NUMBERS 13-15-00461-CR &
13-15-00462-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CHRISTINE JOHNSON, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the Criminal District Court
of Jefferson County, Texas.

MEMORANDUM OPINION ON REHEARING

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Chief Justice Valdez

We issued our original opinion in this cause on April 20, 2017. The State filed motions for rehearing in appellate cause numbers 13-15-00461-CR and 13-15-00462-CR. After due consideration, and within our plenary power, we withdraw our previous opinion and judgments in appellate cause numbers 13-15-00461-CR and 13-15-00462-

CR and substitute the following opinion and accompanying judgments in their place. *See* TEX. R. APP. P. 19.1(b). The State's motion for rehearing in appellate cause number 13-15-00462-CR is granted. The State's motion for rehearing in appellate cause number 13-15-00461-CR is denied.

A jury found appellant Christine Johnson guilty of two counts of injury to a child.[1] *See* TEX. PENAL CODE ANN. § 22.04(a)(1) (West, Westlaw through 2017 1st C.S.). The trial court sentenced Johnson to twenty years in prison on count one and sixty-five years on count two, with the sentences running concurrently. By four issues, which we reorganize as three, Johnson contends that: (1) the evidence is legally insufficient as to both counts of injury to a child; (2) the trial court erred in excluding evidence proffered during the guilt-innocence phase of trial to negate the culpable mental state element of injury to a child; and (3) the trial court erred in admitting a competency report during the punishment phase of trial. We affirm.

I. Background

Johnson gave birth to F.M. on July 13, 2013 at the age of nineteen. F.M.'s biological father, Darrell Mason, was seventeen. After F.M. was born, Johnson, Darrell, and F.M. lived in an apartment with Johnson's aunt, Linda Fields. When viewed in the light most favorable to the verdict, the relevant evidence showed the following.

On the night of August 17, 2013, Johnson's cousin, Angel Fields, arrived at Linda's apartment. When Angel arrived, she saw Darrell holding F.M. F.M. was making an odd

[1] This case is before the Court on transfer from the Ninth Court of Appeals pursuant to a docket equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.).

noise. Angel asked to hold F.M., but Darrell initially refused and got angry. Eventually, Darrell gave F.M. to Angel and went into another room.

According to Angel, F.M. felt light and weak, one of her eyes was twitching, and she appeared to be having trouble breathing. Angel unwrapped F.M.'s blanket and saw that F.M.'s arm "was purple looking." When Angel asked Johnson what happened to F.M., Johnson replied that she did not know. Angel insisted that F.M. required immediate medical attention. Johnson reluctantly agreed to take F.M. to the hospital after Angel persisted.

Thereafter, Angel, Johnson, and Linda took F.M. to the hospital. Darrell stayed at the apartment. Upon arriving to the hospital, medical personnel determined that F.M. was having a seizure and required immediate medical treatment. Johnson remained quiet when medical personnel asked for information regarding F.M.'s condition. Medical testimony showed that many of F.M.'s bones were either broken, bruised, or fractured, and her brain was bleeding from the inside. F.M. also suffered a fractured neck, which a doctor described as the most recent, significant injury. The majority of F.M.'s injuries were sustained within the two-to-three week period immediately prior to being taken to the hospital. There was medical testimony indicating that F.M.'s injuries were so obvious just from looking at her that almost anyone would have known that she needed medical attention. Medical testimony also showed that F.M. probably would have died if Johnson delayed taking her to the hospital another six hours. Fortunately, F.M. survived.

During her video interview with a detective at the hospital, Johnson admitted that she jerked F.M. out of bed the previous morning, on August 16, 2013, because F.M. woke her up too early. Using a sheet of paper, Johnson demonstrated on video the amount of

force she used to jerk F.M. out of bed. A medical expert watched Johnson's demonstration on video and determined that the amount of force used could have caused F.M.'s neck to fracture.

Aside from F.M.'s neck fracture, the evidence regarding who caused F.M.'s other injuries suggested several individuals, including Darrell,[2] Johnson (according to the State), or other members of Johnson's extended family.

At the close of the evidence, the trial court submitted two counts of injury to a child; count one asked the jury to consider whether Johnson was guilty of recklessly causing F.M.'s neck injury on or about August 16, 2013 by "pulling" F.M.; count two asked the jury to consider whether Johnson was guilty of intentionally or knowingly causing serious bodily injury by failing to seek medical treatment for F.M. Count two did not specify the type of injury that was the result of Johnson's failure to seek medical treatment. After deliberating, the jury found Johnson guilty on both counts.[3]

Following a punishment trial, during which the State admitted Johnson's competency report into evidence, the trial court accepted the jury's punishment verdict and sentenced Johnson to twenty years in prison on count one and sixty-five years on count two. This appeal followed.

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[2] The record shows that Darrell was also charged in connection with F.M.'s injuries. The State elicited testimony from a detective that Darrell was charged with the "very same thing."

[3] With respect to count one, the jury specifically found that "on or about August 16, 2013, [Johnson] did then and there recklessly cause serious bodily injury to [F.M.] . . . by pulling [F.M.] with her hand with sufficient force to fracture [F.M.'s] neck." With respect to count two, the jury specifically found that "on or about August 16, 2013, [Johnson] did then and there intentionally or knowingly, by omission, cause serious bodily injury to [F.M.] . . .by failing to seek medical treatment for [F.M.], and [Johnson] ha[d] a statutory duty to act, namely, as a parent of [F.M.]." Johnson does not dispute that as F.M.'s parent, she had a duty to provide medical care. *See* TEX. FAM. CODE ANN. § 151.001(a)(3) (West. Westlaw through 2017 1st C.S.) (providing that parents have a duty to support their children, including providing clothing, food, shelter, medical and dental care, and education).

II. Legal Sufficiency

By her first issue, Johnson contends that the evidence is legally insufficient to support her conviction for injury to a child as alleged in counts one and two.

A. Standard of Review

In conducting our legal sufficiency review, we view "the evidence in the light most favorable to the jury's verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Gross v. State*, 380 S.W.3d 181, 185 (Tex. Crim. App. 2012) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). We "must give deference to 'the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (quoting *Jackson*, 443 U.S. at 318–19).

We look to "the hypothetically correct jury charge for the case" in determining "the essential elements of the crime." *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). A hypothetically correct jury charge 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." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

B. Count One—Reckless

Regarding count one, the jury found that Johnson recklessly caused serious bodily injury by "pulling [F.M.] with her hand with sufficient force to fracture [F.M.'s] neck." By

her first issue, Johnson contests only the jury's finding that she caused serious injury with the requisite culpable mental state—i.e., recklessly.

1. Applicable Law

Injury to a child is a second-degree felony if the defendant "recklessly" causes serious bodily injury to a child; the offense becomes a first degree felony if the defendant "intentionally or knowingly" causes serious bodily injury to a child. TEX. PENAL CODE ANN. § 22.04(a)(1), (e). Serious bodily injury means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id*. § 1.07(a)(46) (West, Westlaw through 2017 1st C.S.).

> A person acts recklessly, or is reckless, with respect to . . . the result of [her] conduct when [she] 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.

Id. § 6.03(c) (West, Westlaw through 2017 1st C.S.).

2. Analysis

Here, Johnson admitted that she jerked F.M. out of anger for waking up too early. Specifically, Johnson admitted: "One morning I woke up and I was mad and I accidentally jerked her but I actually meant to do it because I was so mad because she had woke me up so early in the morning." F.M. was five weeks old at the time. During her video interview with a detective at the hospital, Johnson demonstrated the amount of force she applied when she jerked F.M. out of bed. This demonstration was followed by a doctor's testimony that the amount of force Johnson used could have caused F.M.'s neck to fracture. When viewed in the light most favorable to the jury's verdict, the evidence

supports a finding that Johnson consciously disregarded a substantial and unjustifiable risk of serious injury when she jerked F.M. *See Jackson*, 443 U.S. at 326; *see also Torres v. State*, 116 S.W.3d 208, 210 (Tex. App.—Corpus Christi 2003, no pet.) (defendant acted recklessly when he grabbed and twisted infant's leg in anger while changing his diaper). We further conclude that Johnson's disregard of the risk of injury to F.M. constituted a gross deviation from the standard of care that an ordinary person would exercise as viewed from Johnson's standpoint. *See* TEX. PENAL CODE ANN. § 6.03(c). The evidence is legally sufficient to prove that Johnson recklessly caused serious bodily injury to F.M.'s neck. *See id*. We overrule Johnson's first issue to the extent it challenges the sufficiency of the evidence as to count one.

C. Count Two—Omission

Injury to a child may be committed by a defendant's failure to act—for example, failing to provide medical care for a child, which causes serious bodily injury. *See id*. § 22.04(b). Regarding count two, the jury found that Johnson intentionally or knowingly caused serious bodily injury to F.M. by failing to seek medical care. By her first issue, Johnson also contends that there is no evidence that F.M. suffered serious bodily injury as a result of any delay in seeking medical care.

1. Applicable Law

a. *Villanueva v. State*

Injury to a child is a result-oriented offense. *See Villanueva v. State*, 227 S.W.3d 744, 748 (Tex. Crim. App. 2007). This means that the child's "injury" forms the "gravamen of the offense" or "allowable unit of prosecution." *Id*. Because it is the child's injury that defines this offense, the State may not obtain two convictions against a defendant for

causing the same injury. *Id*. This holds true even if a single injury results from a combination of the defendant's affirmative act and subsequent omission. *Id*. An example of this would be where a parent shakes a baby (affirmative act) and then fails to seek medical care after shaking the baby (omission)—causing a single injury (shaken-baby syndrome). *Id*. In that scenario, the person has committed one offense, not two offenses, because one injury occurred. *Id*. at 749 (holding that double jeopardy prohibition against multiple punishments precluded punishing defendant for both his act in shaking baby and his omission in failing to seek medical help because only one injury occurred).

As previously mentioned, the application paragraph of the jury charge did not specify the type of injury that F.M. suffered as a result of any delay in seeking medical care. However, because Johnson was found guilty of causing F.M.'s neck injury in count one, the same neck injury could not serve as the predicate injury to support Johnson's conviction in count two unless F.M. suffered "a separate and discrete, or at least incrementally greater," injury to her neck as a result of Johnson's delay in seeking medical care.[4] *See id.* at 748 (recognizing that appellant could be held criminally responsible in count two for failing to seek medical care for the child's underlying injury if the failure to seek care resulted in a "separate and discrete, or at least incrementally greater," injury to the child than the one for which appellant had already been held criminally responsible in

[4] To illustrate this point, the court of criminal appeals offered the following hypothetical:

> Had the [defendant] continued to prevent Legg from taking G.V. to the hospital on the morning of July 30th, when G.V.'s condition was obviously deteriorating and it was apparent that he might suffer further serious bodily injury absent medical intervention, . . . it could reasonably be said that the failure to seek treatment for G.V.'s apparent injuries resulted in a separate and discrete, or at least incrementally greater, injury for which the appellant could also be held criminally accountable without violating double jeopardy.

Villanueva v. State, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007).

count one); *see also Francis v. State*, No. 07-12-00238-CR, 2013 WL 5043014, at *4 (Tex. App.—Amarillo Sept. 12, 2013, pet. ref'd) (mem. op., not designated for publication) (noting that *Villanueva* does not provide that "a defendant is . . . ipso facto exposed to double jeopardy simply because he is charged with causing serious bodily injury to a child by an act and by omission," and explaining that "[w]here the act caused an initial injury and that injury was made greater by later denying the child medical treatment, two discrete offenses may indeed exist permitting their prosecution without hindrance from the double jeopardy prohibitions."). In other words, the evidence had to show that Johnson's delay in seeking medical care caused a serious bodily injury beyond that which Johnson caused in count one. *See Villanueva*, 227 S.W.3d at 748.

b. Causation

The Texas Penal Code provides that "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." TEX. PENAL CODE ANN. § 6.04(a) (West, Westlaw through 2017 1st C.S.). "The defendant's conduct must be a direct cause of the harm suffered although, as set out in section 6.04(a), it need not be the only cause; it may be a concurrent cause." *Williams v. State*, 235 S.W.3d 742, 755 (Tex. Crim. App. 2007).

To establish causation for the offense of injury to a child by omission, it is not enough that the State proves that the defendant failed to provide medical care *for* a serious bodily injury. *Dusek v. State*, 978 S.W.2d 129, 133 (Tex. App.—Austin 1998, pet. ref'd). Rather, the State must prove that the child suffered a serious bodily injury *because*

the defendant failed to provide medical care. *Id.* Causation for such an injury is established where the evidence demonstrates that the failure to seek medical treatment created a substantial risk of death above and beyond that resulting from the initial injuries. *See Desormeaux v. State*, 362 S.W.3d 233, 241 (Tex. App.—Beaumont 2012, no pet.); *Johnston v. State*, 150 S.W.3d 630, 637 (Tex. App.—Austin 2004, no pet.); *see also* TEX. PENAL CODE ANN. § 1.07(a)(46) (defining serious bodily injury, in part, as "bodily injury that creates a substantial risk of death"). The existence or nonexistence of a causal connection is a question for the jury's determination. *Wright v. State*, 494 S.W.3d 352, 361 (Tex. App.—Eastland 2015, pet. ref'd) (citing *Dorsche v. State*, 514 S.W.2d 755, 757 (Tex. Crim. App. 1974); *Fountain v. State*, 401 S.W.3d 344, 358–60 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd)).

2. Analysis

In light of *Villanueva,* we focus our sufficiency review for count two to those injuries sustained by F.M. other than her neck injury.[5] As to the extent of the injuries, the emergency room nurse who initially assisted in F.M.'s treatment testified as follows:

> [Y]ou do a full body scan on any trauma and we noticed that—that's when we noticed when her hemoglobin was so low we had to give her a blood transfusion and her brain was bleeding and with the seizure you have to intubate them. You have to put them on life support to protect their airway because, obviously, she cannot any more. . . . And once we were intubating her and then her pulse went down we had to code her and do CPR on her and brought her back and we got her back and put her on life support, got her X rays after we intubate[.] . . . And I'm like—*everything is broken*. . . . *She was fractured. I don't even know what was not fractured. There was so much.* We did CPR. Coded her. Got her back. Got her stabilized as much can be. We gave her fluids, blood transfusions, had her on life support. We had to splint everything that was splintable that we could

[5] There was no evidence that Johnson's omission in failing to timely seek medical treatment for F.M.'s neck injury resulted in a "separate and discrete, or at least incrementally greater" injury. *See id*. at 748.

> splint[.] . . . I think this started at 9 o'clock at night and she didn't get there until it was so—so—such a critical situation.

(Emphasis added). F.M. suffered bone fractures throughout her body, including to her ribs, legs, arms, fingers, and right ankle. Importantly, F.M. did not suffer the numerous fractures in a single incident. Rather, according to a treating physician, the fractures were in various stages of healing, indicating that the injuries were sustained over a period of two to three weeks. F.M. was in obvious distress prior to being taken to the hospital—she was gasping for air, and her eyes were twitching.

There was testimony and photographic evidence demonstrating that F.M.'s femur was broken completely in half and her upper leg appeared to the casual observer to be in the shape of an "L" or a "C." Johnson was aware of the broken leg for at least two days prior to seeking medical treatment. Dr. Peter Shelby Evans, the emergency room physician, noted the following: "[W]hen you have femur fractures you can bleed into the femur and there is a lot of blood and so that's why [F.M.] is really critical. When I saw that I knew she had to be intubated and basically stabilized and get her out of here because time is of the essence with her." As to the effect of the delay in seeking treatment, Dr. Evans explained, "When you are losing blood you go into hemorrhagic shock and go into hemorrhagic shock that means no blood pressure. No blood pressure, you die. And hemorrhagic shock, you know, going again into the acidosis, make you breathe fast." He further noted, "I knew with the multiple trauma as like I mentioned before, that there is a lot of blood through the broken femurs. And so you have to be—establish that outer airway and get her intubated and get her transported rapidly." Dr. Evans predicted "if [Johnson] had not brought that child in, let's say, and waited another six hours or so that child would have been probably dead."

Johnson was also aware that F.M. hit her head at least two days prior to seeking medical treatment. Johnson admitted that she hit F.M.'s head while rocking her and to having knowledge that Darrell kicked F.M. in the head while F.M. was sleeping. The emergency room nurse noted that the amount of bleeding in the brain was indicative of a delay in treatment: "Well, there is no way—I mean, if her brain is bleeding and you just bring her in right after her brain bleeds, it had to have been bleeding for longer than—because this wouldn't even have started showing up yet." Dr. Evans explained that F.M. was suffering from an "intracerebral bleed" that was "pushing her brain to one side." The effect of such bleeding can cause a patient to "actually stop breathing." F.M. had difficulty breathing when she presented to the emergency room: "her respiratory rate was like 30, very fast[.]" Therefore, Dr. Evans "had anesthesia come down to put her a breathing tube."

Dr. Reena Isaac, a child abuse pediatrician who later treated F.M., testified that F.M.'s brain was not receiving enough blood as a result of swelling which resulted in areas of the brain dying. In reviewing F.M.'s CAT scan, Dr. Isaac noted:

> What you're starting to see is edema. The brain has been hurt in a sense; and so, it's swelling. It's inflamed. . . . [I]f you see that there is a change in color here, this darkening aspect here, the brain is also supplied by blood and this is essentially what's called an infarction, which when there is not enough blood going to a certain area, it starts dying or you start seeing a different color to that area. And so, this darkening part is because there is not enough blood supply to this area and it's indicative of something having happened to a main artery to that area. And because of the swelling, that main artery, could have been compromised causing the rest of this area to not be well supplied by blood.

Dr. Isaac noted that "it's either edema or that type of injury that kills a baby." Dr. Isaac indicated that F.M.'s brain injuries would possibly lead to blindness and hearing problems. However, Dr. Isaac could not assess F.M.'s current vision or hearing impairments

because F.M. was nonverbal. Dr. Isaac also expressed concerns that the injuries would affect F.M.'s balance and coordination and her ability to express and understand speech. As a result of the brain injuries, F.M. was significantly delayed.

In light of the above testimony, a rational jury could reasonably infer that Johnson's delay in seeking medical treatment for an infant who has suffered a head injury—at least a two-day delay—and broken bones throughout her body—between two days and three weeks—resulted in a greater injury substantially increasing the risk of death. *See Desormeaux*, 362 S.W.3d at 241 (holding that the jury could reasonably conclude that the failure to seek medical treatment caused incrementally greater injury increasing substantially the risk of death where child was in obvious physical distress and having difficulty breathing, but rather than seek medical treatment, the defendant shook the child repeatedly to wake him up); *Johnston*, 150 S.W.3d at 637 (holding that there was legally sufficient evidence that the defendant's omission caused serious bodily injury where the defendant delayed child's medical treatment for several days while the child's health visibly deteriorated and the child's condition was critical when he was examined at the hospital due to dehydration and buildup of stomach secretions).

As a result of Johnson's delay in seeking medical treatment, F.M. was within hours of dying and was suffering hemorrhagic shock, intracerebral bleeding, and swelling of the brain upon her arrival to the hospital. From Dr. Evan's testimony, a rational jury could have reasonably inferred that F.M.'s hemorrhagic shock was caused by an untreated femoral bleed and that F.M's intracerebral bleeding and swelling of the brain was caused by the untreated head injury. Accordingly, we hold that there is legally sufficient evidence

that F.M. suffered serious bodily injury because of Johnson's omission. *See* TEX. PENAL CODE ANN. § 6.04(a); *Wright*, 494 S.W.3d at 362.

D. Count Two—Criminal Intent

By her first issue, Johnson also contends that the evidence is insufficient to establish that she caused serious bodily injury by omission with the requisite criminal intent.

1. Applicable Law

The jury charge, under count two, asked whether Johnson was guilty of intentionally or knowingly causing serious bodily injury by failing to seek medical treatment for F.M. The State must prove that a defendant caused a child's serious bodily injury with the requisite criminal intent. *Williams*, 235 S.W.3d at 750. As previously mentioned, injury to a child is a result-oriented offense. *Villanueva*, 227 S.W.3d at 748. Accordingly, the required mental state for the offense relates not to the specific conduct but to the result of that conduct. *Williams*, 235 S.W.3d at 750.

A person acts intentionally with respect to the result of her conduct when it is her conscious objective or desire to cause the result. TEX. PENAL CODE ANN. § 6.03(a). A person acts knowingly with respect to a result of her conduct when she is aware that her conduct is reasonably likely to cause the result. *Id*. § 6.03(b). The evidence is sufficient to support Johnson's conviction for injury to a child by omission if the State proves either that she intended to cause the injury through her omission or that she was aware that her omission was reasonably certain to cause the injury. *See Johnston*, 150 S.W.3d at 636; *Dusek*, 978 S.W.2d at 134. Direct evidence of the required mental state is not required. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). The jury may infer both

knowledge and intent from any facts that tend to prove the existence of these mental states, including the defendant's acts, words, or conduct, and from the nature of the injury inflicted on the victim. *Id*.

2. Analysis

We again stress the obvious and severe nature of F.M.'s injuries. F.M.'s femur was so severely broken that her upper leg appeared to the casual observer to be "L" or "C" shaped. F.M.'s arm was bruised and swollen and appeared to be deformed. One of F.M.'s feet was hanging to the side, and when a nurse picked it up, "it felt like pixie sticks. It's just cracking." F.M.'s left eye was black as a result of internal bleeding in her brain. Medical personnel noted that F.M. had no stability in her limbs and that "when you would pick her up everything would just fall limp[.]" Prior to arriving at the hospital, F.M.'s eyes were twitching, and she was struggling to breathe. Johnson admitted that at least two days prior to seeking medical treatment for F.M, she hit F.M.'s head while rocking her and that Darrell kicked F.M.'s head. Johnson also admitted that she was aware F.M.'s arm was purple and green. The numerous, obvious, life-threatening injuries and resulting symptoms constitute evidence supporting the jury's finding that Johnson was aware that a lack of medical care was reasonably certain to cause serious bodily injury to F.M. *See Johnston*, 150 S.W.3d at 636 (considering as factors the victim's "sickly appearance, distended abdomen, and inability to hold himself up or hold down food and water" in the days prior to receiving medical care in concluding that the evidence was sufficient to support that the defendant knowingly caused serious bodily injury by failure to render care to a child). We conclude there was legally sufficient evidence that Johnson was aware

her delay in seeking medical care was reasonably certain to cause serious bodily injury. *See id.*

E. Summary

We conclude that the evidence was legally sufficient to support Johnson's conviction for injury to a child under both counts one and two. We overrule Johnson's first issue.

III. Excluding Expert Testimony During Guilt-Innocence Phase

By her second issue, Johnson contends that the trial court erred under rule 401 of the Texas Rules of Evidence when it excluded expert testimony at the guilt-innocence phase of her trial—testimony which Johnson argues was directly relevant to rebut the culpable mental state element of injury to a child.

A. Offer of Proof

The trial court held a hearing outside the presence of the jury to determine whether Johnson's expert, Dr. Seth Silverman, would be allowed to testify at the guilt-innocence phase of trial. At the hearing, Dr. Silverman, a forensic psychiatrist, testified that Johnson's records indicate that she has an IQ of 67, which means she is "intellectually challenged." Dr. Silverman further testified that, in his opinion, Johnson's intellectual impairment "may affect her ability to appreciate certain actions or inactions that may have certain consequences regarding [F.M.]." On cross-examination, Dr. Silverman clarified that, although he could not speak to Johnson's "culpability," he could say that she does not have the "sophistication to understand some of the consequences of some of her behaviors compared to other people because of her intellectual impairment." After considering the arguments of counsel, the trial court excluded Dr. Silverman's testimony.

B. Standard of Review

We review the trial court's evidentiary ruling to exclude evidence for an abuse of discretion. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). The trial court abuses its discretion only if the ruling is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008).

C. Applicable Law

Rule 401 provides that evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401. Evidence that a defendant suffers from a mental disease or defect may, in some cases, be relevant to rebut the culpable mental state element of the charged offense. For example, in *Ruffin v. State,* the Texas Court of Criminal Appeals held that the defendant's delusional belief that he was shooting at Muslims, as opposed to police officers, was directly relevant to rebut the culpable mental state element of first-degree aggravated assault, which required the State to prove that the defendant actually knew his targets were police officers rather than members of some other group. 270 S.W.3d 586, 594 (Tex. Crim. App. 2008). However, the court clarified that evidence of a mental disease or defect may be excluded "if it does not truly negate the required mens rea." *Id*.

D. Analysis

Here, Johnson offered Dr. Silverman's testimony to negate the culpable mental state element of injury to a child. With respect to count one, Dr. Silverman's testimony was relevant if it truly negated a finding that Johnson consciously disregarded the risk

that jerking F.M. out of bed would cause a fractured neck. With respect to count two, Dr. Silverman's testimony was relevant if it truly negated a finding that Johnson knew that F.M. was reasonably certain to suffer serious bodily injury because of a delay in seeking medical care.

Dr. Silverman testified that Johnson's intellectual impairment may affect her ability to appreciate the consequences of her actions or inactions towards F.M. However, nothing more was offered by Dr. Silverman regarding how Johnson's impairment affected her mental state, and Dr. Silverman conceded on cross-examination that he could not speak to Johnson's "culpability." The trial court could have reasonably determined that Dr. Silverman's testimony did not truly negate Johnson's culpable mental state. Based on the record before us, we cannot conclude that the trial court's decision to exclude Dr. Silverman's testimony was "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor*, 268 S.W.3d at 579. We overrule Johnson's second issue.

IV. Admissibility of Johnson's Competency Report at Punishment

By her third issue, Johnson contends that the trial court erred in admitting a competency report at the punishment phase of her trial pursuant to article 46B.007 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 46B.007 (West, Westlaw through 2017 1st C.S.). Johnson argues that the trial court's error merits a new punishment trial.

A. Pertinent Facts

Prior to trial, the trial court appointed Dr. Edward Gripon to examine Johnson regarding her competency to stand trial. After examining Johnson, Dr. Gripon found her

competent to stand trial. Dr. Gripon prepared a competency report, which included Dr. Gripon's ultimate finding regarding competency. The report also recited various statements made by Johnson to Dr. Gripon during the competency examination. The trial court accepted Dr. Gripon's finding that Johnson was competent, and the case proceeded to a trial on the merits.

Following the jury's verdict of guilt, the trial court convened a punishment trial. After the State rested, Johnson presented her evidence. An integral part of Johnson's mitigation theory was that the jury might find her to be less deserving of a harsh punishment if they understood how her intellectual impairment interfered with her ability to function in the world. To advance this mitigation theory, Johnson called Dr. Silverman.

Dr. Silverman testified that his evaluation of Johnson was based on interviews with her and those who knew Johnson, as well as his review of various records, including Dr. Gripon's competency report. Although Dr. Silverman mentioned Dr. Gripon's competency report, he did not testify to the contents of the report or to any statements made by Johnson as recited in the report. Dr. Silverman testified that, in his opinion, Johnson is easily influenced by others and cannot function independently due to her intellectual impairment. Dr. Silverman also testified that Johnson's impairment affected her mental awareness of the potential consequences of her actions or inactions as it pertained to the charges on which she had been found guilty.

On cross-examination, the State moved to admit a copy of Dr. Gripon's competency report into evidence. Johnson objected on the basis that the competency report was inadmissible under code of criminal procedure article 46B.007. The trial court overruled Johnson's objection and admitted the report into evidence. During the State's

cross-examination of Dr. Silverman, the State referred to several statements made by Johnson during her competency evaluation as a means of testing the reliability of Dr. Silverman's opinion regarding Johnson's intellectual impairment.

B. Standard of Review and Applicable Law

We review the trial court's decision to admit Johnson's competency report under the abuse-of-discretion standard set out above. *See Cameron*, 241 S.W.3d at 19. Article 46B.007, entitled "Admissibility of Statements and Certain Other Evidence," provides, in relevant part, as follows:

> A statement made by a defendant during a[] [competency] examination [or] the testimony of an expert based on that statement . . . may not be admitted in evidence against the defendant in any criminal proceeding, other than at: (1) a trial on the defendant's incompetency; or (2) any proceeding at which the defendant first introduces into evidence a statement [or] testimony . . . described by this article.

TEX. CODE CRIM. PROC. ANN. art. 46B.007.

C. Analysis

1. Error

The statements made by Johnson to Dr. Gripon during her competency examination were admitted during her punishment trial, not at any competency trial. Consequently, by statute, Johnson's statements were inadmissible unless she "first introduce[d] into evidence a statement [or] testimony . . . described by [article 46B.007]."[6] It is undisputed that Johnson never introduced any statement she made during her

[6] As a matter of statutory interpretation, we construe the phrase "testimony . . . described by [article 46B.007]" as a reference to "expert" testimony described earlier in the article. *See Spradlin v. Jim Walter Homes, Inc*., 34 S.W.3d 578, 580 (Tex. 2000) (observing that, under the doctrine of "last antecedent," a qualifying phrase in a statute must be confined to the words and phrases immediately preceding it to which it may be applied without impairing the meaning of the sentence). As such, article 46B.007 allowed the State to admit Johnson's statements if Johnson first introduced "the testimony of an expert [that was] based on" a statement that Johnson made during her competency examination.

competency examination. Nonetheless, the State argues that Johnson opened the door to the use of her statements by offering the testimony of her expert, Dr. Silverman. However, Dr. Silverman never testified that his opinion regarding Johnson's intellectual impairment was based on any statement that Johnson made during her competency examination. Instead, Dr. Silverman testified that his opinion regarding Johnson's intellectual impairment was informed by a review of Dr. Gripon's competency report, among a myriad of other material; the jury never heard anything more about Dr. Gripon's competency report, much less about any statement recited in the report, until the State admitted it into evidence during cross examination. Furthermore, it is clear that Dr. Silverman's testimony on direct examination focused on Johnson's intellectual impairment as it related to the circumstances of the offenses, not as it related to her competence to stand trial. In other words, the State used Johnson's statements during her competency examination as a means to impeach Dr. Silverman even though Dr. Silverman testified that he had no opinion regarding Johnson's competence, was never asked to evaluate her for competence, and never referenced any statement she made during her competency examination.

Under these circumstances, we cannot conclude that Johnson "first introduce[d] into evidence a statement [or] testimony . . . described by [article 46B.007]" when Dr. Silverman made only a passing mention of Dr. Gripon's competency report without referencing any of Johnson's statements. *See Espinosa v. State*, 328 S.W.3d 32, 41 (Tex. App.—Corpus Christi 2010, pet. ref'd) (concluding that testimony generally referencing the defendant's competence to stand trial did not implicate article 46B.007 when the testimony did not refer to any statement made by the defendant during his

competency examination and did not reference any expert testimony based on any such statement). Johnson did not open the door to the admission of Dr. Gripon's competency report or to its use by the State in cross examining Dr. Silverman. Therefore, we hold that Johnson's statements were admitted in error.

2. Harm

Having found error, we must conduct a harm analysis to determine whether the error calls for a new punishment trial. Error in the admission of evidence generally does not rise to a constitutional level. *See Mitten v. State*, 228 S.W.3d 693, 695 (Tex. App.—Corpus Christi 2005, pet. ref'd, untimely filed). Instead, constitutional error is presented only if the erroneously admitted evidence violated the Texas or United States constitutions. *Id*. At trial, Johnson complained that admitting her statements violated a Texas statute, article 46B.007. She did not complain of any constitutional error. On appeal, neither Johnson nor the State address whether the error is statutory or constitutional. In order to apply the proper harm standard, we must first determine whether the error at issue here was constitutional. *See* TEX. R. APP. P. 44.2(a)–(b) (articulating a different harm standard for "constitutional" as opposed to "other" error).

According to our research, statements described by article 46B.007 may sometimes implicate a defendant's Fifth Amendment right against compelled self-incrimination. In *Estelle v. Smith*, the United States Supreme Court held that admitting, at a punishment trial, statements made by a defendant during a court-ordered, in-custody competency examination implicated Fifth Amendment protections against compelled self-incrimination where, among other things, the defendant neither initiated the competency

examination nor attempted to introduce any psychiatric evidence at his punishment trial. 451 U.S. 454, 468 (1981).

Although statements described by article 46B.007 were the subject of *Estelle v. Smith*, none of the circumstances that implicated Fifth Amendment concerns in that case are present here. The main reason is that Johnson initiated the competency examination by specifically requesting one prior to trial; therefore, unlike the defendant in *Estelle v. Smith*, Johnson's competency examination did not occur under circumstances in which she was compelled to incriminate herself. *See id*. Furthermore, unlike the defendant in *Estelle v. Smith*, Johnson introduced psychiatric evidence through Dr. Silverman at her punishment trial. *See id*. We therefore conclude that no error of constitutional dimension is presented on these facts. However, because admitting Johnson's statements violated article 46B.007, a statute, we conduct a harm analysis for statutory error under Texas Rule of Appellate Procedure 44.2(b). TEX. R. APP. P. 44.2(b).

Under Rule 44.2(b), the error is to be disregarded unless it affected Johnson's "substantial rights." *Id*. To make this determination, we must decide whether the error had a "substantial or injurious" effect on the jury's punishment verdict. *Mitten*, 228 S.W.3d at 696–97. Neither party has the burden of proof under rule 44.2(b). *See id*. Instead, we examine the record for purposes of determining harm. *See id*. If we are fairly assured that the error had "no influence or only a slight influence" on the jury's punishment verdict, the error is harmless and does not call for a new punishment trial. *Id*.

> In assessing the likelihood that the jury's decision was adversely affected by the error, [we] should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. [We] might also consider the jury instruction given by the trial

> judge, the State's theory and any defensive theories, closing arguments and even voir dire, if material to appellant's claim.

Morales v. State, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000).

Here, Dr. Gripon's report recites several statements made by Johnson during her competency examination. According to the report, Johnson provided routine background information, including her date of birth, marital status, employment, school, and family history; she stated that her pending charges are for "injury to a child" and "forgery"; she denied a history of mental health treatment; she denied a history of significant alcohol or drug use; and she stated that she spent her time while incarcerated reading a Bible and attending GED classes. As the State points out, most of the facts contained in Johnson's statements were either beneficial to Johnson's defense or of no real significance or consequence to the punishment verdict. Furthermore, the statements that were detrimental to her, such as the forgery charge, were already borne out by other evidence admitted by the State without objection.

The report also recited Dr. Gripon's observations of Johnson based on her statements. Notably, some of Dr. Gripon's observations actually supported Dr. Silverman's testimony that Johnson was intellectually impaired. For example, in assessing Johnson's competency to stand trial, Dr. Gripon rated her intelligence as "low to borderline" and stated that she was identified in school as needing "special education." Thus, at least to some extent, Dr. Gripon's observations buttressed Dr. Silverman's testimony regarding whether Johnson was intellectually impaired.

We recognize, however, that other observations made by Dr. Gripon would appear to undermine Johnson's mitigation theory that she was less deserving of a harsh punishment based on her intellectual impairment. For example, in finding Johnson

competent to stand trial, Dr. Gripon states: Johnson "possesses sufficient ability to communicate with her attorney with a reasonable degree of rational understanding"; she "has a layperson's working knowledge of the role of a judge, jury, prosecutor, and defense attorney"; she is able to discuss "the various parameters of guilt, innocence, acquittal, and punishment"; and she has the ability to "conform her behavior to an acceptable standard in a courtroom setting." However, we are convinced that these observations did little to undermine Johnson's mitigation theory because they focused on Johnson's competency to stand trial, not on her relative blameworthiness for the underlying offenses due to her intellectual impairment. *See Morales*, 32 S.W.3d at 867 (directing reviewing courts to consider the character of the alleged error and how it might be considered in connection with other evidence).

Finally, the State did not excessively emphasize the error. *See Motilla v. State*, 78 S.W.3d 352, 359 (Tex. Crim. App. 2002) (considering whether the State emphasized the error in assessing harm). The record shows that the State's use of Dr. Gripon's report accounts for only fifteen pages of the sixty-two page punishment record devoted to cross-examining Dr. Silverman. The record also shows that the State made only a brief mention of Dr. Gripon's report during closing argument without repeating any of Johnson's statements.

After reviewing the entire record, we are fairly assured that the error in admitting Johnson's statements had "no influence or only a slight influence" on the jury's punishment verdict. *See* TEX. R. APP. P. 44.2(b); *Mitten*, 228 S.W.3d at 696–97. We therefore conclude that the error is harmless and that it does not call for a new punishment trial. *See* TEX. R. APP. P. 44.2(b). We overrule Johnson's third issue.

V. Conclusion

We affirm the judgments of the trial court.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Do Not Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
19th day of October, 2017.