IN THE
TENTH COURT OF APPEALS

No. 10-18-00053-CR

MELANIE BROOKE HOLLOWAY,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2016-1548-C1

OPINION

A jury convicted Appellant Melanie Brooke Holloway of the offense of endangering a child[1] and assessed her punishment at two years' confinement in state jail

[1] Several documents in the appellate record, including the judgment of conviction, indicate that Holloway was convicted of the offense of "abandoning or endangering a child." *See generally* TEX. PENAL CODE ANN. § 22.041 (comprehensively entitled "Abandoning or Endangering Child"). Abandoning a child and endangering a child are, however, two distinct offenses, *see id.* § 22.041(b), (c), and Holloway was charged with and convicted of only the offense defined by Texas Penal Code subsection 22.041(c), *i.e.*, the specific offense of endangering a child, *see id.* § 22.041(c).

and a $10,000 fine. *See id.* §§ 12.35(a), (b), 22.041(c), (f). This appeal ensued. We will affirm the trial court's judgment.

JURY CHARGE ERROR

In her first issue, Holloway contends that the trial court failed to properly instruct the jury in the jury charge regarding the culpable mental states for the offense of endangering a child. Holloway argues that the jury charge was erroneous regarding the culpable mental states in the following two respects: (1) it provided definitions regarding "circumstances surrounding the conduct" when the offense of endangering a child is a "nature of conduct" offense and (2) it "fail[ed] to tailor the appropriate definitions to the elements of the offense to which they applied." According to Holloway then, because the offense of endangering a child is a "nature of conduct" offense, the trial court should have provided the jury in the jury charge only the "nature of conduct" definitions of "intentionally" and "knowingly" and should have instructed the jury in the jury charge that only the "nature of conduct" definitions for "intentionally" and "knowingly" applied to the charged offense.

Standard of Review

A claim of jury-charge error is reviewed in two steps. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). We first determine whether there is error in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we find error, then we analyze that error for harm. *Id.*

Step One

Texas Code of Criminal Procedure article 36.14 provides that the trial court "shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case[.]" TEX. CODE CRIM. PROC. ANN. art. 36.14. "The purpose of the jury charge is to inform the jury of the applicable law and guide them in its application to the case." *Beltran De La Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019) (quoting *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996)). A proper jury charge therefore consists of an abstract statement of the law and the application paragraph(s). *Ramirez v. State*, 336 S.W.3d 846, 851 (Tex. App.—Amarillo 2011, pet. ref'd). The abstract paragraphs of a jury charge serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge. *Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012). Each statutory definition that affects the meaning of an element of the offense must be communicated to the jury. *Villarreal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009). The application paragraphs then apply the relevant law, the definitions found in the abstract portion of the charge, and general legal principles to the particular facts of the case. *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012).

> Section 6.03 of the Texas Penal Code sets out: four culpable mental states—intentionally, knowingly, recklessly, and criminally negligently; two possible conduct elements—nature of the conduct and result of the conduct; and the effect of the circumstances surrounding the conduct. In a jury charge, the language in regard to the culpable mental state must be tailored to the conduct elements of the offense. When "specific acts are criminalized because of their very nature, a culpable mental state must apply to committing the act itself." *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). "On the other hand, unspecified conduct that is criminalized because of its result requires culpability as to that result." *Id.* A trial court errs when it fails to limit the language in regard to the

> applicable culpable mental states to the appropriate conduct element. *See Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) ("Intentional murder . . . is a 'result of conduct' offense; therefore, the trial judge erred in not limiting the culpable mental states to the result of appellant's conduct.").
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> We use the gravamen of the offense to decide which conduct elements should be included in the culpable mental-state language. The gravamen of the offense is: the "gist; essence; [or the] substance" of the offense (BALLENTINE'S LAW DICTIONARY 534 (3rd ed. 1969)); "[t]he substantial point or essence of a claim, grievance, or complaint" (BLACK'S LAW DICTIONARY 817 (9th ed. 2009)); "the part of an accusation that weighs most heavily against the accused; the substantial part of a charge or accusation." (WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 617 (1989)).
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> If the gravamen of an offense is the result of conduct, the jury charge on culpable mental state should be tailored to the result of conduct and likewise for nature-of-conduct offenses. *See, e.g.*, *Alvarado v. State*, 704 S.W.2d 36, 38-40 (Tex. Crim. App. 1985) (holding that the trial court erred in failing to tailor the culpable mental states to the result of conduct for the result-oriented offense of injury to a child). If the offense has multiple gravamina, and one gravamen is the result of conduct and the other is the nature of conduct, the jury charge on culpable mental state must be tailored to both the result of conduct and the nature of conduct. *Hughes v. State*, 897 S.W.2d 285, 295 (Tex. Crim. App. 1994) (recognizing, based on *Cook*, "that in a capital murder case involving more than one conduct element it would not be error for the definitions to include more than the result of conduct element").

Price v. State, 457 S.W.3d 437, 441-42 (Tex. Crim. App. 2015).

Texas Penal Code subsection 22.041(c) provides: "A person commits [the] offense [of endangering a child] if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment." TEX. PENAL CODE ANN. § 22.041(c). This statute does not require that the accused's conduct be of a specific nature or that it be committed under specific circumstances.

Millslagle v. State, 81 S.W.3d 895, 897 n.1 (Tex. App.—Austin 2002, pet. ref'd); *see* TEX. PENAL CODE ANN. § 22.041(c). Both the nature of conduct and the circumstances surrounding the conduct are therefore inconsequential to the commission of the offense of endangering a child. Instead, subsection 22.041(c) plainly criminalizes unspecified conduct because of its result, *i.e.*, because the conduct "places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment." *See* TEX. PENAL CODE ANN. § 22.041(c); *Alvarado*, 704 S.W.2d at 39 ("[T]he injury to a child statute, like the homicide and other assaultive proscriptions, does not specify the 'nature of conduct.' Clearly then, the 'nature of conduct' in these offenses is inconsequential (so long as it includes a voluntary act) to commission of the crimes. What matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified."). The gravamen of the offense of endangering a child is therefore the result of conduct.[2] The language in the jury charge regarding the culpable

[2] Our sister courts are split regarding whether this offense of endangering a child is a "nature of conduct" or "result of conduct" offense. *Compare Alcoser v. State*, 596 S.W.3d 320, 331 (Tex. App.—Amarillo 2019, pet. granted) ("[C]hild endangerment is a 'nature-of-conduct' offense because it is the nature of the conduct which is prohibited, regardless of the result. The gravamen of a child endangerment offense is engaging in conduct that endangers a child—regardless of whether the child is actually harmed or the conduct is actually prohibited."), *and Walker v. State*, 95 S.W.3d 516, 520-21 (Tex. App.—Fort Worth 2002, pet. ref'd) ("The language of section 22.041(c) is unambiguous and expresses a clear legislative intent that a person commits the offense of child endangerment if he intentionally or knowingly 'engages in conduct' that places a child in imminent danger of death, bodily injury, or physical or mental impairment. The statute does not require proof that the person intend or know that his conduct places the child in such imminent danger."), *with Bicknell v. State*, No. 04-20-00016-CR, 2020 WL 6048783, at *2-3 & n.2 (Tex. App.—San Antonio Oct. 14, 2020, no pet. h.) (mem. op., not designated for publication) ("[E]ndangering a child is a result-of-conduct offense. . . . [W]e believe the gravamen of section 22.0[41](c) is not the nature of the defendant's conduct itself, but rather whether that conduct <u>results</u> in a child being placed in imminent danger of harm."), *Suarez v. State*, No. 05-03-00096-CR, 2003 WL 23025024, at *3 (Tex. App.—Dallas Dec. 30, 2003, pet. ref'd) (not designated for publication) ("Under section 22.041(c), the culpable mental state applies to the result of Suarez's conduct."), *and Millslagle*, 81 S.W.3d at 897 n.1 ("Notwithstanding the phrase 'engages in conduct that,' section 22.041(c) appears to be a 'result of conduct' offense."). The Court of Criminal Appeals has not yet addressed the issue. *Schultz v. State*, 923 S.W.2d 1 (Tex. Crim. App. 2014)

mental states for the offense of endangering a child should thus be tailored to the result of conduct.[3] *See Price*, 457 S.W.3d at 441.

The jury charge in this case stated in relevant part as follows:

> Our law provides that a person commits the offense of Abandoning or Endangering a Child if she intentionally, knowingly, recklessly, or with criminal negligence, engages in conduct that places a child younger than fifteen years in imminent danger of death, bodily injury, or physical or mental impairment.
>
> . . . .
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> A person acts intentionally, or with intent, with respect to the nature of her conduct when it is his conscious objective or desire to engage in the conduct.
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> A person acts knowingly, or with knowledge, with respect to the nature of her conduct or to circumstances surrounding her conduct when she is aware of the nature of her conduct or that the circumstances exist.
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> A person acts recklessly, or is reckless, with respect to circumstances surrounding her conduct when she is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(plurality op.), involved the offense of abandoning a child as defined by Texas Penal Code subsection 22.041(b), not the offense of endangering a child as defined by Texas Penal Code subsection 22.041(c). *See id.* at 2-4 (holding that "the fact that 'intentionally' immediately precedes 'abandons' means that the prescribed mental state is connected with the act of abandonment itself" rather than element of surrounding circumstances and that offense of child abandonment is therefore "nature of conduct" offense); *see also* TEX. PENAL CODE ANN. § 22.041(b), (c).

[3] Holloway's argument actually exposes the suitability of this conclusion. As pointed out by Holloway, a person cannot be reckless or negligent with respect to the "nature of conduct." *Alvarado*, 704 S.W.2d at 38-39. Instead, the only conduct element that can be the object of all four of the culpable mental states is "result of conduct." *Id.* Accordingly, "when all four culpable mental states have been prescribed by the Legislature in defining an offense, [as is the case with the offense of endangering a child,] it is a strong indication that the offense is a 'specific result' type of crime." *Id.* at 39; *see* TEX. GOV'T CODE ANN. § 311.021(2) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective."); *see also* TEX. PENAL CODE ANN. § 1.05(b) ("Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code.").

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding her conduct when he [*sic*] ought to be aware of a substantial and unjustifiable risk that the circumstances exist. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
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> . . . .
>
> ELEMENTS
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> 1. On or about the 1st day of August, 2016;
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> 2. In McLennan County, Texas;
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> 3. the Defendant, Melanie Brooke Holloway;
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> 4. did then and there intentionally or knowingly or recklessly or with criminal negligence, engage in conduct that placed [A.W.;]
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> 5. a child younger than Fifteen (15) years, in imminent danger of death, bodily injury, or physical or mental impairment;
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> 6. by ordering the child, age Seven (7), to leave and never return to the residence, at which time the child did then obey the Defendant's command and walk barefoot and unattended on a city street[.]

The application paragraph of this jury charge tracked the statutory language of subsection 22.041(c), as charged in the indictment. *See* TEX. PENAL CODE ANN. § 22.041(c). Furthermore, because subsection 22.041(c) is a "result of conduct" offense, all four of the culpable mental states listed in the statutory language of subsection 22.041(c) may apply to the charged offense of endangering a child, *see Alvarado*, 704 S.W.2d at 38-39, and all four of the culpable mental states were therefore properly included in the application paragraph of the jury charge. Accordingly, we conclude that there was no error in the

application paragraph of the jury charge. *See Duffy v. State*, 567 S.W.2d 197, 204 (Tex. Crim. App. 1978) ("The charge submitted tracks the language of the statute, and therefore properly charges the jury on the statutory issue.").

In the abstract portion of the jury charge, however, the definitions of the culpable mental states for the offense of endangering a child contained language regarding only the nature of conduct and the circumstances surrounding the conduct. The definitions of the culpable mental states were not properly tailored to the result of conduct, which would have stated as follows:

> A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
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> A person acts recklessly, or is reckless, with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
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> A person acts with criminal negligence, or is criminally negligent, with respect to the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

See TEX. PENAL CODE ANN. § 6.03. Accordingly, while we disagree with Holloway's *specific* argument in this issue, *i.e.*, that the trial court failed to tailor the language

regarding the culpable mental states to only the nature of conduct, we agree with Holloway's *general* contention that there was error in the jury charge.

Step Two

Because the jury charge was erroneous, we must determine whether Holloway was harmed by the error. *See Ngo*, 175 S.W.3d at 743.

When, as in this case, the error was not preserved by objection, the error will not result in reversal of the conviction without a showing of "egregious harm." *Price*, 457 S.W.3d at 440; *Ngo*, 175 S.W.3d at 743-44. "Egregious harm" is "a difficult standard to meet and requires a showing that the defendant[was] deprived of a fair and impartial trial." *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013). "The record must disclose 'actual rather than theoretical harm,' and the error must have affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory." *Id.* (quoting *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011)). "In determining whether egregious harm is shown, we look at the entire jury charge, the state of the evidence (including the contested issues and the weight of probative evidence), the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole." *Id.*

First, regarding the jury charge, the error was only in the abstract portion of the charge, not in the application paragraph. The application paragraph is the jury charge's "heart and soul." *Vasquez*, 389 S.W.3d at 367. It is the application paragraph of the charge, not the abstract portion, that "explains to the jury, in concrete terms, how to apply the law to the facts of the case." *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013).

We look at the "wording of the application paragraph to determine whether the jury was correctly instructed in accordance with the indictment and also what the jury likely relied upon in arriving at its verdict." *Id.* (footnote omitted). The failure to give an abstract instruction, or definition, is therefore reversible "only when such an instruction [or definition] is necessary to a correct or complete understanding of concepts or terms in the application part of the charge." *Plata v. State*, 926 S.W.2d 300, 302 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997). The Court of Criminal Appeals has also held that generally, error in the abstract portion of a jury charge that is not present in the application paragraph is not egregiously harmful. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999) ("Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious.").

Second, the State's argument in this case actually treated the offense of endangering a child as a "result of conduct" offense. The State's argument to the jury acknowledged that Holloway's conviction required culpability as to the result of her conduct. For instance, during the State's closing argument, the prosecutor stated:

> [A]t the very minimum, a mom who tells her kid to leave and don't come back from the front of their house ought to be aware that there is a risk there, ought to at the very, very minimum. And I would argue and I think the evidence would show that there could be some intent there . . . .

Based on our review of the record, we therefore conclude that the error in the abstract portion of the jury charge here was not egregiously harmful. We overrule Holloway's first issue.

FACTUAL SUFFICIENCY

In her second issue, Holloway contends that the evidence is factually insufficient to support her conviction for the offense of endangering a child.[4]

The Court of Criminal Appeals has abandoned the factual-sufficiency standard in criminal cases. *See Brooks v. State*, 323 S.W.3d 893, 902, 912 (Tex. Crim. App. 2010) (concluding that there is "no meaningful distinction between the *Jackson v. Virginia* legal sufficiency standard and the . . . factual-sufficiency standard, and these two standards have become indistinguishable" and holding the following: "As the Court with final appellate jurisdiction in this State, we decide that the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis*, are overruled."); *see also Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). As an intermediate appellate court, we are required to follow binding precedent in cases decided by the Court of Criminal Appeals. *See State v. DeLay*, 208 S.W.3d 603, 607 (Tex. App.—Austin 2006) ("As an intermediate appellate court, we lack authority to overrule an opinion of the court of criminal appeals."), *aff'd sub nom. State v. Colyandro*, 233 S.W.3d 870 (Tex. Crim. App. 2007). Accordingly, this Court has repeatedly considered and rejected the arguments presented by Holloway. *See, e.g.*, *Thornton v. State*, No. 10-18-00068-CR, 2020 WL 4875721, at *1 (Tex. App.—Waco Aug. 19, 2020, pet. ref'd) (mem. op.,

[4] Holloway does not challenge the sufficiency of the evidence under the *Jackson v. Virginia* standard of review. *See* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

not designated for publication) (citing several additional opinions in which this Court has rejected similar factual-sufficiency arguments); *accord Roberson v. State*, No. 06-17-00181-CR, 2018 WL 3484185, at *4 (Tex. App.—Texarkana Jul. 20, 2018, pet. ref'd) (mem. op., not designated for publication); *Rivera v. State*, No. 01-17-00351-CR, 2018 WL 3352990, at *4 (Tex. App.—Houston [1st Dist.] Jul. 10, 2018, no pet.) (mem. op., not designated for publication); *Schafer v. State*, No. 11-16-00180-CR, 2018 WL 2976361, at *1 (Tex. App.—Eastland Jun. 14, 2018, no pet.) (mem. op., not designated for publication).

We are therefore not persuaded to consider Holloway's factual-sufficiency argument in this proceeding. We overrule Holloway's second issue.

Conclusion

Having overruled both of Holloway's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed December 9, 2020
Publish
[CR25]

* (Chief Justice Gray concurs in the Court's judgment only. A separate opinion will not issue. Chief Justice Gray notes, however, that after determining that the specific complaint raised by the appellant should be overruled, the Court identifies a different problem with the charge that was not raised by the appellant, decides that there is error in the charge, and moves on to determine that the error identified by the Court was harmless. Chief Justice Gray does not agree with the Court's analysis that the statute at

issue is only a result-of-conduct *mens rea*, although, because that is not the issue raised, he would not reach or decide that issue. Specifically, Chief Justice Gray finds the line of cases from *Walker v. State*, 95 S.W.3d 516 (Tex. App.—Fort Worth 2002, pet. ref'd), is the better reasoned line of cases in the split of authority among the intermediate appellate courts. Chief Justice Gray would hold, however, that the error in the charge as argued by the appellant is harmless under the *Almanza* standard. Therefore, Chief Justice Gray would reach the same result as the Court and therefore concurs in the Court's judgment while respectfully rejecting the reasoning in the Court's opinion.)