

Opinion issued June 30, 2020



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-18-00896-CR

NICOLE ANN SAENZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1597550**

MEMORANDUM OPINION

Nicole Ann Saenz appeals her conviction for causing serious bodily injury to a child by omission. TEX. PENAL CODE § 22.04(a)(1), (b). In three issues she argues that the evidence was insufficient to support her conviction, that her right to a

unanimous verdict was denied, and that the trial court erred in excusing and replacing a juror. We affirm.

Background

Saenz gave birth to J.S. on October 26, 2013 and brought her home two days later to an apartment where she lived with her boyfriend, Franchescoli Garcia, and her 18-month-old daughter. Garcia was not the father of either child. Saenz's mother, Lourdes Castillo, lived in the same complex.

J.S. died when she was 24 days old. On the day J.S. died, Saenz's mother called the pediatrician complaining that J.S. was coughing up blood. The pediatrician's office told Castillo to take the baby to the emergency room and to call an ambulance if she needed transportation. Saenz and her mother did not take J.S. to the hospital. Later that evening, Saenz called 911. When an ambulance arrived, Garcia brought the baby, who was not breathing and did not have a pulse, to the paramedic. She was pronounced dead that evening at the hospital.

Saenz was charged with injury to a child and proceeded to trial by jury. At trial, the jury heard from responding paramedic E. Potenza. She testified that she arrived at Saenz's apartment in the evening on November 18, 2013. Garcia carried J.S. outside toward the ambulance. J.S. was not breathing and had no pulse. Potenza observed that J.S. had bruising around her face, her lips were cracked and dry, her muscles appeared undeveloped, she had no fat rolls, and she had poor skin turgor.

Potenza also noticed that J.S. had a sunken fontanel, an area of the forehead, which when sunken is generally indicative of dehydration. Paramedics administered CPR and transported J.S. to Memorial Northeast Hospital. The CPR was unsuccessful, and J.S. died at 9:17 p.m.

Potenza also testified that paramedics had visited J.S. two weeks before. Though she did not respond to the call, Potenza reviewed and testified about the paperwork prepared by the paramedics who responded. She explained that on October 31, 2014, when J.S. was five days old, an ambulance was dispatched to Saenz's apartment, and Franchescoli Garcia complained that J.S.'s upper lip was bleeding. When they arrived, paramedics observed J.S. with dry lips and an upper lip bleeding. They also noted that J.S. was active and had normal skin appearance and temperature. Franchescoli Garcia refused attempts to transport J.S. to the hospital and the paramedics left.

The jury heard from Dr. Yong Duck Lee, J.S.'s pediatrician. Through Dr. Lee, the jury learned that Saenz took J.S. to the hospital on November 1, 2014, the day after paramedics were called to the apartment the first time. At the time, J.S. was five days old. She weighed 6.62 pounds, slightly below her birthweight. Saenz told the doctor that J.S. had coughed up blood the night before, but that she was still eating. J.S. was transported to Texas Children's Hospital for coughing and difficulty breathing. An x-ray showed mild thickening in her chest, indicative of a virus. The

hospital provided Saenz with discharge instructions. The instructions advised her to seek immediate medical care if J.S. experienced poor feeding, coughed up blood, or had a fever.

Dr. Lee testified that Saenz brought J.S. to a follow up appointment in her office on November 11, 2013.* At the appointment, J.S. weighed seven pounds. Saenz reported that J.S. was congested, she was spitting up “bloodstains” twice a day, and she had a temperature of 100.7 degrees Fahrenheit the day before. Dr. Lee observed the congestion but did not observe any spitting up of blood. She also did not see blood in J.S.’s nose or mouth. Dr. Lee examined J.S., noting her temperature was normal and that she did not have any bruises, abrasions, or scratches. She diagnosed J.S. with an upper respiratory infection and prescribed saline nose drops to clear up congestion. She also conducted a newborn screening test, which was normal.

A week later, Saenz’s mother called Dr. Lee’s office in the late afternoon and reported that J.S. was vomiting blood. Castillo said that that J.S. looked “too skinny.” Through her medical assistant, Dr. Lee told Castillo to take J.S. to the emergency room at Texas Children’s Hospital. Castillo agreed that J.S. needed to go but said

* Esmirna Gonzalez, Dr. Lee’s medical assistant, who was present at the follow up appointment, also testified at trial.

she was waiting for a ride. Dr. Lee's medical assistant suggested that Castillo call an ambulance if she did not have transportation.

The jury heard from responding law enforcement officers, including Sergeant R. Hamlet, a crime scene investigator, who was called to the hospital the night J.S. died. He observed the deceased baby in the emergency room and noticed bruising on her face and body and that she appeared malnourished. Sergeant Hamlet visited Saenz's apartment the same evening. Upon entering the apartment, he observed a large hole in the wall behind the front door and stains on the walls. The bedroom door had been broken in several pieces. He saw a can of baby formula on a table and a case of Similac in the pantry. There was no bassinet or crib.

Sergeant Hamlet also observed a suction bulb with apparent blood on it, and he found two blankets in a pile of clothing with bloodstains on them. Saenz told Sergeant Hamlet that she had been using the suction bulb to remove mucous from J.S. and that she would wipe the mucous on the blankets. The jury viewed photos of the apartment taken during Sergeant Hamlet's visit.

Sergeant F. Garcia of the Harris County Sheriff's Office testified that he also went to the hospital to investigate the death. He observed that J.S.'s body was covered in bruises and scratches. Both Saenz and her boyfriend voluntarily spoke with him and then left. The jury heard an audio recording of the interview with Saenz at the hospital. In the recording, Saenz stated that the baby was struggling to breathe

and had spit up, so she called 911. She said that J.S. stopped breathing before the emergency personnel arrived. She maintained that she did not know what happened to J.S. or how she became bruised and scratched.

About nine months later, Sergeant Garcia attempted to contact Saenz. He left her a message on multiple occasions between August and November 2014, obtaining a new phone number for Saenz from her mother. In November, he met Saenz at a mobile home where she was living. She agreed to a future meeting in Sergeant Garcia's office, but she did not show up to the meeting. He continued to leave her voicemail messages but was unable to contact her. He testified that Saenz was avoiding him. Saenz was charged on December 17, 2014, and Sergeant Garcia met her the next day after she was arrested. At the time of arrest, she was living in a van with her boyfriend.

The jury watched a recording of Sergeant Garcia interviewing Saenz after her arrest. In the interview, Saenz stated that she did not know who hurt J.S. or how J.S. became bruised. She admitted that her boyfriend, Franchescoli Garcia, told her that he had hit the baby's head into a wall a week before she died, but she did not take the baby to the doctor. She also admitted that she had been hit by Franchescoli Garcia before and that he had anger problems. Sergeant Garcia showed Saenz photos of deceased J.S. He testified that normally parents are very emotional when shown the photos, but Saenz had no reaction. Saenz told Sergeant Garcia that she fell on J.S.

because Franchescoli Garcia had pushed her during an argument and it did not injure J.S. During the hours-long interview, Sergeant Garcia told Saenz that she was being charged with murder. She then told him Franchescoli Garcia had hurt J.S. and that she did not tell anyone because she was afraid of him. Later, she told Saenz that she had made that up and it did not happen. Sergeant Garcia testified that Franchescoli Garcia was arrested the same day and also recorded an interview. He believed Franchescoli was still in custody.

M. Davis, a child fatality investigator with the Texas Department of Family and Protective Services, was also called to the hospital on the night of November 18. She also noticed bruising on the deceased baby's face and abdomen. She observed that the baby's rib cage was visible and that she looked small for a three-week-old infant.

Saenz told Davis that she had been feeding J.S. approximately two ounces of formula every three hours. Saenz claimed that J.S. began to throw up at every feeding two days prior to her death. Saenz told Davis that she did not take J.S. to the hospital on November 18 because she did not have transportation, and that she had planned to take her to the hospital the next day, but she passed away. Saenz told Davis that neither she nor her boyfriend knew how J.S. became bruised.

Davis also met with Franchescoli Garcia at the hospital. Garcia's explanation for the bruise conflicted with Saenz's explanation. Garcia told Davis that the bruise

happened when J.S. accidentally hit her head on a wall while Garcia was holding her on November 17. He admitted to prior drug use but stated that he was not currently using drugs.

The jury heard from C. Padgett, a caseworker with the Texas Department of Family and Protective Services. She testified that she knew Saenz well and had been involved with her from September 2011 until February 2013. Padgett was a caseworker in the family preservation unit and her role was to help Saenz maintain custody of her two older children. At the time, one of them was living with his paternal grandparents. She first visited Saenz's home in September 2011 and noticed that there was very little food in the house, even though Saenz received \$500 to \$600 a month in food stamps. At the time, Saenz had a four-year-old boy in the house, but no food for children to eat. She advised Saenz to purchase items for her children that are part of a nutritional diet. Padgett testified that it took a while for Saenz to have appropriate food in the home. On at least four occasions Saenz did not have appropriate food in the house, but over time, she improved, particularly after she gave her mother her food stamp card and her mother agreed to take her shopping weekly for food.

Dr. K. Pinneri, Director of Montgomery County Forensic Services, testified about the autopsy she performed. At the time of the autopsy, she worked for Harris County. Dr. Pinneri ruled the death a homicide and explained that the cause of death

was blunt-force trauma of the head, torso and extremities. Dr. Pinneri's findings included numerous injuries to J.S.'s esophagus, trachea, neck, heart, liver, torso, and brain. Some of the injuries were healing, indicating that they were old, while others were new near the time of death. Her body was covered in bruises, including to the side of her head and ear.

Dr. Pinneri observed internal bleeding, including a hemorrhage around the spinal cord in the upper neck region and multiple hemorrhages and swelling near her brain. These were indicative of blunt trauma. Dr. Pinneri explained there were fresh injuries to the heart, including blood accumulating in the layer of tissue that surrounds the heart and a contusion to the heart. In her career, it was one of the worst heart injuries she had seen and the most serious injury to J.S. Dr. Pinneri explained that as blood collected in the tissue around the heart, it put pressure on the heart, and then the heart stopped beating. Dr. Pinneri stated that the injury happened within hours before her death.

Dr. Pinneri pointed out the numerous fractures on J.S.'s body. She had new injuries, including fractures in both wrists and legs. Dr. Pinneri opined that the type of fracture indicated that the baby had been forcefully grabbed, pulled, or twisted. Additionally, she had 37 rib fractures to both the right and left side of her chest. The rib fractures were likely from aggressive squeezing of the chest. All the rib fractures were new injuries with no healing.

Finally, Dr. Pinneri explained that J.S. was both malnourished and dehydrated. At the time of her death, J.S. weighed 5.88 pounds and was 24 days old. She had very little fat and wrinkly skin. There was little food in her stomach and no fecal matter in her colon. She had sunken eyes and a high sodium level, indicative of dehydration. She testified that level of dehydration and fat loss would occur over the course of more than two days. She believed that the malnutrition was likely caused by lack of feeding and difficulty taking in food. Dr. Pinneri opined that malnutrition and dehydration created a substantial risk of death, and that earlier medical intervention could have given the baby nourishment through intravenous feeding.

Lourdes Castillo was the only witness for the defense. She testified that at the time of the death, she lived in the same apartment complex as her daughter. She picked up both J.S. and her other granddaughter daily and brought them to her home. She testified that Saenz did not have a car, so she had driven Saenz and J.S. to the emergency room on November 1, 2013, and to the pediatrician later in the month. She and Saenz sought medical treatment each time because the baby was coughing up blood. Castillo testified that for the week before her death, the baby would gasp and throw up blood and formula.

Castillo testified that the day J.S. died, she watched J.S. while Saenz ran an errand, and she witnessed J.S. coughing up blood. When her daughter returned, she

mentioned it to her, and they decided to call the pediatrician's office. The doctor told her to go to the emergency room, but her car had broken down. She testified that she and Saenz planned to take the baby to the hospital the next day, but J.S. died that night.

Castillo also testified that there had been times when Saenz left the two children with Franchescoli Garcia. On one occasion, Saenz stopped by Castillo's apartment after buying milk. Franchescoli Garcia ran to the apartment to tell Saenz that she needed to come home immediately because the children had woken up. Castillo was upset because he had left the apartment unlocked while he came to get Saenz. She was also upset with her daughter for leaving the children with him.

On cross-examination, Castillo testified that she knew that Franchescoli Garcia had a drug problem because he had used drugs with Castillo's ex-husband. She saw Franchescoli Garcia use "Kush" or synthetic marijuana on many occasions, and she said it made him "lazy" and "paranoid."

The jury found Saenz guilty of causing serious injury to a child by omission. The jury assessed punishment at 40 years' imprisonment and a \$7,500 fine. The court sentenced Saenz in accordance with the jury's verdict.

Saenz presents three issues on appeal: (1) the evidence was insufficient to support the jury's guilty verdict; (2) the jury charge denied Saenz the right to a

unanimous verdict; and (3) the trial court erred in dismissing and replacing a juror during the trial. We affirm.

Sufficiency of the Evidence

Saenz challenges the sufficiency of the evidence to support her conviction. With regard to serious injury to a child by failure to provide adequate nutrition, she argues that J.S.'s malnourishment could have been caused by her inability to tolerate food, and she relies on Dr. Pinneri's testimony that the injury to J.S.'s trachea and esophagus would have caused difficulty eating. With regard to serious bodily injury caused by failing to secure medical care, Saenz argues that the evidence is insufficient because there was evidence that she sought some medical care for the child. With regard to serious bodily injury caused by failure to provide adequate supervision, Saenz argues that the evidence is insufficient to establish that she acted intentionally or with knowledge that it was reasonably likely that J.S. would sustain a serious bodily injury when left in Franchescoli Garcia's care.

A. Standard of Review

In an appeal of a criminal conviction, we review a challenge to the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318–20 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under the *Jackson* standard, evidence is insufficient when, considered in the light most favorable to the verdict, no rational factfinder could have found that each

essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

We consider both direct and circumstantial evidence as well as all reasonable inferences that may be drawn from the evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the jury's credibility and weight determinations because the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899. We resolve inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000); *see Clayton*, 235 S.W.3d at 778 ("When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination.").

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

If an appellate court finds the evidence insufficient, it must reverse the judgment and enter an order of acquittal. *Estrella v. State*, 546 S.W.3d 789, 797 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd).

B. Applicable Law

A person commits the offense of injury to a child if she “intentionally, knowingly, or recklessly with criminal negligence by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . serious bodily injury.” TEX. PENAL CODE § 22.04(a)(1); *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006). Causing serious bodily injury by an omission, i.e., a failure to act, is a first-degree felony when the actor “intentionally or knowingly” failed to act. TEX. PENAL CODE § 22.04(e). “Serious bodily injury” is defined “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.” *See id.* § 1.07(46); *see also id.* §1.07(8) (defining bodily injury as “physical pain, illness, or any impairment of physical condition”).

A parent has a statutory duty to care for, control, protect, and provide food and medical care to a child. TEX. FAM. CODE § 151.001(a)(2)–(3) (providing that “[a] parent of a child has [enumerated] rights and duties” including “the duty of care, control, protection, and reasonable discipline of the child” and “the duty to support

the child, including providing the child with clothing, food, shelter, medical and dental care, and education”).

“A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.” TEX. PENAL CODE § 6.03(a). 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. *Id.* § 6.03(b). Injury to a child is a result-oriented offense requiring a mental state that relates not to the specific conduct but to the result of that conduct. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The evidence is sufficient to support a conviction for injury to a child by omission if the State proves either that a defendant intended to cause the injury through her omission or that she was aware that her omission was reasonably certain to cause the injury. *Proo v. State*, 587 S.W.3d 789, 809–10 (Tex. App.—San Antonio 2019, pet. ref’d). Stated another way, “knowingly” causing the child’s injury requires evidence that the defendant was aware with reasonable certainty that the result of serious bodily injury or death would have been prevented had the defendant performed the act that was omitted. *Payton v. State*, 106 S.W.3d 326, 329 (Tex. App.—Fort Worth 2003, pet. ref’d). Mental state is rarely proved through direct evidence, and almost always depends on circumstantial evidence. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). Knowledge and intent may be inferred from any facts which tend to

prove their existence, including the acts, words, and conduct of the accused, the method of committing the crime and from the nature of wounds inflicted on the complainant. *Id.* (quoting *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)).

Under the hypothetically correct jury charge for the offense as indicted here, the State was required to prove that Saenz, while having a statutory duty to act on J.S.'s behalf, intentionally or knowingly by omission caused J.S. serious bodily injury by failing to provide adequate nutrition, by failing to provide adequate medical care, or by failing to provide adequate supervision. We address each in turn.

C. Failure to provide adequate nutrition

Saenz contends there is insufficient evidence that she failed to provide nourishment or that the failure caused serious bodily injury to J.S. We disagree. There is ample evidence of both elements of this offense.

The causal link between the defendant's failure to act and the serious bodily injury may be proven through reasonable inference based on the evidence. *Proo*, 587 S.W.3d at 810. The jury heard evidence that J.S. lost almost 20% of her body weight in her last week of life. Several witnesses testified that when they saw her, they immediately noticed that J.S. looked underweight and dehydrated. These included the responding paramedic, the child fatality investigator, and other law enforcement officers. Dr. Pinneri testified that it would have taken more than two days for her to

become so dehydrated. She also said that the autopsy revealed no food in the baby's stomach or colon and very little fat on her body. Eyewitness testimony concerning a child's appearance can provide evidence of the extent of a defendant's awareness and knowledge of the child's condition and need for medical care. *Id.* at 811; *Payton*, 106 S.W.3d at 328–30; *see also Guerrero v. State*, No. 04-15-00762-CR, 2016 WL 4537694, at *8 (Tex. App.—San Antonio Aug. 31, 2016, no pet.) (mem. op., not designated for publication) (defendant's knowledge that failure to provide nutrition was substantially certain to result in serious bodily injury was inferable from the child's apparent and obvious malnourished condition, as testified to by EMS technicians and investigator).

The jury also viewed photographs of J.S.'s body. Images such as photos or video may refute a defendant's claim of lack of knowledge or intent by clarifying and supporting the witnesses' observations and conclusions about the child's condition. *See Proo*, 587 S.W.3d at 812; *see also Sifuentes v. State*, No. 04-1200607-CR, 2013 WL 3422916, at *5 (Tex. App.—San Antonio July 3, 2013, no pet.) (mem. op., not designated for publication) (noting photographs were “strong evidence that [the defendant] must have known something was going on with [the child] and chose to ignore it”). Finally, Dr. Pinneri testified that the degree of malnourishment was life threatening and that medical care could have provided lifesaving intravenous feeding.

Based on the medical and testimonial evidence, as supported by the visual evidence, the jury could have reasonably inferred that Saenz knowingly or intentionally caused J.S. serious bodily injury by failing to provide her with adequate nutrition or medical care.

D. Failure to provide medical care

Saenz also challenges the sufficiency of the evidence to support a conviction based on failure to obtain medical care, arguing that the State failed to present evidence as to what injury she could have prevented had she sought medical care. She argues that evidence was presented that she sought medical care for the baby a few weeks before she died.

The evidence shows that lack of medical care created a substantial risk of serious bodily injury or death to J.S. either because Saenz did not seek medical care for malnourishment or because Saenz did not seek medical care for blunt force trauma.

1. Failure to seek medical care for malnourishment

The record reflects that J.S. gained weight between the hospital visit on November 1 and her visit to the pediatrician on November 11. But between November 11 and her death, she lost over a pound, or roughly 16-18% of her body weight. At the time of her death, she weighed 5 pounds, 14 ounces. As discussed supra, the record reflects that J.S. was malnourished and dehydrated at the time of

her death. Responding paramedics noticed her lack of body fat and dehydrated state. Dr. Pinneri testified that she had thin, wrinkly skin suggesting inadequate fat and that she exhibited many signs of dehydration. Additionally, there was no food in her stomach and no fecal matter in her colon. Dr. Pinneri testified that it would have been apparent that J.S. was not soiling the proper amount of diapers.

Saenz points out that Dr. Pinneri testified that injuries to J.S.'s esophagus and trachea could have caused difficulty in eating and spitting up blood. But the source of the child's injuries is irrelevant, the question is whether the jury could reasonably infer that Saenz knew about the child's serious condition and knowingly caused the child serious bodily injury by failing to timely seek medical care. *See Proo*, 587 S.W.3d at 812.

Malnourishment is a condition that takes time to develop. *See id.* at 810–11 (recognizing that some crimes such as injury caused by failure to provide nourishment, by their nature, do not occur on a particular day, but rather occur over a period of time). Saenz told the fatality investigator that J.S. began throwing up at every feeding two days before she died. J.S.'s pediatrician recommended that J.S. go to the emergency room on the day that she died. Despite this advice, Saenz failed to take J.S. to the hospital or call 911 immediately. She claimed that she was planning to take the baby to the hospital on the following day. "A jury may reasonably infer that the defendant intentionally, not accidentally, inflicted the injury

when the defendant fails to render aid known to be needed.” *Baldwin v. State*, 264 S.W.3d 237, 242 (Tex. App.—Houston [1st Dist.] 2008, pet. ref’d). Dr. Pinneri testified that the malnourishment would have taken more than two days to develop. She testified that medical treatment, such as intravenous fluids and feedings, could have helped J.S. to gain weight and that the lack of adequate nutrition caused her serious bodily injury. *See id.* at 243 (defendant’s failure to obtain medical care or provide adequate food or nourishment in light of child’s obviously malnourished condition was sufficient to support reasonable inference that defendant consciously desired or was aware that her conduct was reasonably certain to cause serious bodily injury).

There was sufficient evidence for the jury to conclude that Saenz intentionally or knowingly failed to seek medical care for J.S.’s malnourishment and that her failure to do so caused J.S. serious bodily injury.

2. Failure to seek medical care for blunt force injuries

The State also presented evidence that Saenz failed to seek medical care for blunt force injuries to J.S.’s head, torso, and extremities, resulting in her death.

Dr. Pinneri testified about numerous fractures and hemorrhages found on the baby’s body. The responding law enforcement and emergency medical personnel noticed bruising and scratching all over J.S.’s body. Eyewitness testimony that a child is covered in bruises can provide evidence of the extent of the defendant’s

awareness of a child's condition. *See e.g., Proo*, 587 S.W.3d at 810, *Tijerina v. State*, No. 13-00430-CR, 2012 WL 3525632, at *5 (Tex. App.—Corpus Christi Aug. 16, 2012, no pet.) (mem. op., not designated for publication) (describing how “death by internal bleeding” is a prolonged process with obvious changes to a child's behavior and demeanor, and stating that on the day of the child's death, “anyone would have known something was wrong, regardless of medical training” and would have known the child needed immediate emergency care). According to Dr. Pinneri, J.S. had fresh fractures on both of her legs, both of her wrists, and many of her ribs. She had contusions on her cheek and ear. In addition, Dr. Pinneri testified that J.S.'s heart was perforated by extreme pressure and the beating of her heart caused blood to collect in the pericardial sac. This accumulation of blood interfered with the heart's ability to pump and caused it to stop beating. Dr. Pinneri explained that the accumulated blood could have been extracted with a needle or manually removed during surgery, but if left untreated, it would cause rapid death.

From this testimony, the jury could have reasonably inferred that Saenz knowingly or intentionally caused J.S. serious bodily injury by failing to seek medical care for her blunt force injuries.

E. Failure to provide adequate supervision

Saenz contends that the evidence is insufficient to establish that she left J.S. with Franchescoli Garcia knowing that J.S. would sustain a serious bodily injury. We disagree.

Saenz told law enforcement that Franchescoli Garcia had hit her multiple times. She also admitted that he once pushed her, causing her to fall on the baby. Saenz told investigators that she left J.S. alone in his care on more than one occasion, even though he had been abusive to her and was addicted to drugs. Castillo testified that Garcia used synthetic marijuana on numerous occasions, and, when he did so, he would be paranoid and lazy. She also testified that a few days before J.S. died, Saenz left the house to buy milk and left Franchescoli Garcia with J.S. and her 18-month-old sister. When Saenz stopped by her mother's home on the way back, Castillo was upset when she learned that Saenz had left the children with him. Franchescoli Garcia left the children alone, came to Castillo's apartment to get Saenz, and told her to come home immediately. Castillo described him as looking sweaty, paranoid, and upset.

The jury saw photographs of the apartment where Saenz lived with Franchescoli Garcia. There were holes in the walls, and the door to the bedroom was broken. In an interview on the night of J.S.'s death, Garcia told an investigator that he accidentally struck J.S.'s head on a wall a few days before she died. He also told

the child fatality investigator that he informed Saenz that he had done so, implying she was not present when it happened.

Saenz initially told investigators that she did not know how the baby received any bruises. She later told detectives that she knew Garcia had bumped the baby on the head and had noticed bruising on the baby's ear. Nevertheless, she continued to allow Franchescoli Garcia to have access to J.S. Garcia brought the lifeless baby to the ambulance when first responders arrived. Though J.S. did not have any bruises at her November 11 pediatrician's appointment, when the ambulance arrived and at the time of the autopsy, her body was covered in obvious bruises and abrasions, including new and old injuries. Multiple witnesses testified that they immediately noticed that J.S. was bruised.

Dr. Pinneri testified that the baby had new fractures to both legs and swelling of her wrist. She also had 37 bilateral rib fractures that were mostly new injuries dating from near the time of death with no healing. While Dr. Pinneri stated that the injuries could have been from a natural event, she believed they were from a trauma related event. She explained that they likely were caused by squeezing or using strong force from front to back on the baby. Dr. Pinneri also pointed out bruising to the baby's ear and opined that it indicated child abuse because a young infant is immobile and unable to injure itself in that way. Finally, Dr. Pinneri opined that the baby died from blunt force trauma as a result of bleeding near the heart.

The evidence established that Saenz was aware that Franchescoli Garcia had hit the baby's head into a wall, and she was also aware that the baby was exhibiting symptoms of distress—coughing up blood and vomiting. Still she failed to act. Dr. Pinneri testified that J.S. would have benefitted from medical treatment. The jury heard evidence that Saenz was aware of Garcia's behavior, including drug use and past abuse, yet she still allowed J.S. to be in his presence, including unsupervised. *See Payton*, 106 S.W.3d at 331. (stating defendant was aware of his adult son's past behavior, and "even believed he was cruel, yet he still allowed the children to be in his presence unsupervised for short periods of time"). Given the evidence presented, the jury could reasonably conclude that Saenz knowingly or intentionally caused serious bodily injury to J.S. by failing to provide adequate supervision.

We overrule Saenz's first issue.

Jury Unanimity

Saenz contends that her right to a unanimous verdict was denied. She argues that the jury charge, which contained three paragraphs setting out three means by which Saenz caused serious bodily injury to a child, allowed the jury to convict based on the result of different assaults or offenses.

A. Standard of Review

We review allegations of charge error in two steps. First, we determine whether error exists. If it does, we evaluate whether sufficient harm resulted from

the error to require reversal. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015).

B. Analysis

Saenz was charged with causing serious bodily injury to a child, and the jury charge permitted the jury to convict her based on three distinct means of doing so: failure to provide adequate nutrition, failure to seek proper medical treatment, or failure to provide adequate supervision.

Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005). To render a unanimous verdict, every juror must agree that the defendant committed the same, specific criminal act. *Id.* When a statute sets forth different means by which an offense may be committed, unanimity is generally not required as to the means of commission. *Jefferson v. State*, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006) (quoting *State v. Johnson*, 627 N.W.2d 455, 459–60, *cert denied*, 534 U.S. 1043 (2001)).

Texas Penal Code Section 22.04 states that a person commits injury to a child if the person by act or omission causes “(1) serious bodily injury; (2) serious mental deficiency, impairment or injury; or (3) bodily injury.” TEX. PENAL CODE § 22.04(a). Injury to a child is a “result of conduct offense.” *Stuhler v. State*, 218 S.W.3d 706, 718 (Tex. Crim. App. 2007). The gravamen of the offense is “not the particular

conduct that caused the injury, but the resulting injury that the conduct caused.” *Id.*; *see also Jefferson*, 189 S.W.3d at 312 (holding that the focus of Texas Penal Code Section 22.04(a) is the result of the conduct “and not the possible combinations of conduct that cause the result”).

The jury charge in this case instructed the jury to convict Saenz pursuant to section 22.04(a)(1): serious bodily injury. *See* TEX. PENAL CODE § 22.04(a)(1). Specifically, the charge stated that the jury could convict Saenz if it found that she caused serious bodily injury to J.S. on or about November 18, 2013: (1) by failing to provide her with adequate nutrition; (2) by failing to seek proper medical treatment for her, or (3) by failing to provide adequate supervision for her. The jury was instructed to return a unanimous verdict, but the charge did not require the jury unanimously to decide on which act by Saenz resulted in serious bodily injury to J.S. The charge alleged various means by which Saenz caused serious bodily injury, and unanimity among the means was not required. *Jefferson*, 189 S.W.3d at 312 (holding a jury does not have to be unanimous about the act or omission that caused injury to a child). The jury charge did not permit a non-unanimous verdict on the underlying statute, and therefore the charge was not erroneous. *Price*, 457 S.W.3d at 440. We overrule Saenz’s second issue.

Juror Replacement

Saenz contends that the trial court erred by excusing a qualified juror over defense counsel's objection. During the trial, it was brought to the court's attention that juror 13's uncle had passed away. At that time, it was believed that the funeral would be the following Monday or Tuesday. The trial court attempted to accommodate the juror by scheduling trial proceedings around the funeral and instructed an alternate juror that she would not be able to go on a planned business trip the following week because the trial would extend into it. During the next week, juror 13 informed the judge that the funeral would likely be at the end of the week. The trial court examined the juror who responded that she was extremely emotional and though she was paying attention, she was also constantly thinking about her family. During the exchange, the juror was crying and emotional. The trial court discharged the juror stating that the juror was preoccupied and emotionally upset and that the court was concerned about her ability to focus on the testimony and to be a fair juror. Saenz's counsel objected that the defense would be harmed by seating an alternate juror because the alternate lacked the same life experiences as the excused juror. Counsel moved to strike the alternate and proceed with the remaining 11 jurors. The trial court denied the request.

A. Standard of Review

A juror is disabled if she has a physical illness, mental condition, or emotional state that hinders her ability to perform her duties as a juror. *Hill v. State*, 90 S.W.3d 308, 315 (Tex. Crim. App. 2002). A disability includes any condition that inhibits a juror from fully and fairly performing the functions of a juror. *Routier v. State*, 112 S.W.3d 554, 588 (Tex. Crim. App. 2003).

The trial court has discretion to determine whether a juror has become disabled and to seat an alternate juror. *Scales v. State*, 380 S.W.3d 780, 783 (Tex. Crim. App. 2012); *see* TEX. CODE CRIM. PROC. art. 36.29. In deciding to remove a juror, the trial court must make a finding, sufficiently supported by the record, that the juror was disqualified or unable to perform the duties of a juror. *Scales*, 380 S.W.3d at 783. We may not substitute our own judgment for that of the trial court. *Id.* at 784. Instead, on appeal, we assess whether, after viewing the evidence in the light most favorable to the trial court's ruling, the ruling was arbitrary or unreasonable. *Id.* The ruling must be upheld if it is within the "zone of reasonable disagreement." *Id.*

B. Analysis

Article 33.011(b) of the Texas Code of Criminal Procedure states that, before a jury renders a verdict regarding a defendant's guilt or innocence, the alternate jurors "shall replace jurors who . . . become or are found to be unable or disqualified

to perform their duties” TEX. CODE CRIM. PROC. art. 33.011(b). Article 33.011 of the Code of Criminal Procedure provides that the trial court may call up to four additional jurors to be impaneled as alternate jurors. *Id.* art. 33.011(a). If a juror is found to be “unable or disqualified” to perform her duties, before a verdict has been reached as to guilt or innocence, then the trial court “shall” replace the disabled juror with an alternate juror. *See id.* art. 33.011(b); *Romero v. State*, 396 S.W.3d 136, 148 (Tex. App.—Houston [14th Dist.] 2013, pet. ref’d).

The record reflects that the juror was properly dismissed and replaced. A juror can become “disabled” if an emotional problem hinders her ability to fully and fairly perform the juror function. *See Castro*, 233 S.W.3d 46, 49 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding that trial court did not abuse its discretion in excusing juror who suffered from an emotional state that hindered his ability to perform his duties). The trial court examined juror 13, and the juror became very emotional after the death of her uncle. The event recalled negative emotions associated with the death of her mother a year earlier. Although the juror asserted that she would try to be openminded and pay attention, she also admitted that half of her thoughts were focused on her aunt. She stated that she was constantly thinking about her aunt, because she had experienced similar grief as her aunt after the loss of her mother. The record also reflects that the trial court considered that the trial would be delayed two days while the juror attended the funeral.

The trial court was able to hear directly from the juror and evaluate her demeanor before dismissing her. Once the juror was disabled, the trial court replaced her with an alternate juror. *See* TEX. CODE CRIM. PROC. art. 33.011(b). The trial court did not abuse its discretion in determining that the juror suffered from an emotional condition that hindered her ability to fully perform as a juror. *See Castro*, 233 S.W.3d at 49; *see also Allen v. State*, 867 S.W.2d, 427, 430 (Tex. App.—Beaumont 1993, no pet.) (trial court did not abuse its discretion in finding a juror disabled by an emotional condition after two family members passed away and the juror stated his concentration would not be 100 percent). We overrule Saenz’s third issue.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Keyes, Lloyd, and Kelly.

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