pounds and had a traumatic head injury, along with other healing and acute injuries to his body. The medical examiner listed J.W.'s cause of death as the combination of three factors: "dehydration in a battered, underweight child," each of which was capable of causing serious bodily injury.

In March 2013, the State indicted Charleston, Crystal, and Proo each with one count of first-degree injury to a child-serious bodily injury, alleging two alternate manner and means: by failing to provide adequate nourishment (Paragraph A), or by failing to obtain and provide proper

medical care (Paragraph B). Each defendant proceeded separately. In September 2017, Proo pled not guilty, proceeded to a jury trial, and was convicted. The jury recommended a sentence of 88 years in prison, which was imposed by the trial court along with a $10,000 fine. Proo appealed.

TRIAL EVIDENCE

At trial, several witnesses testified about Proo's presence at the Gayle Street house and her involvement with J.W. and his care during the six-month period between June 29, 2012 and December 27, 2012. Witness testimony and medical evidence established the deterioration in J.W.'s health and physical appearance during that period leading up to his death.

Stephanie Vera, a friend of Proo's and Crystal's, testified that she saw J.W. twice during the six-month period. When she saw him in August or September, he looked "really healthy" and "fine" and she had no concerns. The next time Vera saw J.W. was at a late November barbeque at Crystal's house. J.W. had "lost a lot of weight" and looked "like he was malnourished." He looked "a little yellowish," and his skin looked "jaundiced;" he "looked ill." In Vera's opinion, "he was in trouble." J.W. was not running and playing with the other kids; he was "standing in the corner" even though he was clearly sick. Vera also saw an old scab on J.W.'s "frontal lobe" of his "forehead." The people present at the barbeque were Crystal and Charleston and their three children, Proo, and Vera and her husband and their four children. Based on Vera's observations of Proo's "interactions" with J.W., she formed an opinion that Proo "was in charge of J.W." When Vera left that day, she felt concerned for J.W., "for his safety" and "for him, period." Because Vera and her husband "felt like something was wrong," they tried to contact Crystal to see if J.W. could come to their house so they could talk to him alone, but they were unsuccessful. Vera explained why she and her husband did not call an emergency or non-emergency phone number to report their concerns about J.W., stating it was not because they did not feel calling was

warranted, but because "[w]e weren't comfortable calling CPS, not knowing 100 percent if there was anything wrong or not." Crystal had told her that J.W. was "sick."

Lawrence Walker, the husband of Stephanie Vera, testified he first met J.W. at the barbeque "right before Thanksgiving." J.W. looked "underweight" and "the color of his skin was kind of yellowish," and he had a "couple of scars on him;" he also looked "depressed." Walker noticed that J.W. was isolated and not allowed to play with or interact with the other children or adults. When it came time to eat, Proo informed Walker that J.W. was "not allowed" to sit at the table and eat with everyone else. Walker learned that J.W. was in "time out." Walker decided to go sit on the sofa by J.W.; however, Proo again informed Walker that he was "not allowed" to sit next to him. In Walker's opinion, Proo seemed upset with J.W. Walker asked to speak with J.W. away from the adults in the household, but was informed that was "not allowed;" he did not identify who told him. Walker testified he spoke to J.W. anyway and told J.W. he wanted to be his friend. J.W. "was crying" and "depressed" and told Walker that he "didn't have any friends." Walker stated that no adults tried to comfort him. J.W. eventually got to eat two leftover pieces of pizza after everyone else was finished. Based on Walker's observations, even though the parents Crystal and Charleston were present, it was Proo who was in charge of J.W. that day and Proo was "the one taking care of him." Walker stated that although J.W. looked sick and jaundiced, he did not think he needed to call 911 that day.

Because Walker felt that J.W. needed help, he found a way to go back to the house a few days later to help with a stove repair. Although he mainly spoke with Crystal and Charleston that day, Proo was there at the house and J.W. was standing in the same "time out" spot as before. Because J.W. was not wearing a shirt this time, Walker could see his "bones" and J.W. "looked like a skeleton;" he also looked "very depressed." Crystal told Walker he could not talk to J.W., but Walker found a way to speak to J.W. without the adults around. Walker asked J.W. if he was

"ok," but J.W. gave "no response." Walker again discussed J.W. with his wife, but they did not call CPS or the police because Crystal's and Charleston's other two children appeared to be fine.

N.P., Crystal's son, was 13 years old when he testified. N.P. stated he lived with his grandmother Proo until he was five years old, and she was the only parent he had day-to-day during that period. He agreed that Proo "fed him and clothed him and put a roof over his head." N.P. explained that Crystal was in the military during his first five years of life, and when she came back she began living with Charleston.

N.P. testified he was eight years old when J.W. came to live in their home with him and his half-sister K.W. N.P. explained that he was not related "by blood" to J.W., but "through his step-dad's side." At the time of trial, N.P. had been adopted by another family and testified he had tried to forget what happened in 2012 and "just move on." He had to talk about "what happened with J.W." while he was in the CPS system for two years, and he also talked with "other people" about it right after it happened. When asked whether Proo was at the home when J.W. lived there, N.P. testified he remembered Proo babysitting J.W. N.P. stated he would go off to school, but J.W. did not go to school. N.P. stated he did not specifically remember, however, whether Proo would be at home with J.W. while he was in school. N.P. did remember that J.W. would try to "sneak food."

N.P. agreed that in his recorded forensic interview shortly after J.W. died he stated that Proo babysat on December 23, 2012, but he no longer remembered that particular day. When asked whether he remembered Proo "living at the house prior to the police being called for a month or two prior?" N.P. replied, "I know she stayed there. I don't know the time period or what, but I know she has stayed there" and "she would come there sometimes and then she would be somewhere else, because she didn't actually stay with us, like, all the time." Asked specifically about the period between Thanksgiving and Christmas, N.P. stated he did not remember Proo being

at the house during that time, but also did not remember his mother Crystal being there either. Finally, N.P. stated that, "when the police came" in December 2012, Proo was not living with them. When asked whether that was because Proo's father was in the hospital, N.P. replied that he remembered Proo's father being very sick, but not from the time period when he was 8 years old.

Olivia Ramirez, testified she rented the four-bedroom home on Gayle Street to Crystal and Charleston in April 2012. She conducted the first walk-through with only Crystal, but Crystal was accompanied by her mother Gloria Proo for the second walk-through. Ramirez's son, Carlos Barron, testified he was present at the second walk-through with Crystal and Proo and heard Proo make comments that she liked the yard and patio. Crystal informed Ramirez the next day that they wanted to lease the house. Only Crystal's and Charleston's names are on the lease. Either Ramirez or Barron went to the house to collect rent every month. Ramirez testified she did not begin seeing Proo at the house until the third or fourth month, i.e., June or July. After noticing Proo at the house "more than once or twice," Ramirez asked Crystal whether Proo was living there. Crystal then told her that J.W. had come to live with them. Asked exactly how many times she saw Proo at the home, Ramirez specifically recalled seeing Proo in June or July and in November when the stove was repaired, but stated she may also have seen Proo on a third visit. Ramirez did not investigate further by asking neighbors whether Proo was living there; she only asked Crystal and let it go after she denied it. Barron testified that when he collected the rent Crystal preferred to meet him places, and he picked up the rent at the house only once or twice. Barron saw only two children and never knew a third child lived there.

Robert Johnson, an emergency medical technician, testified he responded to a call for "cardiac arrest" of a child on December 27, 2012 at a home on Gayle Street. He entered only the dimly lit front room of the residence. He did not see Proo in the room and did not know whether

she was present elsewhere in the house; he also did not see any other children. Johnson was inside the house less than one minute before he carried J.W. out to the ambulance and he did not return to the house. When Johnson asked who had been caring for J.W., the parents replied they did but also stated Proo "had watched him too in the past." The parents were not specific as to how long ago Proo had been with him.

Johnson described J.W. as being "fairly malnourished;" his report states he was "severely emaciated." In testifying about State Exhibit 15, a photograph of J.W.'s body on the stretcher inside the ambulance, Johnson stated, "we can see his ribs. We can see the bone protrusions on the hips, the elbows, knees, shoulders are standing out. There's no padding of fat or muscle across them." Johnson continued, "you can see the iliac crest on his hips, those bones at the front of your hips that protrude out," and explained, "they stand out more when you're emaciated." Johnson testified J.W.'s weight was not the typical weight of a five year-old.

Johnson's external examination of J.W.'s body revealed "numerous injuries," most noticeably bruising around the eyes, several skin lacerations, and bruising and instabilities in his skull. "Basically, these injuries are spread across his whole body." Johnson documented the injuries in his written report and testified that none were caused by their attempts at medical treatment. Specifically, Johnson noted that J.W. had "instability, basically a soft spot on his skull," which usually indicates a skull fracture and can cause bleeding in the skull, i.e., a "subdural or epidural hemorrhage, a serious condition that can cause death." Johnson also testified that J.W. had "multiple lacerations (cuts) and abrasions (like a scrape)" in "multiple stages of healing," which means they happened "over time," "not just one specific incident but several incidents over days or weeks." Johnson also noted bruising to J.W.'s wrists; bruising around his neck; scratch marks behind both ears in multiple stages of healing; and abrasions and healed lacerations to both shoulders. With respect to the cause of his injuries, Johnson's report stated the father told him

J.W. had fallen off a toilet and off a chair a few days before. Johnson stated his EMT partner spoke to the stepmother Crystal and she told him that J.W. fell three days before and had not been eating.

San Antonio Police Detective Tom McNelly testified that he took Proo's written statement early in the investigation as part of the fact-finding phase. The written statement was admitted into evidence. Proo did not testify at trial. In the statement, Proo wrote that she currently lived in Live Oak, Texas. Other evidence showed her father's home was located in Live Oak, Texas. According to Proo, she "watched the kids for Crystal about four to five times." The last time she babysat was "from 6pm to 10 or 11pm" "on a Sunday in Dec." and it was only J.W. because Crystal and Charleston took the other two children to Fiesta Texas. J.W. wanted to stay home and not go to Fiesta Texas. Proo stated she brought toy soldiers and coloring books for the kids and she played with J.W. He spelled out his name, counted to 30, and did his ABC's, and was "able to talk very well." Proo stated J.W. "was fine," and she "did not notice any type of bruises or bumps on him." J.W. said he missed his mother who was in prison. Crystal had told Proo that J.W. "had been depressed about his mother being gone for some time." Proo stated she did not see the children on Christmas Eve or Day, but she spoke to all three children on the phone "at 8 or 9pm on Christmas Day" and "all three sound[ed] fine." None of the kids had behavioral problems, and Crystal never mentioned any problems with the kids besides J.W. missing his mother. Proo stated she never saw Crystal or Charleston hit the children; instead, they would usually put them in time-out. According to Proo, they treated all the children the same.

San Antonio Police Lieutenant Jesse Salame, the lead detective on the case, testified about his investigation and how he identified Proo as a suspect. The first information he received was a tip-line call from Walker and Vera after J.W. died. After Salame reviewed their statements,

watched N.P.'s forensic interview,[1] and attended the autopsy, his investigation began to focus on the grandmother Proo. Salame determined that J.W. was the only child in the home who was battered and he was the only child not a blood relative of Proo. Salame testified that during his investigation he determined that, while Proo may not have actually lived full-time at the house on Gayle Street, Proo "essentially stayed" at the house and babysat J.W. more than just occasionally. Salame stated his investigation showed "there was way more interaction" between Proo and J.W. than Proo admitted in her written statement and he believed Proo was lying about only babysitting J.W. "four to five times." Salame used a photo dated December 23, 2012 showing N.P. and K.W. with Santa at Fiesta Texas to pinpoint the date of the "Sunday in December" that Proo admitted babysitting J.W. Salame testified to his opinion that Proo was in the home more than just that one day in December. When Salame interviewed Crystal and Charleston, they gave various explanations for J.W.'s acute injuries, stating that he had "started falling down lately" and had fallen off a chair and hit his head.

Lieutenant Salame entered the home on Gayle Street after obtaining a search warrant. He described the living conditions by stating, "[s]ome rooms were clean, others a mess, and some things I saw that looked like it was out of a horror movie." He did a walk-through of the house and identified areas of special interest to the crime techs. Salame determined that N.P. and K.W. each had their own bedroom with lots of toys. Their bedrooms did not have locks on the doors. Salame determined that J.W. did not have a bedroom, but stayed in the "kitchen area" leading into the wash room and a converted garage. Salame learned that J.W. slept "in the kitchen area on a chair or on the cardboard . . . the broke-down cardboard box" on the floor. Salame testified both the green chair and the flattened cardboard box smelled strongly of urine. The fold-up green chair

[1] Based on N.P.'s forensic interview, which was not admitted into evidence, Salame determined that Proo "took certain actions" and had "certain interactions" with J.W. on more than one occasion.

and cardboard box seemed to Salame to be the place where J.W. spent all of his time. The garage was converted into another room being used as a "storeroom," but it was "not fully finished yet" and was "not insulated so it would probably get too cold in the winter and too hot in the summer." Salame observed there was a reversed lock on the interior door to the garage, so that someone inside the garage could not get into the house. The hallway closet, however, was the "most significant" to Salame because "there were holes in the wall. It looked like there was some violence that had taken place. There was blood on the walls, and it looked to me like that's where something had happened." Salame testified he saw nothing to suggest there was insufficient food or water in the home. Finally, Salame noticed photos of the other two children displayed in the home, but no photos of J.W. on display. Salame noted that both N.P. and K.W. wore clothing that fit them, and he described K.W. as "heavy."

With respect to the condition of J.W.'s body, Salame testified he was "obviously emaciated" and that "malnourishment" only happens over a period of time. J.W. had also been "beaten" and had recent head injuries. When asked whether he had any information to show J.W. had a medical emergency on December 23, the last day Proo admitting babysitting him, that would require a babysitter to call the doctor, Salame answered, "the way he looked when I saw him, that didn't - - that's not four days . . . if you saw that kid on the 23rd and you didn't call the police, I think that's a problem." Salame stressed that, "there was more . . . based on his physical features," it was not just the recent injuries. Salame testified he did not believe Proo's statement that J.W. was "fine" and played with Proo on December 23, four days before he died. Salame explained that his opinion that Proo was lying was not based on emotion, but on his years of training and professional experience with child abuse cases. Salame conceded that he found no eyewitness who could testify that J.W. had a medical emergency on December 23, but stressed there was "no way" J.W. would not have appeared to be in medical distress on December 23. Salame explained

that, in his experience, defendants under arrest often do not tell police the truth and blood relatives will often stick by a defendant. Salame noted that Proo's son Jacob gave his statement on January 3, 2013, the same day Proo was arrested.

Dr. Samantha Evans, a forensic pathologist, testified that she performed the autopsy on J.W. on December 28, 2012. State Exhibit #21, which was admitted, is a complete copy of her autopsy report, including a toxicology report and body diagrams, and a summary of cause and manner of death, plus a copy of her investigator's report from the crime scene regarding the surrounding circumstances of the death. The autopsy report lists the "manner of death" as "homicide." As to the "cause of death," in Dr. Evans's opinion, "[J.W.] died as a result of dehydration in a battered, underweight child." Her wording of the "cause of death" is "a direct reflection of the complicated nature of this child's passing." Dr. Evans testified that all three factors played a role in why J.W. died, and no one factor can be viewed in isolation as the cause of death. Dr. Evans explained, "All of those things individually are capable of causing death, but all of them are also things that people could survive with." She stated that neither she nor any scientific equipment "can differentiate which of those things actually caused his death, or all three of these things and in what proportion." She stated there is no way to look at the information and say one of the three factors is more important or played a bigger role. With respect to the connection between J.W.'s acute head injury and his dehydration and malnutrition, Dr. Evans testified that having a head injury could make the signs of dehydration worse, but it would take longer for signs of malnutrition to show up if he was not eating and drinking properly due to the head trauma.

With respect to the first cause-of-death factor, dehydration, Dr. Evans testified the results of the lab analysis she ran on the vitreous fluid taken from behind J.W.'s eyes showed the "electrolytes [in his blood] were overconcentrated in a pattern we see with dehydration." She

explained that vitreous fluid is one of the last fluids to dry out in the body's system. Dr. Evans stated there was no evidence of any other causes of the electrolyte imbalance such as eating too much salt or having another disease, versus a lack of water. Dr. Evans acknowledged reading an opinion letter by defense expert Dr. Mark Luquette which questioned the inclusion of dehydration as a cause of death based on the finding that J.W.'s bladder was fully distended with urine and other autopsy findings. Dr. Evans replied that the vitreous chemistry results cannot be viewed "in a bubble," and must be considered in context of the known surrounding circumstances, other diseases, and other available information. Dr. Evans explained that the kidneys will still create urine even if the body is dehydrated "up to a point," and that the bladder may hold urine after death because it depends on whether or not the muscles relax and release the urine upon death. Dr. Evans stated she could not explain why J.W.'s bladder had so much urine, but the objective lab results show he was dehydrated. Finally, Dr. Evans testified she could not give an opinion on how fast a "thin five-year-old [can] get dehydrated" because food naturally contains some water and many variables affect how long it took for J.W. to develop the electrolyte abnormality, i.e., dehydration. Dehydration is a "complicated topic in and of itself" and most studies are on adults; a typical adult can go five to seven days before exhibiting "any real issues being completely dehydrated." Dr. Evans agreed, however, that going two to three days without water could be a serious problem for a "thin child," and dehydration could occur within the "acute time frame" of the preceding one to two days before death.

Regarding the "battered" factor, Dr. Evans found multiple external injuries on J.W.'s body in various stages of healing. Some injuries were old with scabs or scarring which she classified as "healing injuries," while others looked fresh "within a day or two" of his death, classified as "acute injuries." Both types of injuries included abrasions (scrapes), contusions (bruises), and lacerations (tears of the skin). Her autopsy report contains four diagrams of J.W.'s body showing the locations

of the external injuries that would have been visually apparent on his body. The first two diagrams show the healing injuries and the acute injuries to his face and head, including, among others, a healing contusion to his forehead,[2] and multiple acute contusions to all sides of his head and both eyes. The next two diagrams depict the locations of the healing injuries and the acute injuries to his front and back body, including, among others, contusions to the tops of both hands, and some "patterned abrasions" which have a particular defined shape or design "like it's from something." Dr. Evans testified that J.W. had approximately 24 acute injuries that happened "within a day or two" prior to death, as evidenced by the body not having a chance to begin the healing process. Dr. Evans also explained, however, that differentiating between "acute" and older "healing" injuries is not a perfect science and is not always accurate.

Dr. Evans testified to her opinion that, because J.W. had a lot of injuries in various stages of healing and on multiple different parts of his body, the medical evidence is not consistent with the parents' explanations and is not consistent with routine "falling down" by kids. When asked whether the bodily injuries on the diagrams would have been noticeable if J.W. was wearing clothes, Dr. Evans noted there was "a lot of bruising to the hands," ankles, and head. With respect to her findings of "blunt force injuries" in the autopsy report, she testified that term referred to contusions, abrasions, and lacerations resulting from blunt trauma to the skin or body caused by "anything broad and flat" without sharp edges, for example, asphalt or a baseball bat. She stated that blunt force injuries [to the head] could have been caused by pushing the head into drywall. Dr. Evans testified that J.W.'s "acute head injuries" were not automatically fatal, but could be fatal. She clarified that J.W. did not have a skull fracture, but she could see how the EMT Johnson

[2] When questioned about Patty's testimony that J.W. was born with a bump on his forehead, Dr. Evans acknowledged that testimony, but explained that the healing contusion shown on J.W.'s forehead in Diagram #1 is based on her examination underneath the skin and observation of a true bruise as opposed to a birth-related anomaly.

misinterpreted a large soft area of swelling on his head as a skull fracture. Finally, Dr. Evans found evidence of an "old subdural hemorrhage" which she testified is exclusively due to blunt force trauma from the head hitting something or something hitting the head. A subdural hemorrhage is bleeding between the brain and the inside skull surface.

The third factor attributed as a cause of death was that J.W. was "underweight." Dr. Evans based that finding on the facts that his body mass index was 11.6, while normal is within 19-25, and he weighed 38 pounds at five years of age. J.W. also had a lot of very fine hair on his back which is a condition called "lanugo" and commonly associated with being malnourished. Dr. Evans explained lanugo is "a body's response mechanism to not getting adequate nutrition." She also observed that "he did not have a lot of subcutaneous fat," "you could see the rib contours, the shapes of the ribs, the pelvic bone," and "the nubs along the back of [his] spine were visible, and that's not common in more appropriately nourished, normal-weight people." Finally, J.W.'s height was 95% percentile, but his weight was 20% percentile.

On cross-examination, Dr. Evans explained that "malnourishment" is not listed as part of the cause of death conclusion because J.W. was not "starved to death." A five-year old child weighing 38 pounds is "20% percentile" on the chart, and some kids can be "healthy and thin." Some people have "lower-than-normal BMI's or statures or weights." Dr. Evans stated that "a child being underweight or very thin is not necessarily an emergency situation," and "does not necessarily equate with sudden death." But, Dr. Evans also stated she would consider it "abnormal" to weigh only 38 pounds in the context of the normal BMI range, and as a medical doctor she would be concerned about other health concerns, explaining that, "it is not healthy, nor is it normal" and "it can produce death, but it is not necessarily a guarantee [of death]."

Finally, Jacob Hernandez, Proo's 29 year-old biological son and Crystal's half-brother, testified as a defense witness. Jacob stated he has had a "rocky relationship" with his mother.

Jacob kept in touch with Crystal and had known Crystal's children N.P. and K.W. for a long time. Jacob first met Charleston's son J.W. in 2010. Jacob learned J.W. was living with Crystal and Charleston when he called on Thanksgiving in November 2012. Jacob was living in Dallas at that time.

Jacob testified he traveled to San Antonio for one week in December 2012 because his grandfather (Proo's father) had suffered a cardiac arrest in late November and was in critical condition. During his visit the week before Christmas, Jacob spent two nights at Crystal's house and visited with Crystal's three children—but he clarified that "[J.W.] wasn't her biological son." Jacob testified he did not see Proo at the house because she was at the hospital with his grandfather. Jacob went to the hospital every day he was in town, which was about four or five days total, and Proo was there every time; he understood that Proo and his aunt Diana were staying at the hospital, sleeping on chairs or a cot. Asked whether he knew "where Proo was living" at that time, Jacob replied, "[t]hat I know of … where she received her mail, which was the same residence as my grandfather." Jacob explained, however, that to his knowledge Proo did not have a permanent residence. Jacob had talked to other relatives and "heard hearsay," but stated he "could not say for sure" that Proo was living with or "staying with" Crystal and Charleston at their house. When Jacob stayed at Crystal's house, he did not see Proo's belongings there, but he also did not search every room. Jacob went back to Dallas on the afternoon of December 25. After J.W. died, Proo and Crystal came to live with him in Dallas.

With respect to J.W., Jacob testified he noticed that only K.W. was heavyset, and he asked Crystal, "why are both boys so skinny?" Crystal replied, "they eat, they're fine." Jacob testified there was food in the house and he saw all three kids eat in front of him. Jacob initially testified that J.W. was "thin" but he did not see his "ribs or bones" because he was "not that skinny." However, Jacob later conceded that he was concerned that J.W. was "so skinny" and he suggested

that Crystal take J.W. to a doctor. Jacob also stated he did not recall whether J.W. was wearing long sleeves when he saw him, but stated he "probably" had on long sleeves since it was December. Jacob also noted it was dark in the "refrigerator area" of the house where he saw J.W. During his visit, Jacob slept on one couch and he saw J.W. sleep on the other couch. Jacob described J.W. as "very shy," but stated he would talk once a conversation was started.

Jacob testified that Defense Exhibit #2, an undated photograph showing J.W. eating at a restaurant, depicts how J.W. looked the last time he saw him alive.[3] Jacob testified that when he saw J.W., he did not have blackened eyes or cuts and bruises "because I would have questioned that." Jacob has read the description of how J.W. looked when he died and it disturbed him; he did not view the photos. Jacob testified he had to clean the Gayle Street house after J.W. died and he saw "a wall with blood, and it affected [him] very badly" "for many years." Jacob stated the blood was not there while he was staying there, and he does not know when it got there. Proo was the first person to call Jacob and tell him what happened to J.W.

SUFFICIENCY ISSUES

On appeal, Proo raises three issues challenging the sufficiency of the evidence to support her conviction. Specifically, Proo asserts the evidence is insufficient to prove that she: (1) assumed care, custody, or control over J.W.; (2) knowingly or intentionally caused J.W. serious bodily injury by one of the alleged omissions; and (3) failed to provide adequate nourishment or medical care to J.W.

[3] At oral argument, defense counsel asserted that Defense Exhibit #2 represented the way J.W. looked on December 23, when Proo claimed she last saw him. However, the photograph is not dated, and there was no testimony linking the photograph to a particular date. The only testimony about the photograph came from Jacob who stated it showed "how" J.W. looked when he saw him in "mid-to-late December." Jacob testified that he visited San Antonio for four or five days during the week before Christmas and spent two nights at Crystal's house; he did not specify which dates he spent the night. Finally, Jacob stated he went over to the house to drop off tamales on "the day before Christmas Eve," and he left on Christmas afternoon, i.e., December 25, to go back to Dallas. Jacob testified he saw J.W. "over the balance of two, three days" during his visit, but did not specify the particular dates on which he saw J.W.

Standard of Review

In reviewing the legal sufficiency of the evidence, we determine whether, viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). The essential elements of the crime are the elements of the offense as defined by a hypothetically correct jury charge, which is 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." *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). The law "as authorized by the indictment" consists of the statutory elements of the offense as modified by the charging instrument. *Id.*; *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

In determining whether the State met its burden under *Jackson v. Virginia*, we compare the elements of the crime, as defined by the hypothetically correct jury charge, to the evidence admitted at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). In conducting this analysis, we defer to the jury's assessment of the credibility of the witnesses and the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (jury may draw reasonable inferences from the basic facts to the ultimate facts). We determine whether the necessary inferences are reasonable based on the cumulative force of the evidence viewed in the light most favorable to the verdict, and we presume the jury resolved any inconsistencies in the evidence in favor of the verdict and defer to that resolution. *Murray v. State*, 457 S.W.3d 446, 448-49 (Tex. Crim. App. 2015). In assessing sufficiency, we consider all the admitted evidence, even if it was improperly admitted. *Thomas*, 444 S.W.3d at 8. "Direct

evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Fields v. State*, 515 S.W.3d 47, 52 (Tex. App.—San Antonio 2016, no pet.). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Thomas*, 444 S.W.3d at 8 (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). "Evidence is insufficient to uphold a conviction when the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense." *Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012) (citing *Jackson*, 443 U.S. at 320).

Injury to a Child by Omission

A person commits the offense of injury to a child if she "intentionally, knowingly, recklessly, or with criminal negligence, by act *or* intentionally, knowingly, or recklessly by omission, causes to a child . . . serious bodily injury." TEX. PENAL CODE ANN. § 22.04(a)(1) (emphasis added). With respect to an omission that causes serious bodily injury, the statute makes the omission an offense if: "(1) the actor has a legal or statutory duty to act; or (2) the actor has assumed care, custody, or control of [the] child …." *Id.* § 22.04(b). Proo was charged only with having "assumed care, custody, or control" of J.W., not with a legal duty toward him. The statute defines what constitutes "assum[ing] care, custody, or control" by stating that,

> [f]or purposes of an omission that causes [serious bodily injury] … the actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child ….

Id. § 22.04(d). Finally, an omission causing serious bodily injury is a first-degree felony when the actor "intentionally or knowingly" caused the serious bodily injury. *Id.* § 22.04(e).

Indictment and Jury Charge

The indictment alleged that Proo committed injury to a child by omission in that:

> Paragraph A
> On or about the 23rd day of December, 2012, GLORIA PROO . . . did intentionally and knowingly by omission cause SERIOUS BODILY INJURY to [J.W.], a child … and the defendant HAVING ASSUMED CARE, CUSTODY AND CONTROL OF [J.W.] did THEN AND THERE FAIL TO PROVIDE ADEQUATE NOURISHMENT FOR [J.W.];
>
> Paragraph B
> On or about the 23rd day of December, 2012, GLORIA PROO . . . did intentionally and knowingly by omission cause SERIOUS BODILY INJURY to [J.W.], a child … and the defendant HAVING ASSUMED CARE, CUSTODY AND CONTROL OF [J.W.] did then and there FAIL TO OBTAIN AND PROVIDE PROPER MEDIAL [sic][4] CARE FOR [J.W.]

The jury charge tracked the language of the indictment, submitting Paragraphs A and B as alternative means of committing the single count of injury to a child by omission. The charge also instructed the jury on the statutory definition of "assuming care, custody, or control" of the child. The jury returned a general verdict of guilty.

Assumption of "Care, Custody, or Control" (Issue #1)

Proo first argues there is insufficient evidence that she assumed "care, custody, or control" of J.W. as defined by section 22.04(d). Proo specifically asserts the evidence is insufficient on that element because: (i) no evidence showed that she lived in the Gayle Street house with Crystal, Charleston, and the kids; (ii) the evidence showed she only babysat the children at the house occasionally, i.e., only four to five times according to her written statement; (iii) no evidence showed she was in charge of providing "protection, food, shelter, or medical care" for J.W. because his father had conservatorship and providing those basic needs fell within the responsibilities of a parent or conservator; and (iv) other evidence showed Proo spent a lot of time with her father in

[4] The parties agreed this was a typographical error, and the word was "medical."

the hospital during December. Throughout all her sufficiency issues, Proo focuses on the December 23 date alleged in the indictment, asserting the evidence (i.e., her written statement) established it as the last day she saw J.W. before he died on December 27. She asserts the State's evidence only placed her at the house with J.W. on three identifiable days — the day of a barbeque in late November; the day of a stove repair in late November; and when she admitted babysitting J.W. on the evening of December 23. Proo argues that because there was no direct evidence that Proo was present in the home or babysat J.W. on any other particular day(s), the evidence is insufficient to prove she assumed care, custody or control of J.W.

Analysis

To obtain a conviction for injury to a child due to omission, the State must prove the defendant had a duty to act. *State v. Guevara*, 137 S.W.3d 55, 56 (Tex. Crim. App. 2004). The duty may be a legal or statutory duty such as that of a custodial parent, or may arise because the defendant assumed care, custody, or control of the child. TEX. PENAL CODE ANN. § 22.04(b). Proo was only charged with having assumed care, custody, or control of J.W., not with having a custodial or other legal duty toward him. Thus, we must determine whether the State presented legally sufficient evidence, i.e., "more than a mere modicum" of evidence, to support the jury's finding that Proo "assumed care, custody, or control" of J.W. by acting or speaking in a way that would cause a reasonable person to believe she had accepted responsibility for his protection, food, shelter, and medical care. *See id.* § 22.04(d) (statutory definition).

The Court of Criminal Appeals has held that the statutory definition of "care, custody, or control" in section 22.04(d) is clear and unambiguous, and therefore must be interpreted according to the text's plain meaning. *Hicks v. State*, 241 S.W.3d 543, 545-46 (Tex. Crim. App. 2007). In *Hicks*, the court instructed that the definition's plain language means more than just physical "possession" alone. *Id.* at 545-46 (holding the court of appeals erred by looking outside the

statutory text and adding "possession," as defined by Penal Code section 1.07(a)(39), thereby broadening the definition of "care, custody, or control"). In its original opinion, the intermediate court of appeals held the defendant met the requirements of section 22.04(d) because he assumed physical control, i.e., possession, of an unknown mentally disabled man who was knocked unconscious and dumped him on the side of a rural road. *Id.* at 543-44. In reversing, the Court of Criminal Appeals rejected the court of appeals' reasoning that section 22.04(d) establishes "[a] bright-line rule that, once someone has become a caretaker—even informally—for a vulnerable individual, he or she cannot then escape responsibility for the individual by arguing he or she has not assumed that individual's care, custody, or control." *Id.* at 544.

On the other end of the spectrum, the court held in *Rey v. State* that "care, custody, or control" as defined by section 22.04(d) means less than "*in loco parentis*," referring to a person who assumes the duties of a parent. *Rey v. State*, 280 S.W.3d 265, 268-69 (Tex. Crim. App. 2009) (construing the meaning of section 22.04(d)'s definition of "care, custody, or control" as applied to section 22.041 criminalizing abandonment or endangerment of a child). The court compared the broad rights, duties, and liabilities of a parent to the statutory definition of "care, custody, or control" and concluded,

> it is obvious that being *in loco parentis* not only includes 'accept[ing] responsibility for protection, food, shelter, and medical care for a child,' but greatly exceeds it. Thus, one who stands *in loco parentis* has, by its very definition, 'care, custody, or control' of the child under § 22.04(d), but a person, such as a baby-sitter, who has at least temporary 'care, custody, or control,' is not *in loco parentis*.

Id. at 269. Thus, the court recognized that a baby-sitter who temporarily assumes "care, custody, or control" of the child can meet the statutory definition of the element and need not have assumed all the duties of a parent. *See id.* (referring to TEX. FAM. CODE § 151.001(a) in listing a parent's rights, duties, and liabilities and holding that assumption of "care, custody, or control" under section 22.04(d) is more narrow). No familial relationship with the child is necessary for a duty

to act to arise. *Id.* at 269 (familial relationship with the child is an evidentiary fact to be considered, but court of appeals erred in making defendant's lack of an *in loco parentis* relationship determinative); *Hawkins v. State*, 891 S.W.2d 257, 259 (Tex. Crim. App. 1994) (state is not required to prove defendant had familial relationship with child to prove assumption of "care, custody, or control" under section 22.04(d), and live-in boyfriend of injured child's mother could have a duty to act). Finally, a defendant need not assume *exclusive* "care, custody, or control" of the child, as multiple persons may each have an individual duty to act on behalf of the child. *See Rey*, 280 S.W.3d at 269; *see also Hawkins*, 891 S.W.3d at 259.

Here, the jury heard conflicting evidence regarding the amount of time Proo spent babysitting J.W., whether she stayed or lived at the home, and J.W.'s physical condition when Proo was with him. Proo's appellate arguments focus on the evidence favorable to her rather than viewing the evidence in the light most favorable to the verdict, as we are required to do. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899. Proo's arguments also ignore the jury's ability to believe or disbelieve all or part of a witness's testimony, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *See Murray*, 457 S.W.3d at 448; *see also Brooks*, 323 S.W.3d at 899.

According to Proo's account, she only babysat J.W. "four or five times" and her residence was in Live Oak, Texas. However, her son Jacob testified that Proo did not have a permanent residence, she received mail at her father's home in Live Oak, and Proo and Crystal came to live with him in Dallas after J.W. died. The record is silent about whether Proo's father had passed away before she moved to Dallas. While Jacob testified he "could not say for sure" that Proo lived at Crystal's house, he did not affirmatively state that Proo did not live there. Ramirez saw Proo at the Gayle Street house enough times after J.W. came in late June that she questioned Crystal whether Proo was living there. Barron stated Crystal did not want him to come to the house to

pick up the rent, preferring to meet him elsewhere. N.P. testified he remembered Proo babysitting J.W., who did not go to school, and "staying" at the house sometimes, although he was not certain of the exact time period. Both times Walker visited the home in November Proo was there with J.W. Lieutenant Salame formed the opinion based on the entirety of his investigation that Proo "essentially stayed" at the house and had much more frequent interactions with J.W. than she admitted. The jury could have made a reasonable inference based on the circumstantial evidence that Proo did live or "stay" at the Gayle Street house during the relevant time period, although residence is only one evidentiary factor. *See Rey*, 280 S.W.3d at 269.

In her statement, Proo claimed that she last babysat J.W. on December 23, four days before his death, and she did not see any bruises or bumps on him, he was playing and talking to her, and he was "fine." She also stated that she talked to J.W. on the phone on December 25 and he was "fine." Proo further stated that all three children were treated the same and the parents used time-out and did not hit them. These statements by Proo directly conflict with the testimony and medical evidence that J.W. was "emaciated" and dehydrated and had multiple bruises, abrasions, and lacerations to various areas of his body in different stages of healing on December 27 when he died, while the other two children appeared healthy. Indeed, Detective McNelly expressly testified the fact that J.W. had "healing injuries" in different stages and appeared "emaciated," while the other two children did not, conflicted with Proo's statement. In addition, although at trial Proo's defense included a partial alibi based on her spending time at the hospital with her father in late December, she did not include any reference to that in her written statement made shortly after J.W.'s death. Detective McNelly testified Proo did not tell him that she had been staying at the hospital with her father when he interviewed her shortly after J.W. died. Lieutenant Salame also noted the inconsistency between Proo's claim that J.W. was "fine" on December 23 and his own observations of J.W.'s condition, stating there was "no way" he looked "fine" on December 23.

The jury could have found Proo less than credible and disbelieved her statement in view of the contradictory medical evidence and witness testimony. *See Brooks*, 323 S.W.3d at 899.

Further, Proo's arguments focusing on the December 23 date alleged in the indictment ignore the well-settled law that an indictment's allegation that an offense occurred "on or about" a particular date does not restrict the State's proof to that date; rather, the State may prove a date other than the one alleged as long as it is anterior to presentment of the indictment and within the statute of limitations. *Sanchez v. State*, 400 S.W.3d 595, 600 (Tex. Crim. App. 2013). Therefore, the State's evidence proving Proo committed the alleged offense could encompass any date during the six months that J.W. lived in the Gayle Street house. Some crimes by their nature, such as injury caused by failure to provide nourishment, do not occur on a specific day but occur over a period of time. *See*, *e.g.*, *Deleon v. State*, No. 04-05-00369-CR, 2006 WL 1684637, at *6 (Tex. App.—San Antonio June 21, 2006, pet. ref'd) (mem. op., not designated for publication) (child who looked like a "skeleton" died from long-term starvation). Dr. Evans, as well as Johnson and Salame, all testified that malnutrition and emaciation occurs over time.

Vera testified that from August/September to November, J.W.'s appearance changed from looking "really healthy" to "malnourished," "jaundiced," and "ill." At the late November barbeque, Walker and Vera both observed that, even though the parents were present, Proo held herself out as being "in charge of [J.W.]" Specifically, Proo was the one who restricted J.W.'s food intake and social interaction as a disciplinary measure and informed Walker he was not allowed to engage with J.W., who was standing in a corner in "time-out" even though he was "clearly ill." Proo was present with J.W. again when Walker went back for the stove repair and found J.W. standing in the exact same time-out spot, this time not wearing a shirt and looking "like a skeleton." EMT Johnson also testified the parents identified Proo as someone who also took care of J.W. Based on the cumulative force of the evidence, the jury could have disbelieved Proo's

assertion that she had only limited interaction with J.W. and reasonably inferred that she assumed responsibility for his basic needs, i.e., food, shelter, protection, and medical care, on multiple babysitting occasions. *See Murray*, 457 S.W.3d at 448-49 (jury's inferences must be reasonable based on the cumulative force of the evidence viewed in the light most favorable to the verdict).

This case is similar to *Deleon*, in which we concluded the defendant grandmother "carried herself like the child's caretaker" based on testimony that she was the person who prohibited a visitor at the house from feeding the child "because he would vomit," scolded the visitor for secretly feeding him, prohibited the visitor from taking him for medical attention, and subsequently determined "if and when" the person could visit with the child. *Deleon*, 2006 WL 1684637, at *5, 7. We held there was sufficient evidence that the grandmother "assumed care, custody, or control" of the child under section 22.04(d) because she watched him in the mother's absence and "regulated the child's food consumption, medical attention, and movement" during those periods. *Id.* at *7 (an additional factor was present in that a witness overheard the grandmother tell the child's mother that she would take care of him). Similar to Proo, in her statement the grandmother in *Deleon* stated that she rarely saw the child and only kept him for a few days "here and there," only saw him for a few hours beginning on Christmas Eve during which he was opening presents and playing, and "nothing unusual happened" before he stopped breathing in the early morning on Christmas Day. *See id.* at *3-4 (grandmother also claimed a partial alibi of being incarcerated for several weeks during October). In holding the evidence sufficient on the care, custody, or control element, we stressed that it was the jury's role to resolve conflicts in the evidence and judge the witnesses' credibility and weight of the evidence. *Id.* at *7-8; *see also Tijerina v. State*, No. 13-11-00430-CR, 2012 WL 3525632, at *4-5 (Tex. App.—Corpus Christi Aug. 16, 2012, no pet.). (mem. op., not designated for publication) (recognizing jury's ability to disbelieve grandmother and find that she "assumed care, custody, or control" over the child based on evidence that she

lived downstairs while the child, mother, and her boyfriend lived upstairs, she "was always watching" one or more of the children and assisted in their day-to-day care "including bathing, feeding, and disciplining," and she owned the home and bought food for the group).

Conclusion

Viewing the evidence in the light most favorable to the verdict and deferring to the jury's credibility determinations and resolution of conflicts in the evidence, we conclude the cumulative force of the evidence, both direct and circumstantial, is sufficient to support the jury's finding that Proo assumed "care, custody, or control" of J.W. under section 22.04(d). *See Fields*, 515 S.W.3d at 52; *see also Thomas*, 444 S.W.3d at 8.

Intentionally or Knowingly Caused Serious Bodily Injury By Omission (Issues #2-3)

In her second sufficiency issue, Proo argues there was no evidence that she had the necessary culpable mental state or that her omissions caused J.W. serious bodily injury. Specifically, Proo contends the physical injuries that J.W. suffered, particularly the head trauma, occurred after she last saw him on December 23, and there is no evidence that she saw J.W. between December 23 and December 27 when he died. She cites to Dr. Evans' testimony that J.W.'s "acute" physical injuries detailed in the autopsy report, including the acute head trauma, occurred one to two days prior to his death. Proo relies on her written statement in which she said J.W. was "fine" when she babysat him on December 23 and was also "fine" when she talked to him by phone on Christmas evening. Proo also relies on Jacob's testimony that Proo was with his grandfather at the hospital and he did not notice cuts and bruises on J.W. as support for her purported lack of knowledge of J.W.'s condition. Finally, Proo cites the responding EMT Johnson's testimony that he did not see Proo at the house on the day J.W. died, although Johnson also stated he only entered the front room and was inside less than one minute.

In her third sufficiency issue, Proo contends there was no evidence that she failed to provide adequate nourishment or medical care to J.W. In support, Proo cites to Vera's and Walker's testimony that they saw J.W. eat two pieces of leftover pizza at the November barbeque and did not believe he was in such immediate medical distress that they needed to call 911 that day. Proo argues there was no evidence that she withheld food or water from J.W. "during th[e] four-hour window" when she babysat him on December 23, and no evidence that J.W. needed medical care that day because, according to her own statement, he was "fine."

Analysis

Proo was charged with "knowingly" and "intentionally" committing the offense of injury to a child. Because the statute lists the culpable mental states in the disjunctive, the State only had to prove one of the mental states to satisfy the *mens rea* element of the offense. TEX. PENAL CODE ANN. § 22.04(a); *Tijerina*, 2012 WL 3525632 at *5 n.5. Injury to a child is a result-oriented offense; therefore, the culpable 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); *Prescott v. State*, 123 S.W.3d 506, 510 (Tex. App.—San Antonio 2003, no pet.) (the "nature of conduct" is not specified in the statute and is inconsequential so long as it includes a voluntary act) (citing *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985)). Here, Proo was charged with causing J.W. serious bodily injury, which by definition includes death. TEX. PENAL CODE ANN. § 1.07(46) ("Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death). 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." TEX. PENAL CODE ANN. § 6.03(b). 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." *Id.* § 6.03(a). The charge instructed the jury on these definitions.

When a defendant is charged with injuring a child "by omission," the evidence is sufficient to support a conviction "if the State proves *either* that a defendant intended to cause the injury through her omission *or* that she was aware that her omission was reasonably certain to cause the injury." *Tijerina*, 2012 WL 3525632 at *5 (emphasis added) (citing *Johnston v. State*, 150 S.W.3d 630, 636 (Tex. App.—Austin 2004, no pet.)). Stated another way, "knowingly" causing the child's injury requires evidence that the defendant was aware with reasonable certainty that the result of serious bodily injury/death would have been prevented had the defendant performed the act that was omitted. *Payton v. State*, 106 S.W.3d 326, 329 (Tex. App.—Fort Worth 2003, pet. ref'd). Mental state is rarely proved through direct evidence, and almost always depends on circumstantial evidence. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Smith v. State*, 56 S.W.3d 739, 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "Knowledge and intent may be inferred from any facts which tend to prove their existence, including the acts, words, and conduct of the accused, [] the method of committing the crime and from the nature of wounds inflicted on the complainant." *Hart*, 89 S.W.3d at 64.

Finally, there must be a causal link between the defendant's omission and the child's serious bodily injury. The State must prove the child suffered the serious bodily injury ***because*** of the defendant's omission. *Payton*, 106 S.W.3d at 331 (emphasis added). For example, it is not sufficient for the State to prove only that the defendant failed to provide medical care for a serious bodily injury; rather, it must prove the child suffered serious bodily injury, i.e., substantial risk of death or death, because the defendant failed to provide him with medical care. *See id.* The causal link may be proven through a reasonable inference based on the evidence. In *Payton*, the court found the evidence sufficient to prove a causal link between the grandfather's omission and the child's serious bodily injury. Specifically, the court held that, based on the testimony by the emergency technicians, nurses, and medical examiner, the jury could have reasonably inferred the

grandfather would have noticed blood in the child's diaper when he changed it, the extended abdomen, and lethargic condition, which are signs of internal bleeding, and would have been aware of the apparent need for emergency care; therefore, the evidence supported a reasonable inference that the child suffered serious bodily injury, i.e., death, because the defendant failed to provide him with prompt medical care. *Id.* at 330.

Similarly, the testimony and medical evidence established that J.W. had obvious and apparent emaciation and physical injuries that the jury could reasonably infer Proo "would have noticed" during the times she babysat J.W. *See id.* Specifically, J.W. had multiple physical injuries in various stages of healing all over his body that were visually obvious and immediately apparent to anyone who saw him. According to EMT Johnson and Dr. Evans, the presence of different phases of healing showed the injuries occurred over an extended period of time and during multiple incidents. Aside from the acute head injury that occurred within one to two days prior to death, Dr. Evans found evidence of a prior head injury due to blunt force trauma as revealed by an old subdural hemorrhage; she also observed an external healing contusion to his forehead. Dr. Evans testified the head injuries would have caused J.W. to exhibit obvious symptoms. She further stated that while head injuries are not automatically fatal, they can cause death (i.e., create a substantial risk of death). Dr. Evans listed physical "battering" as one of the three cause-of-death factors for J.W.

As to the "underweight" factor that was another cause of J.W.'s death, EMT Johnson and Lieutenant Salame testified J.W. appeared "severely emaciated," "obviously emaciated," and "malnourished" when they saw him on December 27, and that such emaciation and malnourishment only occurs over a period of time. Lay witnesses Vera and Walker noticed J.W. looked "malnourished" and "like a skeleton" in November when Proo was present with him. Even Jacob questioned why J.W. was "so skinny" and suggested he needed medical attention. Dr. Evans

also testified that while the acute head injury could cause the signs of dehydration to accelerate, it would take longer than just one to two days for the signs of malnutrition to show up. Based on that testimony, the jury could reasonably infer that J.W. did not become malnourished and emaciated during the four days between Proo's last admitted babysitting and his death. Dr. Evans also stated that while J.W. was not starved to death, it was "abnormal" for him to weigh only 38 pounds at five years old and his underweight condition "was not healthy" and "could produce death."

Dr. Evans testified that all three factors of physical battering, malnutrition/underweight, and dehydration were individually capable of causing death (i.e., serious bodily injury), and that all three in fact contributed to J.W.'s death; she could not assign individual proportions of responsibility to each factor or separate one factor from another. Based on the medical evidence, the jury could find that each of the three factors qualified as "serious bodily injury."

The ultimate question is whether the evidence supports a reasonable inference that Proo "knowingly" or "intentionally" caused J.W. to suffer the serious bodily injury, whether by failing to provide him with adequate nutrition or by failing to provide him with medical care. In other words, there must be sufficient evidence on which to base a reasonable inference that Proo *either* intended to cause J.W. serious bodily injury by one of the omissions, *or* was aware with reasonable certainty that the omission would cause him serious bodily injury. *Tijerina*, 2012 WL 3525632, at *5; *Johnston*, 150 S.W.3d at 636.

Eyewitness testimony concerning a child's appearance can provide evidence of the extent of a defendant's awareness and knowledge of the child's condition and need for medical care. *See Payton*, 106 S.W.3d at 328-30; *see also Guerrero v. State*, No. 04-15-00762-CR, 2016 WL 4537694, at *8 (Tex. App.—San Antonio Aug. 31, 2016, no pet.) (mem. op., not designated for publication) (defendant's knowledge that failure to provide nutrition was substantially certain to

result in serious bodily injury was inferable from the child's apparent and obvious malnourished condition, as testified to by EMS technicians and investigator); *Sandoval v. State*, Nos. 14-12-00879 & 880-CR, 2014 WL 3870504, at *6 (Tex. App.—Houston [14th Dist.] Aug. 7, 2014, no pet.) (mem. op., not designated for publication) (evidence sufficient to show defendant knew with reasonable degree of certainty her child was being abused, where the child was "covered in bruises at the time of her death" and had bone fractures and other injuries which would have caused the child pain according to testimony). Here, Vera, Walker, and Jacob testified to their eyewitness observations of J.W.'s obvious and apparent malnourished condition and their concern for J.W.'s health during the months of November and December. Vera, in particular, observed J.W.'s physical deterioration from August/September to November when J.W. appeared to have "lost a lot of weight" and had visible external scars.

Proo argues there is no evidence that she knew J.W. was suffering from a life threatening condition or injuries when she last saw him on December 23. In *Tijerina*, the grandmother made a similar argument, claiming she thought the child only had the stomach flu and thus she did not knowingly or intentionally cause his death by failing to provide timely medical care. *Tijerina*, 2012 WL 3525632, at *5. However, the court disagreed and held that eyewitness testimony that the child had bruises all over his face and body and large abrasions on his head and scalp provided evidence of the extent of the grandmother's awareness of the child's condition. *Id.* (the court described how "death by internal bleeding" is a prolonged process with obvious changes to a child's behavior and demeanor, and stated "anyone would have known something was wrong, regardless of medical training" and would have known the child needed to get to a hospital immediately, not wait to go buy diapers). The court also stated, "the source of [the child's] injuries is irrelevant." *Id.* at *6. The question is whether the jury could reasonably infer that the

grandmother knew about the child's serious condition and knowingly caused the child serious bodily injury by failing to timely seek medical care. *Id.*

As discussed *supra*, the jury could have discounted Proo's statement that she did not see J.W. again after December 23. Even if December 23 was the last time Proo saw J.W., his emaciated condition was "obviously apparent" at that time, as it was in November to Vera and Walker. In Lieutenant Salame's professional opinion, "the way [J.W.] looked when I saw him [on Dec. 27], that didn't - - that's not four days . . . if you saw that kid on the 23rd and you didn't call the police, I think that's a problem." Salame stressed there was "no way" that J.W. would not have appeared to be in medical distress on December 23. EMT Johnson stated that J.W. was "obviously emaciated" and malnourished, with injuries spread all over his body, when he arrived on December 27. The EMTs and law enforcement officers testified similarly in *Deleon*, stating the child looked like "a skeleton with skin," a "concentration camp" victim, "skin and bones," with his head out of proportion to his thin arms and legs and his knees and elbows the "size of tennis balls." *Deleon*, 2006 WL 1684637, at *2-3. The court held the jury could disbelieve the grandmother's written statement that the child played with his sisters, opened Christmas presents, and "was fine" before he died a few hours later. *Id.* at *7-8.

In addition to the testimonial and medical evidence, the jury also viewed a photograph of J.W.'s body and a portion of the crime scene video showing the condition of J.W.'s body. As discussed below, visual images such as photos or video may refute a defendant's claim of lack of knowledge or intent by clarifying and supporting the witnesses' observations and conclusions about the child's condition. *Sifuentes v. State*, No. 04-12-00607-CR, 2013 WL 3422916, at *5 (Tex. App.—San Antonio July 3, 2013, no pet.) (mem. op., not designated for publication). "Visual evidence accompanying testimony is most persuasive and often gives the fact finder a point of comparison against which to test the credibility of a witness and the validity of his

conclusions." *Id.* Here, the photograph and video images showing the condition of J.W.'s body were "strong evidence" refuting Proo's claim that she had no knowledge that he needed medical attention or lacked adequate nourishment when she admittedly saw him four days before his death. *See id.* at *6 (noting the photographs were "strong evidence that the defendant must have known something was going on with the child and chose to ignore it"). Based on the medical and testimonial evidence, as supported by the visual evidence, the jury could have reasonably inferred that Proo knowingly caused J.W. serious bodily injury by failing to provide him with adequate nutrition or medical care.

Finally, there was also some evidence to support a finding that Proo intentionally caused J.W. serious bodily injury through her omissions. Both Jacob and N.P., Proo's biological son and grandson, expressly stated in their testimony that J.W. was not a blood relative. According to Lieutenant Salame, his investigation of the living conditions in the home showed that J.W. was treated differently from Proo's biological grandchildren N.P. and K.W. While they had their own bedrooms, toys, and clothes and appeared healthy, J.W. slept in the kitchen area on a flattened cardboard box on the floor and spent a lot of time in a folding urine-soaked chair in the kitchen; he was left at home when the other children went to see Santa at Fiesta Texas; and, most importantly, J.W. was the only child in the home who was battered and malnourished. Vera and Walker testified they hesitated to call CPS or the police about their concerns for J.W. because Crystal's biological children, i.e., Proo's biological grandchildren, appeared healthy and fine. "Motive is a significant circumstance indicating guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Zarnfaller v. State*, No. 01-15-00881-CR, 2018 WL 3625618, at *10 (Tex. App.—Houston [1st Dist.] July 31, 2018, no pet.) (mem. op., not designated for publication). The jury could have inferred Proo's motive because J.W. was not her "blood" grandchild. In addition, the jury could have considered Proo's characterization of J.W. as "fine" on December 23 as a

knowing misrepresentation in view of the other witnesses' testimony that he was clearly "not fine" as early as November. In addition, Proo's attempts to keep Walker from interacting with and talking to J.W. could be viewed as an attempt by Proo to conceal evidence of J.W.'s true condition. *See Guevara*, 152 S.W.3d at 50 (defendant's attempt to conceal incriminating evidence is a circumstance of guilt); *see also Hart*, 89 S.W.3d at 64 (jury may infer both intent and knowledge from any facts tending to prove existence of mental states, including the defendant's acts, words, or conduct).

In sum, there is sufficient evidence in the record from which the jury could have reasonably inferred that Proo either intentionally or knowingly caused serious bodily injury to J.W. by failing to provide him with sufficient nutrition or medical care.

Conclusion on Sufficiency Issues

Having considered Proo's arguments challenging the sufficiency of the evidence, we overrule her first, second, and third issues. Circumstantial evidence can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13; *see, e.g., Guerrero*, 2016 WL 4537694, at *1, 7-8 (circumstantial evidence was sufficient to prove intentional or knowing omission that caused serious bodily injury to child by malnourishment). Based on the cumulative force of the direct and circumstantial evidence, and the reasonable inferences from the evidence, and deferring to the jury on matters of credibility and weight, we hold there is sufficient evidence to support the elements of "care, custody, or control" and Proo's knowingly or intentionally causing J.W. serious bodily injury by failing to provide him with adequate nutrition or medical care. *See Murray*, 457 S.W.3d at 448. Our holding in this case is limited to the unique facts presented.

ADMISSION OF LANDLORDS' TESTIMONY (ISSUE NOS. 4, 5, 6)

In her next three issues, Proo challenges the trial court's rulings admitting the testimony of landlords Ramirez and Barron. We review a trial court's decision to admit or exclude evidence

for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Proo argues Ramirez's testimony about Proo's participation in the second walk-through and thereafter seeing Proo at the house in June or July and in late November was not relevant to the issue of whether Proo assumed care, custody or control of J.W. She points out that Ramirez did not say she saw Proo "with J.W." at the house, or otherwise knew J.W. was in the house at the same time as Proo. She asserts that any probative value to the testimony was outweighed by its substantial prejudice, and its admission harmed her because the State used it to suggest that Proo appeared to be living at the house. With respect to Barron's testimony confirming Proo's presence and comments during the second walk-through, Proo argues his testimony was not relevant because it occurred in March before J.W. began living there, and thus had no bearing on whether Proo assumed responsibility to care for him.

"Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016) (to be relevant, evidence must be material and probative); TEX. R. EVID. 401, 402. To be "material," the evidence must relate to a fact of consequence, which includes both an elemental fact or an evidentiary fact from which an elemental fact can be inferred. *Henley*, 493 S.W.3d at 84. To be "probative," the evidence must tend to make the existence of the fact of consequence more or less probable than it would be absent the evidence. *Id.* at 83-84. "Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case." *Id.* at 84 ("[r]elevancy is … that which conduces to the proof of a pertinent hypothesis").

Here, the State's theory of the case was that Proo essentially "stayed" at the Gayle Street house and had assumed responsibility for J.W.'s basic needs within the household, or at least

during the many occasions she babysat him. The evidence by Ramirez and Barron about Proo's participation in the second walk-through before the lease was signed related to the disputed fact issue of whether Proo was going to live or "stay" at the house with Crystal and her family. Whether Proo "stayed" at the house with J.W. was a factor in the jury's evaluation of the element of assuming care, custody, or control; therefore, the testimony was relevant. Ramirez's testimony that she saw Proo at the house two or three times between June or July and November, when J.W. lived there, similarly related to the same disputed fact of consequence, i.e., whether Proo was living or "staying" at the house. Ramirez's testimony provided an evidentiary basis from which an elemental fact could be inferred, i.e., whether Proo had assumed care, custody, or control of J.W., and tended to make the existence of that elemental fact more probable than it would be absent the testimony. *See id.* at 83-84. We conclude the landlords' testimony about Proo's presence at the house was relevant and the trial court did not abuse its discretion in admitting the evidence. Proo does not articulate in her brief how the admission of Ramirez's testimony was so unfairly prejudicial that it substantially outweighed any probative value except to complain that the State used it to suggest she was living there. *See Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006) (describing the Rule 403 factors). Merely because evidence is unfavorable or prejudicial to a defendant does not make it unfairly prejudicial within the meaning of Rule 403. *See* TEX. R. EVID. 403; *see also Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010) ("All testimony is likely to be prejudicial to one party or the other, and evidence should be excluded under Rule 403 only when a clear disparity exists between the degree of prejudice of the offered evidence and its probative value."). In view of the probative value of the landlords' testimony on the disputed fact issue of whether Proo lived or stayed at the house with J.W., we conclude the trial court did not abuse its discretion under Rule 403 by admitting the evidence. We therefore overrule Proo's Issue Nos. 4-6.

EXCLUSION OF DEFENSE EXPERT (ISSUE #7)

In her seventh issue, Proo argues the trial court erred in excluding the testimony of her proffered expert witness, family attorney Denise Martinez, to testify about the meaning of legal custody and the responsibilities associated with legal custody of a child. When Proo attempted to call Ms. Martinez to testify, the State raised two objections, arguing the proffered testimony should be excluded because the State did not receive timely notice of the defense expert and, based on the proffer, the expert's testimony would discuss the legal duties of a child's conservator and would not be relevant to any fact at issue in Proo's trial where the State pled only that she "assumed care, custody, and control," not that she had legal custody. The trial court sustained the State's objection without specifying which basis and excluded Martinez's testimony.

Notwithstanding the timeliness issue, the record shows that Ms. Martinez's testimony about legal conservators and their duties was not relevant or admissible in Proo's case. Proo asserts that her defense counsel's proffer of Ms. Martinez's testimony showed it was relevant and admissible on the issue of "who had legal custody of J.W." and the legal responsibilities of a conservator. She contends the exclusion of Ms. Martinez's testimony harmed her because it would have directly contradicted the State's evidence concerning Proo's assumption of J.W.'s care. To the contrary, the short bill of exception describing Ms. Martinez's proffered testimony fails to demonstrate how her testimony on legal conservator duties and responsibilities toward the child would be relevant to an issue in Proo's case where she was not charged with having a legal duty, but only with the assumption of care, custody or control over the child. Rule 702 provides that a witness who is qualified as an expert may testify if the expert's scientific, technical, or other specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. The record shows that, even if Ms. Martinez was qualified to testify as an expert on family law, the substance of her testimony regarding legal conservatorship duties

would not have assisted the jury in understanding the evidence on whether Proo "assumed care, custody, or control" of the child, an express alternative to "a legal or statutory duty" provided in the statute. *See* TEX. PENAL CODE ANN. § 22.04(b). Since Proo was not charged with having a legal or statutory duty toward J.W., Ms. Martinez's testimony about the duties attached to such legal status would not have helped the jury to determine a fact in issue. Therefore, Ms. Martinez's testimony was not admissible under Rule 702, and the trial court did not abuse its discretion in excluding the evidence.

ADMISSION OF PHOTO AND CRIME SCENE VIDEO (ISSUE NOS. 8-11)

Next, Proo challenges the admission of two pieces of physical evidence—a photograph of J.W.'s body inside the ambulance (State Exh. #15), and a two-minute portion of the redacted crime scene video showing the investigators examining J.W.'s body in the ambulance (State Exh. #19A). Proo argues the trial court erred in admitting both exhibits because they were not relevant to the particular facts at issue in Proo's case (Issue Nos. 8 and 9), and their probative value was substantially outweighed by their prejudicial effect (Issue Nos. 10 and 11). *See* TEX. R. EVID. 401, 403. In essence, Proo argues that because she was not charged with causing the physical injuries to J.W. depicted in the photo and video, they have no probative value as to her omissions. The State replies that the visual images of J.W. are probative of the fact he suffered "serious bodily injury" and of Proo's knowing and intentional failure to provide nourishment or medical care and her knowledge of J.W.'s physical condition.

We review a trial court's decision to admit photographs or video for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). A trial court abuses its discretion if its ruling was outside the zone of reasonable disagreement. *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007); *Riley v. State*, 378 S.W.3d 453, 457-58 (Tex. Crim. App. 2012) (abuse of discretion exits if no reasonable view of the record could support the ruling).

State Exhibit #15 – Photo of J.W.'s Body Inside the Ambulance

In the trial court, Proo objected that the photograph was not relevant or probative because no evidence linked her to J.W.'s "thin, lifeless, and battered body" shown in the photo, and the graphic image was unfairly prejudicial. The State argued it showed the malnourished and battered condition of the child, and was probative of Proo's failure to provide nutrition and medical care to J.W. The trial court overruled Proo's objections and admitted the photograph "as it shows the entire body, and as it relates to potential malnutrition." The trial court excluded other similar photographs offered by the State as cumulative.

The emergency medical technician Johnson testified the photograph "fairly and accurately represents the way [J.W.] looked when he was treating him." According to Johnson, the photo shows that J.W. was "fairly malnourished," and "severely emaciated," and had external injuries "over his whole body" consisting of multiple cuts, scrapes, and bruises in various stages of healing. The photo also shows his swollen and bruised eyes, most likely from bleeding in the skull. Finally, the photo shows the bruising to J.W.'s wrists, and healing lacerations to both shoulders.

State Exhibit #19A – Redacted Video of J.W.'s Body

SAPD Sergeant Matthew Overton testified he used a video camera to document the crime scene inside the house and the medical investigators' examination of J.W.'s body inside the ambulance. When the State offered the full video into evidence, Proo objected it was not relevant or probative due to the lack of evidence that Proo herself caused any of J.W.'s injuries, and the video's close-ups of J.W.'s body were so graphic and inflammatory they would improperly sway the jury's emotions. The State argued the video was probative of the same issues as the photo admitted as State Exh. #15 with respect to serious bodily injury and Proo's knowledge of J.W.'s physical condition, and provided additional relevant evidence beyond the still photo by showing the J.W.'s living conditions at the home and the circumstances and context surrounding his injuries

and death. The trial court overruled Proo's objections and initially admitted the entire 20-minute video as State Exhibit #19.

However, the trial court reconsidered its admission of the entire video before it was played for the jury based on Proo's re-urging of her Rule 403 objection. After reconsidering the Rule 403 factors, the court asked the State to shorten the video and redact the parts where the child's body is manipulated by the medical investigator. The video was redacted so that the original 12 minutes showing J.W.'s body was reduced to approximately 2 minutes of his body. Proo then narrowed her objection to just the two-minute portion of the video showing J.W.'s body, including a 20 second "tight shot" of J.W.'s head. The redacted video was admitted as State Exhibit #19A and played for the jury. Besides showing J.W.'s body being examined inside the ambulance, the video shows a walk-through inside the house.

Analysis

"Generally, a photograph is admissible if verbal testimony as to matters depicted in the photograph[] is also admissible." *Gallo*, 239 S.W.3d at 762. "In other words, if verbal testimony is relevant, photographs of the same are also relevant." *Id.*; TEX. R. EVID. 401 (evidence is relevant if it has "any tendency to make a fact more or less probable" and the fact is "of consequence in determining the action"). Photographs of a victim's injuries are relevant and their relevance is not diminished merely because the jury also heard testimony about the same injuries. *Gallo*, 239 S.W.3d at 762.

Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence is more probative than prejudicial. TEX. R. EVID. 403; *Aragon v. State*, 229 S.W.3d 716, 724 (Tex. App.—San Antonio 2007, no pet.). However, Rule 403 permits the exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, or, in other words when the evidence has "an undue tendency to suggest that a decision be made

on an improper basis." *Reese v. State*, 33 S.W.3d 238, 240 (Tex. Crim. App. 2000). In evaluating whether the probative value of photographs or video is outweighed by the danger of unfair prejudice, the court considers several factors, including "the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, and whether the body depicted is naked or clothed." *Gallo*, 239 S.W.3d at 762. The court must also consider the availability of other means of proof and the unique circumstances of the individual case. *Id.* These considerations are part of the general Rule 403 balancing test considering: (1) the degree of probative value; (2) the potential for the evidence to affect the jury in "some irrational, indelible way;" (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence. *Shuffield*, 189 S.W.3d at 787.

Here, the trial court excluded other photographs of J.W.'s body offered by the State (including a morgue photo) and only admitted the one Exhibit #15 photograph. It is a color photo showing his face and entire body lying on the stretcher inside the ambulance; the photo shows his emaciated condition (ribs protruding, thin arms and legs, knobby knees and shoulders, too large head in proportion to his body), heavy bruising to both eyes, bloody cuts on the top of one shoulder, and two bloody cuts to his face, with dried blood under his nose. J.W. is wearing shorts and the photo is standard size and not a close-up. As noted, the trial court instructed the State to shorten and redact the Exhibit #19A crime scene video so that the footage of J.W.'s body was reduced from 12 to 2 minutes. The 2 minutes of the video depicting J.W. shows medical investigators examining J.W.'s body on the stretcher, turning him over to show his back with his spine and shoulder blades protruding, patterned cuts and/or abrasions visible on his lower legs, multiple abrasions on his back, swollen and bruised hands/wrists, cuts/abrasions on his face and the side of his head. By only admitting one photograph and substantially redacting the video of the child's body, the trial court attempted to minimize the prejudicial effect of the visual images of J.W.'s

body, while still allowing the jury to view the images that supported the witnesses' verbal descriptions. EMT Johnson and Sergeant Overton testified that the photograph and video, respectively, fairly and accurately represented J.W.'s condition and the living conditions at the house that night.

The mere fact that a photo or video depicts a child's badly bruised body and is hard to view does not automatically render it too inflammatory or unfairly prejudicial to be admitted. *See Sifuentes*, 2013 WL 3422916, at *5. "Photographs showing a victim's bruises may be admitted to clarify and support observations and conclusions about the victim's injuries, so long as they are not admitted solely to inflame the minds of the jurors." *Id.* (citing *Madden v. State*, 799 S.W.2d 683, 696-97 (Tex. Crim. App. 1990)). The trial court does not err in admitting photographs merely because they are gruesome. *Id.* (citing *Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995)). As in *Sifuentes*, the photograph and video of the condition of J.W.'s body was necessary to refute Proo's claim that she had no knowledge that he needed medical attention or lacked adequate nourishment, i.e., he was "fine" when she admitted last seeing him four days before his death. *See id.* at *6. As noted in *Sifuentes*, "[t]he photographs are strong evidence that [Proo] must have known something was going on with [J.W.] and chose to ignore it." *Id.* "Visual evidence accompanying testimony is most persuasive and often gives the fact finder a point of comparison against which to test the credibility of a witness and the validity of his conclusions." *Id.* (quoting *Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999)). That purpose was served by the admission of the photograph and video footage of J.W. in this case, as in *Sifuentes*, and the trial court minimized the prejudicial effect of the images. Accordingly, we overrule Proo's issues challenging admission of the single photograph and the redacted crime scene video of J.W.'s body.

EVIDENCE REGARDING REVERSED LOCK AND THE CLOSET (ISSUE NOS. 12-14)

In her last three issues, Proo argues the trial court abused its discretion in admitting testimony about conditions inside the house: the existence of holes in the wall of a closet (Issue No. 12); blood on the closet wall (Issue No. 13); and a reversed lock on a door leading to the garage storage area (Issue No. 14). Proo asserts the above evidence was not tied to her and was therefore not relevant to a fact in issue in her injury by omission case; therefore, the evidence should have been excluded as "not relevant" under TEX. R. EVID. 401.

The State replies that Proo waived any complaint regarding this evidence because the same evidence came in through several other means without objection; therefore, any error in its admission was cured. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) (to preserve error, defendant must object each time the inadmissible evidence is offered). The record supports the State's position. Proo objected to "relevance" when Lieutenant Salame began to testify about finding holes and blood in the hall closet and "reversed locks;" her objection was overruled and the evidence was admitted. However, Proo did not object to the portions of the crime scene video admitted as State Exhibit 19A which show the holes in the wall of the hall closet, specifically a large through-hole and another large sunken and cracked area in the wall, and several blood spots on the wall near the holes. The video also shows the officer inspecting a reversed lock on a door in the utility room off the kitchen which led to the garage storage area; the door with the reversed lock was in the same area as the green chair and cardboard box on which Salame concluded that J.W. spent most of his time. In addition, Proo did not object to Jacob's testimony that after J.W. died Jacob had to clean up the blood inside the hall closet and it disturbed and upset him for a long time. Accordingly, Proo's Issue Nos. 12-14 are overruled.

CONCLUSION

Based on the foregoing analysis, we overrule Proo's issues on appeal and affirm the trial court's judgment.

Rebeca C. Martinez, Justice

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