AFFIRMED and Opinion Filed June 4, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00347-CR

DANIEL ANDRE THOMAS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F19-00118-L

MEMORANDUM OPINION

Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Evans

Daniel Andre Thomas appeals from the trial court's judgment convicting him of injury to a child. Appellant contends the evidence is insufficient to prove he caused complainant's injuries. Appellant also contends that the trial court erred by: 1) failing to include a benefit of the doubt instruction in the jury charge; (2) including a definition of reasonable doubt in the jury charge; (3) informing the jury about good conduct time; and (4) failing to limit the definitions of the culpable mental states to the relevant conduct elements of the underlying offense. We affirm the judgment.

BACKGROUND

The grand jury indicted appellant for injury to a child. At trial, Lakeisha Henry, complainant's mother, testified that she began a relationship with appellant resulting in pregnancy. Henry later found out appellant was married and living with his wife and two children. Henry did not speak with appellant during her pregnancy, but he came to the hospital after complainant's birth. Henry and appellant later decided that appellant could have custody of complainant on the weekends from Friday until Sunday. Just a few days before complainant's death, Henry took complainant to her eighteen-month check-up and complainant did not have any illnesses or injuries.

On Friday, July 18, 2014, appellant picked up complainant at Henry's home for the weekend. Henry testified that when complainant left her home, she did not have any injuries or bruises and she was not complaining of any pain. Henry spoke with complainant on Saturday morning and knew that appellant planned to take complainant to the recreation center where he worked. Henry testified that she got a call from her cousin early Sunday morning and told her to call appellant. Henry tried to call appellant around 1:00 am or 2:00 am on Sunday morning but could not reach him or his wife. Henry spoke with appellant's brother and learned that complainant had died. When Henry met up with appellant, he was crying and Henry testified that appellant "was saying that he was sorry that it had happened. But he was not telling me what happened." Appellant later told Henry that complainant had

fallen off a toy chest. After making funeral arrangements for complainant, Henry had no further communication with appellant. Henry also testified that appellant did not have any motive to harm complainant and had never seen him harm complainant.

Deanna McCall, a physician assistant, testified that she was the primary care provider for complainant and had seen her since she was four months old. At complainant's eighteen-month check-up on July 16, 2014, McCall testified that she performed a fully unclothed physical examination and complainant had no injuries. McCall also testified that Henry brought complainant into the office in August 2013 and complainant had a conjunctival hemorrhage in each eye and had sustained the injury while in the care of appellant.

Shalanda Thomas, appellant's wife, testified at trial that when she found out about complainant it put a strain on her marriage but she worked it out with appellant. On the night of July 18, 2014, Thomas was in bed when appellant came home with complainant. Thomas testified complainant climbed in bed with her and went to sleep. Thomas said complainant did not have any marks on her that night and was not complaining of any pain. Thomas had to be at work by 8:30 a.m. on Saturday, July 19, 2014. When she left, everyone else in the house was just starting to get up. Thomas worked until 5:30 pm that day and ran errands after work.

Thomas identified appellant, her children and complainant in a video taken at the recreation center where appellant worked on the weekends. Appellant and the children had been there most of the day and the video showed them leaving at 2:23

p.m. in the afternoon. The video shows complainant running down the hallway and she is not hurt or injured at that time. When Thomas returned home around 6 or 6:30 p.m. in the evening, appellant and the children were already home. The older children were playing in their room, appellant was playing a video game in the living room and complainant was napping on the floor in the living room. Thomas went to lie down for a while before getting up to ask appellant about dinner plans. Thomas left to get groceries and her receipt was time-stamped 9:23 p.m. on July 19, 2014. When Thomas returned, appellant was on the couch and complainant was next to him with an ice pack on her jaw and an Ace bandage wrapped around her head. Appellant told Thomas that complainant had fallen while playing with the kids. While Thomas started dinner, complainant walked into the kitchen and Thomas noticed complainant was drooling, had swelling on her jaw, and a "wobble in her walk." While Thomas finished cooking, appellant came in and told her complainant had thrown up a little and changed her clothes. Appellant put complainant to bed that night in the master bedroom while Thomas was in the living room. Appellant went back to the living room and shortly thereafter Thomas went to take a shower. While Thomas was in the shower, appellant came in and told her he had called 911 because complainant was not breathing. Thomas said appellant seemed "nervous" and "scared" and he told that complainant felt cold and was not responding. The ambulance had arrived by the time Thomas got out of the shower and she overhead

appellant telling the police officers that "[complainant] was playing with the lid on top of the toy box and she fell off it and bumped her face."

Thomas also testified that, at the time of trial, she had been married to appellant for thirteen years and had never seen appellant do anything ugly or mean to his kids. Thomas testified that appellant was a caring and loving parent, a hard worker, and he loved complainant.

James Sain, a firefighter/paramedic, testified at trial that he responded to appellant's 911 call. When he pulled up, appellant was holding complainant and he appeared "very calm" and "blank" and not "showing any emotion at all." Sain could not detect any breath sounds so he began CPR. They cut open her shirt to place defibrillator pads on her but she was in asystole, a non-shockable rhythm, so they continued CPR. Once Sain cut open her shirt, he saw "all the bruising, swelling. I noticed something was wrong with her nose." Sain saw swelling on complainant's face, nose and lips as well as all on "her chest, all quadrants and her abdomen." Sain testified that the injuries he saw on complainant were inconsistent with the story provided by appellant—that she had fallen earlier in the day off a bed or couch—and that he never saw any sign of life in her from the time of his arrival.

Stephanie Quarles, an emergency physician, testified that complainant arrived at Charlton Methodist Hospital around 1:00 a.m. on July 20, 2014. When complainant arrived at the emergency room, she did not have a heartbeat. Dr. Quarles put complainant on a breathing machine, started an IV, and continued

compressions. Based on her experience, Dr. Quarles testified that complainant had been deceased for approximately 20-30 minutes or more by the time she arrived at the emergency room. Complainant's buttocks were covered in bruises as well as her lower back, nasal bridge, jaw, and torso. Dr. Quarles testified that complainant's bruising exceeded that which she would expect from a fall and a fall would not have caused bruising on both sides of her body. Dr. Quarles testified that she suspected child abuse and would have typically alerted the police but the paramedics had already called a detective to the scene based on their suspicions of child abuse. Based on her experience, Dr. Quarles believed the abuser would have to be someone sixteen years of age or older to inflict the level of bruising found on complainant. Dr. Quarles stated that it was possible, although not probable, that complainant's injuries were due to something other than child abuse.

Dr. Elizabeth Ventura, a medical examiner, testified that she performed complainant's autopsy. Dr. Ventura noted that complainant had bruises to her abdomen, chest, back and buttocks. Complainant's liver had a laceration that almost transected her liver in half, as well as bleeding in her right adrenal gland and pancreas. Dr. Ventura testified that these types of injuries are typically caused by a blunt force trauma. In addition, Dr. Ventura noted that complainant had five old rib fractures on her left side and one on her right side, as well as two recent rib fractures on her right side and one on her left side. Dr. Ventura also noted that complainant had bruising on her forehead, across her nasal bridge extending to both sides of her

eyes, chin, cheek and scalp. The damage to complainant's liver was so severe that it could not have been repaired surgically; she would have required a transplant to survive. Following the liver injury, Dr. Ventura testified that complainant would have gone into multi-organ failure and exhibited such symptoms as severe pain, loss of appetite, drooling, instability, dizziness, vomiting, and less movement or activity. Also, these symptoms would have presented immediately and would have lead to her death in a matter of hours. Dr. Ventura watched the video taken at the recreation center and noted that complainant's behavior and mobility at that time was inconsistent with having a lacerated liver. Dr. Ventura testified that complainant's injuries were consistent with physical assault, not a fall from a toy box. Further, a six or eight-year old child would not be able to produce the force necessary for such injuries; it would have had to be an adult. Dr. Ventura noted that there were too many bruises for the injuries to be accidental; the injuries were consistent with an intentional assault. Dr. Ventura concluded in her autopsy report that the cause of death was blunt force injury and the manner of death was homicide. On cross-examination, Dr. Ventura testified that another child jumping off a bunk bed and landing on complainant's abdominal area could have caused one of complainant's injuries but not all of them.

Following Dr. Ventura's testimony, the State rested. Appellant rested and did not object to the jury charge. The jury found the appellant guilty of the charged

offense and the case proceeded to the punishment phase. The jury sentenced appellant to sixty years of imprisonment.

ANALYSIS

A. Sufficiency of Evidence Regarding Identity

In his first issue, appellant contends that the evidence is insufficient to prove that appellant caused complainant's injuries.

i) Standard of review

When reviewing whether there is legally sufficient evidence to support a criminal conviction, the standard of review we apply is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts. *Id.* On appeal, reviewing courts determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Id.*

ii) Analysis

The State is required to prove beyond a reasonable doubt that the accused is the person who committed the charged offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). The State may prove defendant's identity and criminal

culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009).

Appellant was indicted for injury to a child. The indictment alleged that on or about July 19, 2014, in Dallas County, Texas, he did

> unlawfully then and there intentionally and knowingly cause serious bodily injury to [complainant], a child 14 years of age or younger, hereinafter called complainant, by STRIKING COMPLAINANT WITH DEFENDANT'S HAND AND BY STRIKING COMPLAINANT WITH AN UNKNOWN OBJECT, THE EXACT NATURE AND DESCRIPTION OF WHICH IS UNKNOWN TO THE GRAND JURY,
>
> it is further presented that defendant did use and exhibit a deadly weapon during the commission of the offense, to wit: defendant's hand and an unknown object[.]

A person commits injury to a child if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury. *See* TEX. PENAL CODE § 22.04(a).

Appellant challenges the issue of identity. He argues that "the evidence is insufficient to identify him as the person who engaged in conduct that resulted in the death of [complainant]." Appellant notes that a "rational jury could have concluded that the timeline in this case proved that the injury to [complainant's] liver occurred sometime after they all left the rec center but before Appellant's wife got home from work. There were four people present during that time frame. Appellant, his other

two children, and [complainant]." Appellant further argues that medical personnel acknowledged that the injury to complainant's liver could have been caused by one of the other two children jumping off the top bunk of the bunk beds and accidentally landing on complainant so it is "just as plausible that [complainant] was injured in this manner."

We do not find appellant's argument persuasive. In this case, Dr. Ventura testified that another child jumping off a bunk bed and landing on complainant's abdominal area would have caused *one* of injuries to complainant, but would not have caused *all* of complainant's injuries. Dr. Ventura noted that complainant had bruises to her abdomen, chest, back and buttocks as well as on her forehead, across her nasal bridge extending to both sides of her eyes, chin, cheek and scalp. Complainant's liver had a laceration that almost transected her liver in half and Dr. Ventura testified that this type of injury is typically caused by a blunt force trauma. In addition, Dr. Ventura noted that complainant had five old rib fractures on her left side and one on her right side, as well as two recent rib fractures on her right side and one on her left side. Dr. Ventura testified that complainant's injuries were consistent with physical assault. Further, a six or eight-year old child, the ages of appellant's other children at the time of the event, would not be able to produce the force necessary for such injuries; it would have had to be an adult. Dr. Ventura noted that there were too many bruises for the injuries to be accidental; the injuries were

consistent with an intentional assault. Dr. Ventura concluded in her autopsy report that the cause of death was blunt force injury and the manner of death was homicide.

In addition, Dr. Quarles testified that complainant's buttocks were covered in bruises as well as her lower back, nasal bridge, jaw, and torso. Dr. Quarles testified that this bruising exceeded that which she would expect from a fall and a fall would not have caused bruising on both sides of the body. Dr. Quarles testified that she suspected child abuse and would have typically alerted the police but the paramedics had already called a detective to the scene based on their suspicions of child abuse. Based on her experience, Dr. Quarles believed the abuser would have to be someone sixteen years of age or older to inflict the level of bruising found on complainant.

Henry testified that appellant told her that complainant had fallen off a toy chest. Thomas testified that she overhead appellant telling the police officers that "[complainant] was playing with the lid on top of the toy box and she fell off it and bumped her face." Sain testified that appellant told him that complainant's injuries were the result of a fall off a bed or couch earlier in the day, and Sain stated that complainant's injuries were not consistent with this explanation.

The evidence also established that complainant was not injured prior to leaving with appellant for the weekend of July 18, 2014. McCall testified that she performed complainant's eighteen-month check-up on July 16, 2014, including a fully unclothed physical examination and complainant had no injuries. Thomas testified complainant did not have any marks on her the night of July 18, 2014 and

was not complaining of any pain. Further, the evidence showed that complainant's injuries had to take place after 2:23 pm on July 19, 2014, because the video from the recreation center showed complainant running. Dr. Ventura watched the video taken at the recreation center and noted that complainant's behavior and mobility at that time was inconsistent with having a lacerated liver.

Dr. Ventura also testified that following the liver injury, complainant would have gone into multi-organ failure and exhibited such symptoms as severe pain, loss of appetite, drooling, instability, dizziness, vomiting, and less movement or activity. Thomas testified that complainant exhibited some of these symptoms upon her return from the store around 9:30 p.m. on July 19, 2014. Only appellant and his three children were home while Thomas was at the store. The medical doctors both testified that children could not have inflicted enough force to cause complainant's injuries, only an adult could have done so.

In this case, the jury returned a guilty verdict. It is not our role to act as the thirteenth juror and disregard, realign or reweigh the evidence. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our task here is limited to determining whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Viewing all of the evidence in the light most favorable to the verdict, a reasonable jury could have concluded beyond a reasonable doubt that appellant committed the charged offense. We overrule appellant's first issue.

B. Jury Charge Error

In four issues, appellant asserts that the trial court erred in the jury charge by (1) failing to include a benefit of the doubt instruction; (2) including a definition of reasonable doubt; (3) informing the jury about good conduct time during the punishment phase; and (4) failing to limit the definitions of the culpable mental states to the relevant conduct elements of the underlying offense.

i) Standard of review

When we review claims of jury charge error, we first decide whether there was error in the charge. *Ferguson v. State*, 335 S.W.3d 676, 684 (Tex. App.—Houston [14th Dist.] 2011, no pet.). If there was error and appellant objected to the error at trial, then only "some harm" is necessary to reverse the trial court's judgment. *See Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). If, as in this case, the appellant failed to object at trial, then the appellant will obtain a reversal "only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Id.* Egregious harm is the type and degree of harm that affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defense theory. *Allen v. State,* 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). In making an egregious harm determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information

[revealed] by the record of the trial as a whole." *Trejo v. State,* 280 S.W.3d 258, 261 (Tex. Crim. App. 2009) (quoting *Almanza*, 686 S.W.2d at 171). Egregious harm is a difficult standard to meet and must be determined on a case-by-case basis. *See Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002).

ii) Benefit of the doubt instruction

In appellant's second issue, he asserts the trial court erred by failing to include a benefit of the doubt instruction. Appellant concedes that he did not request this instruction or object to its omission from the jury charge. The jury charge states:

> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that the Defendant, DANIEL THOMAS, on or about the 19th day of July, 2014, in County of Dallas, State of Texas, did then and there, **intentionally or knowingly** cause serious bodily injury to [complainant], a child fourteen years of age or younger, hereinafter called complainant, by striking complainant with defendant's hand and by striking complainant with an unknown object, the exact nature and description of which is unknown to the grand jury, then you will find the defendant guilty of injury to a child as charged in the indictment.
>
> If you do not so find, or if you have a reasonable doubt thereof, or if you are unable to agree, you will next consider whether the defendant is guilty of recklessly causing serious bodily injury to a child, a lesser included offense.
>
> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that the Defendant, DANIEL THOMAS, on or about the 19th day of July, 2014, in County of Dallas, State of Texas, did then and there, **recklessly** cause serious bodily injury to [complainant], a child fourteen years of age or younger, hereinafter called complainant, by striking complainant with defendant's hand and by striking complainant with an unknown object, the exact nature and description of which is unknown to the grand jury,

> then you will find the defendant guilty of recklessly causing serious bodily injury to a child.
>
> If you do not so find, or if you have a reasonable doubt thereof, or if you are unable to agree, you will next consider whether the defendant is guilty of causing serious bodily injury to a child by criminal negligence.
>
> Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that the Defendant, DANIEL THOMAS, on or about the 19th day of July, 2014, in County of Dallas, State of Texas, did with **criminal negligence,** cause serious bodily injury to [complainant], a child fourteen years of age or younger, hereinafter called complainant, by striking complainant with defendant's hand and by striking complainant with an unknown object, the exact nature and description of which is unknown to the grand jury, then you will find the defendant guilty of causing serious bodily injury to a child by criminal negligence.
>
> If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge, you will acquit the defendant and say by or [sic] verdict not guilty.

Appellant argues that the "correct jury charge would have instructed the jury that if they had a reasonable doubt as to whether Appellant was guilty of intentional or knowing injury to a child or reckless injury to a child, then they should resolve that doubt in favor or [sic] reckless injury of a child. The same sort of instruction should appear between reckless injury to a child and negligent injury to a child."

We disagree with appellant's contention that the trial court's failure to include this instruction constituted error. The general rule is that when a charge includes greater and lesser degrees of an offense, it would be error to refuse to give a benefit of the doubt instruction *when requested*. *See Benavides v. State*, 763 S.W.2d 587, 589 (Tex. App.—Corpus Christi 1988, pet. ref'd). At trial, appellant did not request

the instruction to be included in the charge. Appellant has not cited any Texas authority that requires the trial court to give this charge sua sponte. *See Simms v. State*, No. 06-18-00181-CR, 2019 WL 2479845, at *9 (Tex. App.—Texarkana June 14, 2019, pet. ref'd) (memo op., not designated for publication) ("Simms has not cited any Texas authority, and we have found none, that requires the trial court to give this charge sua sponte.").

Further, Texas case law provides there is no need to give a benefit of the doubt instruction when the jury charge includes an instruction after the greater offense that instructs the jury that if it has reasonable doubt that the defendant is guilty of the greater offense, to find him not guilty of that offense and consider whether he is guilty of the lesser-included offense. *See id.*; *Villarreal v. State*, No. 05-13-00629-CR, 2014 WL 3056509, at *10 (Tex. App.—Dallas July 7, 2014, no pet.) (not designated for publication); *Benavides*, 763 S.W.2d at 589. This Court has previously decided refusal of a requested instruction on benefit of the doubt was not harmful to the appellant in regard to a charge similar to the one in this case. *See Shelby v. State*, 724 S.W. 2d 138 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 5 (Tex. Crim. App. 1988). In that case, we concluded:

> Although the charge does not explicitly advise the jury, as requested by appellant, that appellant should be given the "benefit of the doubt" if they are in doubt as to whether he is guilty of murder or aggravated assault, the charge leaves no uncertainty as to how to resolve the doubt or where the burden of proof lies on that issue.

Shelby, 724 S.W.2d at 140.

The charge in the present case clearly instructs the jury that, if it is not convinced beyond a reasonable doubt that appellant is guilty of intentionally or knowingly causing injury to a child, it should consider appellant's guilt on the lesser offense. No further "benefit of the doubt" instruction is necessary. Accordingly, the trial court did not err in failing to sua sponte include a benefit of the doubt instruction in its jury charge, so we overrule appellant's second issue.

iii) Definition of reasonable doubt

In appellant's third issue, he asserts that the trial court erred by including a definition of reasonable doubt in the jury charge. The instruction in question read as follows: "It is not required that the prosecution prove the defendant's guilt beyond all possible doubt; it is required that the prosecution's proof excludes all 'reasonable doubt' concerning the defendant's guilt." This Court has previously considered this instruction and concluded that it does not define "reasonable doubt." *See O'Canas v. State*, 140 S.W.3d 695, 702 (Tex. App.—Dallas 2005, no pet). Instead, we decided the instruction "simply states the legally correct proposition that the prosecution's burden is to establish proof beyond a *reasonable* doubt and not *all possible* doubt." *Id.* Following our decision in *O'Canas*, we have continued to reject this exact same argument. *See Robinson v. State*, No. 05-14-00521-CR, 2015 WL 1650062, at *4 (Tex. App.—Dallas Apr. 13, 2015, no pet.); (mem. op., not designated for publication); *Menyweather v. State,* No. 05–13–01108–CR, 2014 WL 6450826, at *3 (Tex. App.—Dallas Nov. 18, 2014, no pet. h.) (mem. op., not

designated for publication); *McCuin v. State*, Nos. 05-12-01148-CR, 05-12-01149-CR, 05-12-01150-CR, 2013 WL 3929215, at *2 (Tex. App.—Dallas July 26, 2013, no pet) (mem. op., not designated for publication); *Wright v. State,* No. 05–10–00186–CR, 2012 WL 3104381, at *2 (Tex. App.—Dallas July 11, 2012, no pet.) (mem. op., not designated for publication); *Bates v. State*, 164 S.W.3d 928, 931 (Tex. App.—Dallas 2005, no pet.); *Bratton v. State*, 156 S.W.3d 689, 696 (Tex. App.—Dallas 2005, pet ref'd). Further, the court of criminal appeals has concluded a trial court does not abuse its discretion by giving this instruction. *See Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010). Accordingly, we once again decline to overrule precedent and we overrule appellant's third issue.

iv) Good conduct time

In his fourth issue, appellant asserts that the trial court erred by instructing the jury in the punishment phase about good conduct time. The trial court's instruction read as follows: "Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time of [sic] the period of incarceration imposed through the award of good conduct time." Appellant does not dispute that the instruction generally conforms to the statute. *See* TEX. CODE. CRIM. PROC. art. 37.07, §4(b), (c). Instead, appellant argues that because he was ineligible for good conduct time, this instruction was an incorrect statement of the law and mislead the jury.

The court of criminal appeals rejected this argument in *Luquis v. State*, 72 S.W.3d 355 (Tex. Crim. App. 2002). Although the court acknowledged the

instruction may appear misleading and inapplicable to some defendants, it construed article 37.07, section (4) to be an absolute command that the good conduct time instruction be given to the jury. *Id.* at 363. Further, this Court has consistently overruled this same argument based on *Luquis*. *See Anderson v. State,* No. 05–13–00253–CR, 2013 WL 6870013, at *4 (Tex. App.—Dallas Dec. 31, 2013, no pet.) (mem. op., not designated for publication); *Coppola v. State,* No. 05–10–00704–CR, 2012 WL 29318, at *5 (Tex. App.—Dallas Jan. 6, 2012, no pet.) (not designated for publication); *Gates v. State,* No. 05–11–00404–CR, 2012 WL 753647, at *1 (Tex. App.—Dallas Mar. 9, 2012, pet. ref'd) (mem. op., not designated for publication). Accordingly, the trial court did not err by including the good conduct time instruction in the jury charge and we overrule appellant's fourth issue.

v) Definition of culpable mental states

In his fifth issue, appellant argues the trial court erred because it gave the full definition of the four mental states in the jury charge. In this case, and as set forth above, the indictment alleged that appellant "did unlawfully then and there intentionally and knowingly cause serious bodily injury to [complainant], a child of 14 years of age or younger. . . ." In the abstract portion of the jury charge, however, the court instructed the jury on all four mental states:

> A person acts **intentionally,** or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

> A person acts **knowingly,** or with knowledge, with respect to the nature of his conduct, or with respect to the circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. 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.
>
> 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.
>
> 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 circumstances exist or 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.

Appellant argues that because injury to a child is "result of conduct" offense, the trial court erred by failing to limit the definitions of the culpable mental states to the specific conduct element required to prove the offense.[1] As the State concedes that the trial court should have limited the definitions of the culpable mental states, we proceed to an *Almanza* egregious harm analysis. The issues to be considered in this analysis include the charge itself, the state of the evidence including contested issues, argument of counsel, and any other relevant information. *Trejo,* 280 S.W.3d at 261.

[1] The Court of Criminal Appeals has held that the injury to a child statute is a "result of conduct" offense in which the culpable mental state has to apply to the result of the conduct, not merely the conduct itself. *See Williams*, 235 S.W.3d at 750; *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985); *see also Crow v. State*, No. 05-16-01434-CR, 2018 WL 271803, at *3 (Tex. App.—Dallas Jan. 3, 2018, no pet.).

a) Entire jury charge

As stated above, appellant argues that the definition section of the jury charge failed to limit the definitions of the culpable mental state to the specific conduct element required to prove the offense.[2] In assessing harm resulting from the inclusion of improper conduct elements in the definitions of culpable mental states, we may consider the degree, if any, to which the culpable mental states were limited by the application portions of the jury charge. *See Patrick v. State*, 906 S.W.2d 481, 492 (Tex. Crim. App. 1995). Accordingly, we note the application portion of the jury charge did provide the jury with correct instructions: "if you find from the evidence beyond a reasonable doubt that the Defendant, DANIEL THOMAS, on or about the 19th day of July, 2014, in County of Dallas, State of Texas, did then and there, **intentionally** or **knowingly** cause serious bodily injury to [complainant]."

In *Patrick v. State*, where the definition was incorrect but the application instruction was correct, the Court of Criminal Appeals noted that "[r]eferring back to the definitions of culpable mental states, it is obvious that the 'result of conduct' and cause the result language are the applicable portions of the full code definitions." *Id.* at 493. The court further noted "because the facts, as applied to the law in the application paragraph, pointed the jury to the appropriate portion of the definitions,

[2] For example, the definition of "intentionally" in the jury charges provides that a person may act intentionally if a person has a "conscious objection or desire to engage in the conduct" when the injury to a child statute requires that the focus be on whether a person had intent to cause the result.

no harm resulted from the court's failure to limit the definitions of culpable mental states to proving the conduct element of the underlying offense." *Id.* Accordingly, this factor does not weigh in favor of egregious harm.

b) Entirety of the evidence

As discussed above, viewing all of the evidence in the light most favorable to the verdict, a reasonable jury could have concluded beyond a reasonable doubt that appellant committed the charged offense.[3] Just as his argument on appeal, appellant's case at trial concentrated on the issue of whether there was sufficient evidence to demonstrate whether it was appellant who caused complainant's injuries. As appellant denied causing any injury to complainant, his culpable intent was not a contested issue at trial. *See Jones v. State*, 229 S.W.3d 489, 494 (Tex. App.—Texarkana 2007, no pet.) (holding in an indecency with a child case that defendant's intent, while a part of the State's required proof, "was not a contested issue and consequently [appellant] could not be egregiously harmed by the definition of the intentional and knowing state of mind."); *Saldivar v. State*, 783 S.W.2d 265, 268 (Tex. App.—Corpus Christi 1989, no pet.) ("Where no defense is presented which would directly affect an assessment of mental culpability, there is no harm in submitting erroneous definitions of 'intentionally' and 'knowingly.'"). Accordingly, this factor does not weigh in favor of egregious harm.

[3] *See supra* section A(ii).

c) Argument of counsel

Appellant does not make any argument about this factor. The State notes that "[i]n its initial closing argument, the prosecutor told the jury that the issue was whether appellant 'intentionally caused serious bodily injury' to [complainant]." The State also noted that the prosecutor "concluded in his rebuttal closing argument that appellant 'caused serious bodily injury, even to death, of complainant.'" As the language used by the prosecutor tracks the indictment, this factor does not weigh in favor of egregious harm.

d) Other relevant information

Neither party raises any "other relevant information" to be analyzed and we do not note any other relevant information.

Considering all the factors, the trial court's failure to limit the definitions in the jury charge did not cause egregious harm so we overrule appellant's fifth issue.

CONCLUSION

Based on the foregoing, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DANIEL ANDRE THOMAS, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F19-00118-L.
No. 05-19-00347-CR V.	Opinion delivered by Justice Evans. Justices Bridges and Pedersen, III participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 4, 2020.