

In an assault with bodily injury, engaging in reckless behavior is not the same as engaging in recklessly injuring someone. [In the Matter of I.L.](12-4-9)

On August 8, 2012, the El Paso Court of Appeals held that during an assault with bodily injury trial the trial court improperly submitted a jury charge which allowed the jury to adjudicate the juvenile delinquent for engaging in reckless behavior (a conduct-oriented charge) rather than recklessly injuring the complainant (a result-oriented charge).

¶ 12-4-9. **In the Matter of I.L.**, No. 08-10-00273-CV, --- S.W.3d ----, 2012 WL 3195097 (Tex.App.-El Paso, 8/8/12).

Facts: On April 23, 2009, the students in Jose Montoya's art class at Desert Wind Middle School were given their routine bathroom break. The class was made up of both 7th and 8th grade students. Appellant was in 8th grade at the time and I.M., the victim, was in 7th grade.

While the students took their break, Montoya went across the hall to the teachers' facility. When he returned to the classroom he noticed I.M. at the back of the class, "not his normal self." Montoya spoke with the boy, who told him, "The guys threw me in the trash can." I.M. was visibly upset, crying, in distress, and in pain.

Montoya took Appellant and two other boys—E.C. and D.G.—outside the classroom. The trio admitted to throwing I.M. in the trash can. Appellant claimed they did it because I.M. was "little." The boys also said it was a joke and they were just playing. Montoya gave the boys a chance to apologize, but Appellant simply said, "I'm sorry, because you're just such a little shit." In Montoya's opinion, Appellant showed no remorse for his actions and even laughed while he apologized. Montoya then headed to file a report when Marco Tristan, the Dean of Instruction, walked down the hallway. Tristan took the three boys down to his office.

Once inside his office, Tristan asked the boys what happened. The boys were "very apologetic." Appellant claimed he had been the main instigator and asked Tristan to dismiss the other two boys. Tristan also spoke with I.M. As a result of their conversation, Tristan decided that I.M. had not been playing. He called I.M.'s mother, the parents of the three boys, and the Socorro Independent School District's Police Department.

The following day, Officer Jorge Murillo of the Socorro Independent School District Police Department went to Desert Wind Middle School to investigate the incident. He spoke with I.M.'s parents and also with I.M. directly. Officer Murillo testified that he observed red marks on the back of I.M.'s neck as well as a scratch on the left side of his stomach.

I.M.'s mother testified that her son was physically injured as a result of the incident. The boy's neck and waist area were hurt, and there were marks and bruises on his neck and hand. There was also swelling and it took three days for her son to recover.

I.M. testified that when he left the classroom, the restroom was full and he waited outside. Appellant, E.C., and D.G., grabbed him by his neck and pushed him head first into a trash can. I.M. resisted by putting his hands on the edge, but the three boys overpowered him. He

fell down, hit his head, and heard his neck pop. As he tried to pull himself out, the boys shoved him down a second time. He again hit his head and heard his neck pop. At one point, the trash can was knocked over. The scenario was repeated yet a third time. During the incident, the boys were laughing at him and he was crying.

The defense called E.C. and D.G. as witnesses. E.C. testified that he, Appellant, D.G., and I.M. were playing with a soccer ball in Montoya's class just before the restroom break. According to E.C., the boys were all playing around and having a good time. No one was angry at I.M. or trying to hurt him. E.C. testified that the boys grabbed I.M. and put him inside the trash can, but he reiterated that all of the boys, including I.M. were “playing,” and that no one punched or kicked the trash can during the incident. E.C. also testified that he did not intend to hurt I.M. when he pushed him into the trash can. D.G.'s testimony essentially tracked that of E.C. All of the boys were engaged in horseplay in Montoya's classroom just before the bathroom break. D.G. had no ill will against I.M. and had no reason to want to hurt him.

Appellant testified in his own defense, claiming that all four boys were horsing around with a soccer ball prior to their break. He heard someone say, “Let's—let's throw [I.M.] to the trash can.” Appellant admitted that he grabbed I.M. by the legs and threw him into the trash can but he did not intend to hurt him. He did not see I.M. crying, but he knew the boy was upset during the incident. Appellant apologized, but he denied cussing when doing so.

On August 21, 2009, the State filed a petition alleging that Appellant engaged in delinquent conduct. The live pleading at trial alleged Appellant:

[D]id then and there intentionally, knowingly or recklessly cause bodily injury to [I.M.] by throwing the said [I.M.] into a trash can, in violation of Section 22.01 of the Texas Penal Code.

The case proceeded to a jury trial.

After hearing all the evidence, the jury found Appellant engaged in delinquent conduct by committing assault causing bodily injury against I.M. and adjudicated Appellant as delinquent. The presiding judge signed and filed an order of adjudication consistent with the jury's verdict and set a disposition hearing. After considering the evidence and the pre-disposition report, the court found that Appellant's parents “provide strong family support” and were able to provide Appellant with “suitable supervision at home.” It determined that Appellant was not in need of rehabilitation and issued a final judgment without disposition.

On appeal, Appellant raises two issues. In Issue One, he complains of charge error. In Issue Two, he challenges the legal sufficiency of the evidence to prove he acted with the requisite mental state.

In Issue One, Appellant contends that the abstract portion of the jury charge wrongfully included the full statutory definition of “recklessly,” one of the three possible mental states for assault causing bodily injury. According to Appellant, the definition should have been limited to the language relating to the “result of conduct” and that, as submitted, the charge allowed the

jury to adjudicate him delinquent for engaging in reckless behavior (a conduct-oriented charge) rather than recklessly injuring the complainant (a result-oriented charge). Appellant contends this amounts to fundamental and reversible error.

Held: Affirmed

Opinion: We begin our inquiry by examining whether there was error in the charge. The petition alleged that Appellant committed assault by “intentionally, knowingly, or recklessly” causing bodily injury to I.M. in violation of Section 22.01 of the Texas Penal Code. The full statutory definitions of “intentionally,” “knowingly,” and “recklessly” provide:

(a) 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.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to 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.

(c) 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. 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. TEX.PENAL CODE ANN. § 6.03(a), (b), & (c)(West 2011).

Here, the abstract portion of the charge limited the definitions of “intentionally” and “knowingly” to the result-of-conduct language:

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

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. [Emphasis in original].

However, the charge included the full statutory definition of “recklessly.” In other words, the definition included the phrase “with respect to circumstances surrounding his conduct or the result of his conduct.” [Emphasis added].

On appeal, Appellant's complaint is based on the italicized text. He maintains that the italicized language should have been excluded because, as written, the charge allowed the jury to adjudicate him delinquent for engaging in reckless behavior (a conduct-oriented charge) rather

than recklessly injuring the complainant (a result-oriented charge). We agree.FN1

There are three conduct elements which may be involved in any offense: (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct. See *Hughes v. State*, 897 S.W.2d 285, 295 n. 14 (Tex.Crim.App.1994), cert. denied, 514 U.S. 1112, 115 S.Ct. 1967, 131 L.Ed.2d 857 (1995); *Cook v. State*, 884 S.W.2d 485, 487 (Tex.Crim.App.1994). As the Court of Criminal Appeals laid out in *Hughes* and *Cook*, a proper jury charge limits the definitions of the applicable culpable mental states to include only the language regarding the relevant conduct elements. See *Hughes*, 897 S.W.2d at 295–96; *Cook*, 884 S.W.2d at 491–92.

In *Cook*, the defendant was charged with murder and convicted of the lesser included offense of voluntary manslaughter. *Cook*, 884 S.W.2d at 485, 487. The definitions of the applicable mental states—“intentionally” and “knowingly”—included the full statutory definitions. *Id.* The defendant objected to the charge, arguing that because murder is a result-of-conduct offense, the definitions of the culpable mental states should have been limited to the result language only. *Id.* at 486. The Court of Criminal Appeals agreed and held that because murder is a result-of-conduct offense, the trial court erred in refusing to limit the definitions of the culpable mental states. *Id.* at 491–92.

Similarly, in *Hughes*, a jury convicted the defendant of capital murder of a peace officer based on a jury charge which included the following definitions of the applicable 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 to 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. [Emphasis in original].*Hughes*, 897 S.W.2d at 294.

The appellant complained that the italicized portions allowed the jury “to find criminal liability from the knowledge of conduct or circumstances surrounding the conduct (i.e.; intent to pull trigger) rather than from the consequences or results of the conduct (intent to cause death of deceased).” *Id.* at 295. The Court of Criminal Appeals looked to the indictment and found that the offense could be viewed to include two of the three conduct elements: (1) the result-of-conduct element (appellant intentionally or knowingly caused the death of the deceased); and (2) the circumstances surrounding the conduct (appellant knew the deceased was a peace officer). *Id.* at 295. But because the offense did not contain a nature-of-conduct element, the court found the trial court erred by failing to limit the definitions of the culpable mental states to the result and circumstances of conduct elements. *Id.* at 296, citing *Cook*, 884 S.W.2d at 491–92.

Conclusion: Assault causing bodily injury is a result-oriented offense. Therefore, the proper definitions of the culpable mental states (intentionally, knowingly, recklessly) should be limited

to include only the result of conduct element. See Hughes, 897 S.W.2d at 295; Cook, 884 S.W.2d at 489 n. 3. Accordingly, the trial court erred. See Hughes, 897 S.W.2d at 296; Cook, 884 S.W.2d at 491–92. We must now analyze the error for harm. See Ngo v. State, 175 S.W.3d 738, 743 (Tex.Crim.App.2005).

After analyzing the error in light of all four Almanza factors, we conclude that Appellant has not suffered egregious harm. We overrule Issue One.