NUMBER 13-16-00037-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BRENT RAYNARD DAVISON, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 12th District Court of Walker County, Texas.

MEMORANDUM OPINION

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

Appellant Brent Raynard Davison was convicted of reckless injury to a child, a second-degree felony. *See* TEX. PENAL CODE ANN. § 22.04(e) (West, Westlaw through Chapter 49, 2017 R.S.). By one issue, Davison argues that the trial court erred by failing to instruct the jury on the lesser-included offense of negligent injury to a child. We affirm.

I. BACKGROUND[1]

On April 16, 2014, B.D.,[2] a ten-week old infant, was admitted to the hospital with serious bodily injuries, including broken ribs, a liver laceration, and a brain hemorrhage. B.D. is the child of Vernishia Williams and Davison. Williams testified that she and Davison lived together in an apartment and that B.D. frequently stayed with Sandra Haywood, Williams's mother, during the day. Williams and Haywood both testified that the baby seemed healthy up to the day immediately prior to being admitted to the hospital.

Officer Kurt Bubela questioned Davison shortly after the infant was admitted to the hospital. Davison claimed that he was not sure what had happened but nonetheless offered three possible explanations for the injuries: B.D. hit her head on the bed's wooden headboard when she threw back her head; B.D. fell out of a swing at Haywood's house; or B.D. fell from the bed when he was outside flipping meat on the barbeque grill. At trial, Davison testified:

> I'm like mama, be quiet, be quiet. You know, I ain't—I don't know no—I mean, like my people—like people tell me, you don't know your strength when you get mad. I have—I mean, like I have strength when I get—when I get—I just know, I wasn't just right like ready, you know, ready to, you know, mad, mad. I was like, you know if—you know, a adrenalin [sic.].

Later at trial, Davison was asked, "do you think you shook the baby too hard, looking back?" Davison replied, "Yes, sir. I think I—I think I—myself, being a man, I think I shook her a little too hard, but it wasn't no intention me to, you know." Shortly after, Davison was asked, "You know you made a mistake?" Davison answered, "Yeah."

[1] This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

[2] We refer to complainant by her initials in order to protect her privacy. *Cf.* TEX. R. APP. P. 9.8(b).

Davison was charged with intentional or knowing injury to a child. *See id.* § 6.03 (West, Westlaw through Chapter 49, 2017 R.S.). Davison filed a timely request to include an instruction in the jury charge on the lesser culpable mental states of reckless and criminal negligence. *See id.* The trial court included an instruction to the jury on the lesser-included offense of reckless injury to a child but denied the request to include an instruction on negligent injury to a child. The jury found Davison guilty of reckless injury to a child, and the trial court assessed punishment at twenty years' confinement in the Texas Department of Criminal Justice—Institutional Division. This appeal followed.

II. Standard of Review and Applicable Law

"On appeal, jury-charge error is reviewed using a two-step process. First, the court determines whether error exists in the charge. If there is, we determine if the appellant has been harmed by the error." *Ferreira v. State*, 514 S.W.3d 297, 300 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

We use a two-prong test to determine whether a defendant is entitled to an instruction on a lesser-included offense. *Wortham v. State*, 412 S.W.3d 552, 554 (Tex. Crim. App. 2013) (citing *Hall v. State,* 225 S.W.3d 524, 528 (Tex. Crim. App. 2007)). First, we must consider whether the offense contained in the requested instruction is a lesser-included offense of the charged offense. *Wortham*, 412 S.W.3d at 554. If it is a lesser-included offense, then we must determine whether the evidence admitted at trial supports the instruction. *Id.*

Whether an offense is a lesser-included offense is a question of law. *Id.* "[W]e do not consider the evidence that was presented at trial. Instead, we consider only the statutory elements of [the offense] as they were modified by the particular allegations of the indictment. . . . We then compare them with the elements of the [requested] lesser

offense." *Hall,* 225 S.W.3d at 536. More specifically, an offense is a lesser-included offense if "it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission." TEX. CODE CRIM. PROC. ANN. art. 37.09(3) (West, Westlaw through 2015 R.S.).

The purpose of the second prong is to ensure that "the lesser-included offense is a valid, rational alternative" to the charged offense. *Wortham*, 412 S.W.3d at 557. "Anything more than a scintilla of evidence entitles the defendant to the lesser charge. . . . However, such evidence cannot be mere speculation—it must consist of affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Id.* at 558.

Regarding the relevant mental states, "[a] person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *See* TEX. PENAL CODE ANN. § 6.03(c). However, "[a] person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.* Thus, reckless conduct involves the conscious disregard of a known risk whereas criminal negligence involves the failure of the actor to perceive a risk. *See Thomas v. State*, 699 S.W.2d 845, 850 (Tex. Crim. App. 1985) (citing *Lewis v. State,* 529 S.W.2d 550, 553 (Tex. Crim. App. 1975)).

III. DISCUSSION

On appeal, Davison complains that the trial court erred by failing to instruct the jury on the lesser-included offense of injury to a child by criminal negligence. Criminally

negligent injury to a child is by definition a lesser-included offense of knowing, intentional, or reckless injury to a child. *Wortham*, 412 S.W.3d at 557; *see* TEX. CODE CRIM. PROC. ANN. art. 37.09(3). Therefore, we move on to the second prong and ask whether Davison presented a scintilla of evidence that both affirmatively raises the lesser-included offense of criminally negligent injury to a child and negates an element of the greater offenses of intentional, knowing, or reckless injury to a child. *See Wortham*, 412 S.W.3d at 557.

Even though he had initially given various alternative theories to explain the injuries, Davison admitted at trial, "I think I shook her a little too hard." Regardless, he argues that the evidence admitted at trial would permit a rational jury to conclude that he was not aware of the substantial risk of shaking B.D. but that he merely should have been aware of said risk. We disagree.

Davison testified multiple times that it was not his intention to harm B.D. and that the injuries he caused were by "accident." If true, these assertions would rebut the intentional and knowing elements of the charged offense. By including an instruction on reckless injury to a child, the trial court agreed with Davison that the evidence at least raised a scintilla of evidence that would allow a rational jury to conclude that he was aware of a risk but consciously disregarded it. However, to warrant an instruction on negligent injury to a child, Davison needed to present evidence that he completely failed to perceive a risk in the first place. *See Thomas*, 699 S.W.2d at 850; *see also* TEX. PENAL CODE ANN. § 6.03(c). But Davison does not point to any evidence, nor can we find any, that affirmatively raises the issue of whether or not he was aware of the risk involved with shaking B.D. *See Wortham*, 412 S.W.3d at 558; *see also Thomas*, 699 S.W.2d at 850 (noting that a criminally negligent instruction is not appropriate in every case in which recklessness is raised; rather, specific evidence "raising the issue of whether or not a

defendant was aware of the risk must be presented before such a charge is required"). It is true that Davison claimed that he did not intend to cause the injuries, but claiming that the injuries were not intentionally inflicted is not the same as claiming to be completely unaware of the risks involved with heavily shaking a ten-week-old infant. *See Thomas*, 699 S.W.2d at 850. He never testified that he was unaware that shaking a baby too hard could lead to serious bodily injury, he merely testified that any harm he caused was unintentional.

In summary, Davison offered sufficient evidence, if true, to negate intentional and knowing injury to a child and raise the issue of recklessness, but he did not present any evidence that affirmatively raised the issue of whether he was completely unaware of the risks involved such as to warrant an instruction on criminally negligent injury to a child. *See Wortham*, 412 S.W.3d at 557; *see also Thomas*, 699 S.W.2d at 850. Therefore, we conclude that the trial court did not abuse its discretion by denying Davison's request to include an instruction on negligent injury to a child in the jury charge. We overrule Davison's sole issue.

V. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
29th day of June, 2017.