No. 14-24-00730-CR

In the Court of Appeals
for the
Fourteenth District of Texas

TIMOTHY RAY ELLIS
Appellant

v.

THE STATE OF TEXAS,
Appellee

No. 22-CR-4191 in the 212th District Court
Galveston County, Texas

APPELLANT'S BRIEF

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Statement of the Case

Appellant Timothy Ray Ellis was charged by indictment with the first degree degree felony of felony murder. CR7; Tex. Pen. Code Ann. § 19.02(b)(3) (West 2011). Ellis pled not guilty and a jury found him guilty. 4RR99; 6RR5. The jury sentenced Ellis to sixty years confinement and a $5,000 fine. 6RR48-49; CR93. Ellis filed timely written notice of appeal. CR102.

Statement of Facts

This case involves a household dealing with incapacitating mental illness, extreme poverty, and inadequate access to desperately needed social services. The complainant, Edwin Colleson, was 45 years old at the time of his death in December of 2022. He was intellectually disabled and lived with his mother, Billie Barnes, and her boyfriend, Timothy Ray Ellis. Barnes entered a guilty plea to injury to a disabled person pursuant to a plea agreement and was sentenced to 10 years TDC in exchange for her testimony against Ellis. 5RR107-08.

Barnes testified that Colleson was well-behaved and generally able to care for himself most of his life. 5RR108-111. With an IQ of 53, Colleson had difficulty communicating a sequence of events and could not cook on a stove or drive. 5RR148. But he was helpful around the house and volunteered at a soup kitchen. 5RR108, 111.

Barnes met Timothy Ellis in 2019. They became romantically involved and soon moved in together in Baytown. Ellis and Colleson got along well at first and Barnes was glad to have help with Colleson. 5RR111-13.

When the three moved into an RV in Hitchcock, things changed. Ellis became very controlling and would not allow Barnes or Colleson to leave the RV. 5RR114. Ellis would not even allow them to take out the trash; Barnes described the RV as a "hoarder's den." 5RR115-16. Barnes and Ellis slept on a mattress in a bedroom, and Colleson slept on a high bunk in the back of the RV. 5RR116. Ellis insisted that they urinate in plastic bottles instead of the toilet. 5RR119.

At some point Ellis began limiting Barnes's contact with Colleson. He told her Colleson was surrounded by demons. 5RR120. Barnes testified that she saw him only about once a month. 5RR123. Ellis was very controlling about food and Colleson became emaciated. 5RR121-23. Ellis kept the refrigerator locked with a padlock, but Barnes knew the combination. She would try to get Colleson extra food during the infrequent occasions when Ellis left the RV. 5RR131-32.

Ellis intimidated Barnes by pointing out that he had friends in law enforcement. He coerced Barnes's compliance by threatening to take Colleson to a "psych ward" and warning that she would never see him again. 5RR123. Ellis began hitting Barnes, but she never saw him hit Colleson. 5RR124. Barnes testified that

she had no ability to leave because lost her glasses and could not drive. She felt that she could not physically overpower Ellis. 5RR129.

Barnes testified that Colleson was able to get up and walk until about a month before his death, when he fell from the bunk and injured his ear. The ear became infected and he developed "cauliflower ear," a deformity associated with repeated trauma. 5RR125. Barnes testified that it did not occur to her call 911. 5RR142.

Barnes testified that a few days before Colleson's death, Ellis carried him out from his bunk and placed him on a blanket on top of some garbage bags. Colleson looked pale and his face was sunken. He was in clothing so Barnes could not see his body. 5RR126. Ellis told Barnes that he had medical field training. He cut the infected ear to drain it, then sewed it up. 5RR125, 128-29. Ellis put Colleson in restraints to keep him from reaching his ear. 5RR127. Within days, Colleson's condition worsened: he was not moving well, could not stand up, and eventually stopped talking. 5RR128-29. When Colleson's breathing seemed weak, Ellis called 911. 5RR131.

EMS was dispatched to the RV for a report of a fall. Ellis refused to allow responders into the RV and carried Colleson outside. Responders described Colleson as extremely emaciated, unresponsive, with a faint heartbeat and no pulse. 4RR107-09. Police were summoned. 4RR118. Colleson was covered in a yellow paste made from turmeric. There were ligature marks on his wrists and ankles and open wounds

on his body. 4RR108-09. His pants were soiled with feces and urine, and his bandaged ear was covered with pus and blood. 4RR119.

Ellis was very cooperative. 4RR131. In what was described as a "cordial" exchange, he told the responders that he was a holistic healer and had used turmeric to treat Colleson. 4RR114. He reported that Colleson had resisted feeding, was combative, and was and dangerous with knives. 4RR128-29. Ellis advised that he cut the infected ear with an exacto knife and sewed it with fishing line. 4RR126. He reported that he had to tether Colleson around his neck, wrists, and legs with a leather strap to keep him from further injuring his ear. 4RR129.

Cassidy Wise was the emergency nurse on duty when Colleson arrived at HCA Mainland Hospital. 4RR133. She described Colleson as extremely thin, bright yellow from turmeric, and smelling of urine and feces. His pants were crumbling from being wet and dried repeatedly. He was unconscious and had sores all over his body. 4RR134-37.

Wise received a telephone call from Barnes and Ellis shortly after Colleson was admitted. Ellis spoke with Wise for about 45 minutes, describing Colleson's history and his efforts to treat him. Wise took several pages of notes during the call. 4RR139-40. Ellis reported that Colleson was possessed by demons. SX97. Ellis described how he used cloves on the ear to deaden it before sewing it back together with fishing line, which he believed he did in a professional manner. He explained

that the turmeric was reduce inflammation. Ellis reported that Colleson kept sabotaging the ear so he tied his knees, neck, and hands just tight enough so that Colleson could not bring his hands up or get down from the bunk. Wise described Ellis's demeanor as arrogant, "as if he knew better than doctors," but also acknowledged that Ellis sincerely wanted to help with treatment by providing background information. 4RR142-44, 151. Wise notified the police and contacted an abuse hotline. 4RR145-46.

Dr. Candice Dunn, medical director for inpatient services at HCA Mainland, was called into the hospital at 4 a.m. to assist with Colleson's treatment. 4RR38-40. Colleson was on a ventilator. Dr. Dunn testified that he could communicate by blinking for the first hour, then became unresponsive. 4RR40-42. She knew immediately that Colleson could not be saved. 4RR43. Her testimony described his condition, as documented in photos:

- four recently broken ribs on right side and multiple pelvic fractures, indicating high trauma
- perforated ulcer in duodenum
- ligature marks on all extremities and in his beard, along with dried blood
- skin infection around ligature marks and swollen hands from tied ligatures
- missing teeth that were bleeding and cut lips

- ear with cauliflower deformity from repetitive damage, cut and crudely sewn up, with a cotton swab left in the ear canal
- small circular wounds everywhere on his body, possibly cigarette burns
- contractures in both legs (muscles spasm causing inability to move or extend legs), indicating that Colleson had been confined for weeks
- pneumonia in both lungs
- cradle cap infection on scalp from not being bathed for weeks
- pressure wound on elbow from lying flat for weeks
- skin ulcers and traces of feces on buttocks
- non-healing wounds on hands from malnutrition
- necrotic and gangrenous wounds on skin
- bleeding and necrotic wounds on genitals
- ulcers on feet from lack of blood flow

4RR44-64.

Dr. Dunn testified that Colleson weighed 68 pounds when admitted. She opined that he would have been immobile and unable to feed himself for at least a month, and that he could not have done this to himself. 4RR61-63. Dr. Dunn testified that a duodenal ulcer could be caused by various things, including stress or excess stomach acid due to lack of food and water. 5RR64. Colleson was given palliative

care (feeding tube, fluids, and antibiotics) but died of cardiac arrest three days after being admitted. 4RR47-50.

Hitchcock Police Department officers secured a search warrant for the RV. 5RR29. They had to wear hazmat suits and respirators to enter. 5RR10. The officers took photos showing piles of garbage several feet deep throughout the trailer. 4RR167; SX24-77. They documented numerous bottles of herbs and essential oils. The bathtub was filled with cleaning supplies and looked like it had not been used recently. 5RR32-36. Amongst the trash officers found a mattress where Ellis and Barnes slept. 5RR9. Officers located a high plywood bunk, with no ladder, mattress, or bedding, where Colleson slept. The bunk was infested with insects and cluttered with garbage bags and plastic bottles of urine. 5RR11, 26-27. The officers collected the belt used to restrain Colleson and bottles of clove and turmeric. 5RR14.

Ellis agreed to be interviewed. He said Colleson had become increasingly violent. He reported that Colleson had killed two children when he was eight by punching them in the stomach,[1] and that he and Barnes had to hide knives from him. 5RR24. Ellis said Colleson had always been skinny and wore baggy clothes. He admitted that he treated Colleson's infected ear by performing surgery on it. 5RR26-27.

[1] The officers found this claim not credible and did not investigate it. 5RR26.

An autopsy was conducted by Dr. Erin Barnhart, Chief Medical Examiner for Galveston County. 5RR71. Her external exam documented severe malnourishment, an infected wound with necrotic tissue on the ear, pressure wounds and ulcerated skin on various parts of the body from immobility and lack of bathing, infected genitals with broken skin from prolonged exposure to dampness, contracted legs, and ulcerated ligature marks on limbs. 5RR82-90. The internal exam revealed recent and old rib fractures, probable pelvic fractures, severe bilateral pneumonia, two duodenal ulcers, peritonitis caused by a perforated duodenal ulcer, and adhesions on organs from prior injury or infection. 5RR91-98.

Dr. Barnhart ruled the cause of death acute peritonitis (infection of the abdominal cavity) due to a perforated duodenal ulcer, with several contributory causes: bilateral pneumonia, multiple soft tissue wounds, severe malnutrition, skeletal fractures, mental retardation, and prolonged immobility. 5RR79-80. Dr. Barnhart testified that the perforated ulcer would be fatal within days without surgical intervention, but the other factors were potentially treatable. 5RR95-96. The manner of death was designated as undetermined because of the complexity of the contributing factors. 5RR80.

Dr. Barnhard testified that ulcers are common and are caused by peptic ulcer disease, primarily from infection with helicobacter pylori and/or chronic use of medications like ibuprofen. She could not identify the cause of an ulcer in any case

but noted that there are numerous factors and conditions that predispose one to having ulcers. 5RR95-96. She opined that it was entirely possible that Colleson's caretakers did not know he had pneumonia or ulcers, especially if Colleson was unable to communicate effectively because of mental retardation. 5RR103.

Issues Presented

Issue One: The evidence is legally insufficient to prove that an act clearly dangerous to human life caused the death.

Issue Two: The trial court improperly broadened the indictment by including recklessness and negligence in the jury instructions when the indictment alleged "intentionally and knowingly."

Summary of the Arguments

Issue One: The evidence is legally insufficient to prove that an act clearly dangerous to human life caused the complainant's death. The medical examiner identified the cause of death as an acute infection caused by a perforated ulcer, a latent condition that would become fatal within days without surgery. The expert testimony from the medical examiner and the treating physician established that there are various factors that can predispose one to ulcers, including lack of food, stress, bacterial infection, or overuse of certain medications. But the experts identified only possible causes of the complainant's ulcer. A jury would have to speculate about a medical condition with complex etiology to find that any act on Ellis's part was a direct and foreseeable cause of the perforated ulcer and resulting fatal infection.

Issue Two: The trial court erred in submitting jury instructions for the charged offense that contained lesser culpable mental states than what was included in the indictment. The indictment alleged that the two underlying felonies were committed "intentionally and knowingly." The application paragraph for the charged offense improperly broadened the indictment by including recklessness and criminal negligence for the underlying felony of injury to a disabled individual and "recklessly" for the underlying felony of illegal restraint. Ellis suffered egregious harm because whether Ellis's mental state (whether he was aware that he was harming the complainant) was a hotly contested issue. The improperly submitted lesser mental states relieved the State of its burden of proving that Ellis intentionally and knowingly harmed the complainant, making the case for guilt clearly and substantially more compelling.

Arguments – Issue One (Insufficiency)

A. Standard of Review

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires every state criminal conviction to be supported by evidence that a rational trier of fact could accept as sufficient to prove all the elements of the offense charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App.1993).

In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). If the record supports conflicting inferences, the reviewing court must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326. The factfinder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). A verdict that is irrational must be overturned. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

B. The evidence fails to prove that Ellis committed an act clearly dangerous to human life that directly and foreseeably caused the death.

1. The causation element.

Felony murder essentially is "unintentional" murder committed in the course of a felony. *Rodriguez v. State,* 454 S.W.3d 503, 507 (Tex. Crim. App. 2014). A

person commits felony murder if the person "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, the person commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." Tex. Pen. Code Ann. § 19.02(b)(3).

Under this statute, the State must prove five things: "(1) an underlying felony, (2) an act clearly dangerous to human life, (3) the death of an individual, (4) causation (the dangerous act causes the death), and (5) a connection between the underlying felony and the dangerous act ('in the course of and in furtherance of ... or in immediate flight from')." *Contreras v. State*, 312 S.W.3d 566, 583–84 (Tex. Crim. App. 2010).

The "act clearly dangerous to human life" must be the cause of the victim's death. *Rodriguez v. State,* 454 S.W.3d 503, 507 (Tex. Crim. App. 2014). Whether the act is clearly dangerous to human life is measured under an objective standard, not the subjective belief of the actor. *Lugo–Lugo v. State*, 650 S.W.2d 72, 81 (Tex. Crim. App. 1983).

The indictment charged in separate paragraphs two alternative underlying felonies: injury to a disabled individual (Tex. Pen. Code Ann. § 22.04) and unlawful restraint exposing to serious bodily injury (Tex. Penal Code Ann. § 20.02(a), (c)(2)(A)). Each paragraph alleged the same four (alternatively pled) acts clearly

dangerous to human life that caused the death: "lock a refrigerator to prevent Edwin Colleson from accessing food, bind Edwin Colleson's hands, legs, and neck using a belt and/or other ligature, perform unsafe medical procedures and/or surgeries on Edwin Colleson, and leave Edwin Colleson in wet clothing after bathing him." CR7.

Causation exists under the Penal Code where "the result would not have occurred but for [the] conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." Tex. Pen. Code Ann. § 6.04(a). The Court of Criminal Appeals has interpreted Section 6.04(a) to mean that

> a "but for" causal connection must be established between the defendant's conduct and the resulting harm. If concurrent causes are present, two possible combinations exist to satisfy the "but for" requirement: (1) the defendant's conduct may be sufficient by itself to have caused the harm, regardless of the existence of a concurrent cause; or (2) the defendant's conduct and the other cause together may be sufficient to have caused the harm. However, § 6.04(a) further defines and limits the "but for" causality for concurrent causes by the last phrase, "unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." If the additional cause, other than the defendant's conduct, is clearly sufficient, by itself, to produce the result and the defendant's conduct, by itself, is clearly insufficient, then the defendant cannot be convicted.

Robbins v. State, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986).

The Court of Criminal Appeals has instructed that an element of foreseeability limits criminal causation just as it limits principles of civil "proximate causation." *Cyr v. State*, 665 S.W.3d 551, 557 (Tex. Crim. App. 2022); *Williams v. State*, 235

S.W.3d 742, 764–65 (Tex. Crim. App. 2007). The defendant's conduct "must be a direct cause of the harm suffered," and criminal liability exists only if the result was "reasonably foreseeable." *Williams* at 755, 764-65. Thus, the result must be within the "scope of risk" of which the defendant is aware, and any intervening cause must be reasonably foreseeable. *Id.* a 764-65.

In this case, the State had to prove beyond a reasonable doubt that Ellis committed an act clearly dangerous to human life that (1) directly and foreseeably caused the death, and (2) was sufficient, alone or in combination with another cause, to cause the death.

2. The testimony.

The medical examiner, Dr. Barnhart, testified that the cause of death was acute peritonitis (infection of the abdominal cavity) due to a perforated duodenal ulcer. She identified several contributory causes: bilateral pneumonia, multiple soft tissue wounds, severe malnutrition, skeletal fractures, mental retardation, and prolonged immobility. 5RR79-80. Dr. Barnhart testified that the perforated ulcer would be fatal within days without surgical intervention, but that Colleson might have recovered from the contributory causes. 5RR95-96. As to manner of death, Dr. Barnhart testified: "Because the degree to which intentional injury, neglect, the use of restraints, or other unknown factors may have played a role in the decedent's death is uncertain, the manner of death is best classified as undetermined." 5RR99.

Regarding the cause of the ulcer, Dr. Barnhard testified that ulcers are commonly caused by infection with helicobacter pylori and/or chronic use of medications like ibuprofen. She testified that there are various conditions that predispose one to having ulcers and that she could not identify the cause of an ulcer in any particular case. 5RR95-96.

Dr. Dunn, the treating physician, testified that an ulcer can be caused by various things, including stress or excess stomach acid due to lack of food and water. 5RR64.

3. The evidence failed to prove a clearly dangerous act that directly caused the death.

The expert testimony established that Colleson died from an acute infection, caused by a perforated ulcer, that would become fatal with days. The experts identified several possible causes of a perforated ulcer (stress, lack of food and water, bacterial infection, and overuse of certain medications) and testified that other unspecified factors and conditions could contribute or predispose one to ulcers. But neither expert identified a specific cause in this case.

There was no testimony that Ellis's restraining Colleson, performing surgery on Colleson's ear, or leaving Colleson in wet clothing was a direct cause of death. On the contrary, Dr. Barnhart testified the contributing causes of soft tissue wounds

and prolonged immobility were not inevitably fatal, and that the degree to which intentional injury or use of restraints played a role in the death was "uncertain."

The only other charged clearly dangerous act, locking the refrigerator, was not established as a direct cause of death because the experts testified that ulcers have complex etiology. At best, lack of food was identified as a possible cause among other possible causes. Neither expert could rule out that the perforated ulcer was caused by a helicobacter pylori infection or some other predisposition or factor. Neither expert even testified that lack of food was a likely or contributory cause of Colleson's perforated ulcer.

A jury would have to speculate about complex physiological processes to find that Colleson's perforated ulcer was caused by locking a refrigerator. Juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013).

The paucity of evidence on causation prevents a fact-finder from sorting out whether withholding food – or any other act on Ellis's part – was sufficient, alone or in combination with other factors, to cause the perforated ulcer. Nor could a rational jury, on this record, rule out that some other factor, condition, or predisposition was clearly sufficient to cause the formation of the ulcer, as required by Section 6.04(a) of the Penal Code. Dr. Barnhart testified that the degree to which

other factors, known and unknown, may have played a role in the decedent's death is "uncertain." If a medical doctor is unable to offer an opinion as to whether Colleson's extreme malnourishment contributed to the formation of the perforated ulcer, then a lay jury would have to resort to mere speculation on causation, which is not legally sufficient evidence.

4. The evidence failed to prove a clearly dangerous act that foreseeably caused the death.

Likewise, the evidence failed to establish that the perforated ulcer and resulting fatal infection were reasonably foreseeable consequences of locking a refrigerator, or any other act. Dr. Barnhart testified that it was entirely possible that the caretakers did not know Colleson had an ulcer, especially if he had communication deficits due to intellectual disability. She further testified that there are "many people walking around with ulcers that don't ever perforate," but once perforation occurs the condition becomes fatal within days. 5RR103.

This chain of events is not reasonably foreseeable to a layperson. If neither expert could draw a non-speculative connection between withholding sustenance (or any other act) and the development of Colleson's perforated ulcer, then the ulcer and resulting acute and fatal infection cannot be within the scope of risk foreseeable to a non-expert. *Williams* at 764-65 (result must be within the "scope of risk" of which the defendant is aware, and any intervening cause must be reasonably foreseeable).

While it is undeniably foreseeable that denying access to food could cause death from malnutrition, there was no evidence that malnutrition was a direct cause of Colleson's death. On the contrary, Dr. Barnhart testified that she could not opine on the degree to which malnutrition (or any other contributing cause) played a role in the death, characterizing it as "uncertain."

The evidence fails to establish, beyond a reasonable doubt, that any clearly dangerous act on Ellis's part caused, directly and foreseeably, by itself or in combination with a concurrent cause, the ulcer that led to the acute internal infection that rapidly became fatal. The chain of causation from locking a refrigerator, to the development of an ulcer, to the perforation of the ulcer, to the peritonitis that quickly caused Colleson's death, is too speculative, indirect, and unforeseeable to support criminal liability.

Where the harm and causation elements to be proven involve complex physiology, the expert testimony must do more than speak in hypothetical or theoretical terms. *Edwards v. State*, 666 S.W.3d 571 (Tex. Crim. App. 2023), is illustrative. A mother was charged with reckless injury to a child for causing serious mental deficiency, impairment, or injury after she repeatedly used cocaine while breastfeeding. A hair-follicle test showed a high level of cocaine and cocaine metabolites in the child's system, and a drug screening expert testified that this level could cause withdrawals, loss of appetite, psychological effects, and possible mental

or physical developmental delays. *Id.* at 572-73. The child's guardian described the child as clingy, fussy, and small for her age. But there were no signs of developmental delays according to the guardian and pediatrician. *Id.* at 573. The defendant challenged the sufficiency of the proof that the cocaine ingestion caused "serious mental deficiency, impairment, or injury." The Court of Criminal Appeals observed that the expert testimony addressed only theoretical or hypothetical effects:

> …the witness testified in general or hypothetical terms about how ingestion of cocaine *could* be harmful. For example, he offered that "*potential*" short-term effects "*could*" include "loss of appetite, psychological effects, [or] your heart racing." He also listed the "*possibility*" of overdose and death. And then long-term effects "*could*" include seizures, the "*possible*" hardening of the right side of the heart, an increased "*risk*" of heart attack, and "*possible*" mental or physical developmental delays. No one testified that L.B. actually suffered from any of these theoretical side effects.

Id. at 576. The Court rejected the State's argument that the that harmful effects of cocaine are such common knowledge that the jurors could simply infer the harm, without expert testimony directly addressing the issue. The Court found that the average juror lacked the necessary expertise and would have to speculate as to whether the cocaine exposure caused "serious mental deficiency, impairment, or injury." Without testimony explaining "precisely how drug addiction and withdrawals affect a child's development, cognitive functioning, or mental health," jurors could not draw a reasonable inference about the existence of a serious mental deficiency, impairment, or injury. *Id.*

The same is true here. Dr. Dunn testified that various things "can cause" an ulcer, including lack of food and stress. 5RR64. Dr. Barnhard agreed that a lot of different factors could cause an ulcer and that she could not "narrow it down to just one thing" or determine a cause in any particular case. 5RR100-101. On this record the jury would have to engage in speculation to determine if any act on Ellis's part played a sufficient role in the development of the perforated ulcer to support criminal liability under the felony murder statute. The evidence failed to prove beyond a reasonable doubt that any clearly dangerous act was a direct and foreseeable cause of death.

5. Reformation of the judgment is unavailable.

If the evidence is insufficient to support an appellant's conviction for a greater-inclusive offense, a court of appeals may reform the judgment to reflect a conviction for a lesser-included offense if (1) in the course of convicting the appellant of the greater offense, the jury must have necessarily found every element necessary to convict the appellant for the lesser-included offense; and (2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, there is sufficient evidence to support a conviction for that offense. *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014).

In this case, the first *Thorton* inquiry cannot be satisfied because the constituent elements were submitted in the alternative.

The trial court submitted four lesser-included offenses: (1) Intentional or Knowing Causing Serious Bodily Injury to a Disabled Individual; (2) Recklessly Causing Serious Bodily Injury to a Disabled Individual; (3) Criminally Negligently Causing Serious Bodily Injury to a Disabled Individual; and (4) Unlawful Restraint exposes to Serious Bodily Injury. CR78-83.

But the two underlying felonies were submitted as alternative manner and means so it is impossible to ascertain which one supported the verdict. The underlying felonies involved distinct acts with no overlap. The jury could have convicted based upon unlawful restraint or injury to a disabled individual.

Moreover, each underlying felony was predicated on four different alternative manner and means: "lock a refrigerator to prevent Edwin Colleson from accessing food, bind Edwin Colleson's hands, legs, and neck using a belt and/or other ligature, perform unsafe medical procedures and/or surgeries on Edwin Colleson, and leave Edwin Colleson in wet clothing after bathing him." It is impossible to know which of the four acts the jurors found.

Additionally, different mental states attached to the two underlying felonies. The trial court submitted four possible mental states for the injury to a disabled individual: that Ellis "intentionally, knowingly, recklessly, or with criminal

negligence causing serious bodily injury and/or bodily injury" by committing one of the four acts. CR78. The mental state submitted for illegal restraint was different: that Ellis "recklessly exposed EDWIN COLLESON to a substantial risk of serious bodily injury" by committing one of the four acts. CR78-79.

Because it is impossible to ascertain which elements the jury necessarily found, reformation is not available. The Court must reverse the conviction and render an acquittal.

Arguments – Issue Two (Jury Charge Error)

A. Standard of Review

In reviewing a jury charge issue, an appellate court's first duty is to determine whether the charge contains error. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If the jury charge contains error, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). The court will reverse if an error was properly preserved by objection and is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). If, as in this case, the defendant did not object to it, reversal is required only if the error is so egregious that the appellant was deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171.

B. The trial court improperly broadened the indictment by including recklessness and criminal negligence in the jury instructions when the indictment alleged "intentionally and knowingly."

1. The indictment.

The felony murder rule dispenses with the necessity of proving the mens rea accompanying homicide because the underlying felony supplies the culpable mental state. *Matter of R.C.*, 626 S.W.3d 76 (Tex. App.—Houston [14th Dist.] 2021, no pet.); *Johnson v. State*, 4 S.W.3d 254, 255 (Tex. Crim. App. 1999).

An indictment for felony murder is not required to allege the constituent elements of the underlying felony, but it must allege the underlying felony and the culpable mental state attending the underlying felony committed. *Tata v. State*, 446 S.W.3d 456, 463 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *Johnson*, 4 S.W.3d at 255.

Here the indictment alleged two alternative underlying felonies, injury to a disabled individual and unlawful restraint exposing to serious bodily injury.

A person commits injury to a disabled individual if he "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury. Tex. Pen. Code Ann. § 22.04(a). The

statute provides different punishment ranges according to the culpable mental state. *Id.*, § 22.04 (e)-(g).

In the paragraph alleging injury to a disabled individual, the indictment alleged that "the defendant was then and there in the course of **intentionally or knowingly** committing a felony, to-wit: Injury to a Disabled Individual…". CR7.

A person commits unlawful restraint when the person "intentionally or knowingly restrains another person." Tex. Penal Code Ann. § 20.02(a). This offense is a third-degree felony if "the actor recklessly exposes the victim to a substantial risk of serious bodily injury" during the unlawful restraint. *Id.* § 20.02(c)(2)(A).

In the paragraph alleging illegal restraint, the indictment alleged that "the defendant was then and there in the course of **intentionally or knowingly** committing a felony, to-wit: Unlawful Restraint Exposing to Serious Bodily Injury…". CR7.

2. The jury instructions improperly broadened the indictment.

In the section titled "APPLICATION OF LAW TO FACTS" the trial set out the elements of the underlying felonies but improperly submitted lesser culpable mental states that were not authorized by the indictment:

> You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that –
>
> 1a. the defendant, in Galveston County, Texas, on or about November 30, 2022 committed or attempted to commit, injury to a disabled

> individual by intentionally, knowingly, ***recklessly, or with criminal negligence*** causing serious bodily injury and/or bodily injury by locking a refrigerator to prevent EDWIN COLLESON, a disabled individual, from accessing food, binding EDWIN COLLESON'S hands, legs, and neck using a belt and/or other ligature, performing unsafe medical procedures and/or surgeries on EDWIN COLLESON and/or leaving EDWIN COLLESON in wet clothing after bathing him,
>
> OR
>
> lb. the defendant, in Galveston County, Texas, on or about November 30, 2022 committed or attempted to commit, unlawful restraint exposed to serious bodily injury by intentionally, or knowingly restrained EDWIN COLLESON and ***recklessly*** exposed EDWIN COLLESON to a substantial risk of serious bodily injury by locking a refrigerator to prevent EDWIN COLLESON from accessing food, binding EDWIN COLLESON'S hands, legs, and neck using a belt and/or other ligature, performing unsafe medical procedures and/or surgeries on EDWIN COLLESON and/or leaving EDWIN COLLESON in wet clothing after bathing him.

CR78.

A defendant is to be tried only on the felony crimes alleged in the indictment. *See Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994). Where the indictment facially alleges a complete offense, the State is bound by the theory alleged in the indictment. *See Fisher v. State*, 887 S.W.2d 49, 55, 57 (Tex. Crim. App. 1994). The jury charge must not enlarge the offense alleged and authorize the jury to convict the defendant on a basis or theory permitted by the jury charge but not alleged in the indictment. *Fella v. State*, 573 S.W.2d 548, 548 (Tex. Crim. App. 1978).

It is error for jury instruction to add to the charged offense a lesser culpable mental state than what was included in the indictment, even if the lesser mental state is allowed under the statute. *Reed v. State*, 117 S.W.3d 260, 264-65 (Tex. Crim. App. 2003); *Wilson v. State*, 625 S.W.2d 331 (Tex. Crim. App. 1981).

In *Reed* the defendant was convicted of aggravated assault. He argued on appeal that the trial court improperly charged the jury by including the mental state of recklessness when the indictment alleged only the mental states of intentionally and knowingly. *Id.* at 260. Even though the statute allows conviction of aggravated assault if the person recklessly caused bodily injury to another, this mental state was not charged in the indictment. The Court held that the State's failure to allege recklessness in the indictment precluded the inclusion of recklessness in the jury charge, and it was error for the jury instructions to expand the indictment. *Id.* at 265.

Likewise, in *Wilson* the defendant was indicted for aggravated robbery with the culpable mental states of intentionally and knowingly. The Court of Criminal Appeals found error because the application paragraph of the jury charge allowed him to be convicted of aggravated robbery if the jury found that he acted intentionally, knowingly, or recklessly. 625 S.W.2d at 333.

Here, the indictment alleged only the culpable mental states of intentionally and knowingly for both underlying felonies. It was error for the jury instructions to

broaden the indictment by submitting recklessness and negligence for injury to a disabled individual and "recklessly" for unlawful restraint.

C. Reversal is required.

Because Ellis did not object to the errors, reversal is required only if the errors are so egregious that he was deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171. An appellate court should consider the cumulative effect when there are multiple errors. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *Stahl v. State*, 749 S.W.2d 826, 828 (Tex. Crim. App.1988); *Harris v. State*, 56 S.W.3d 52, 59 (Tex. App.-Houston [14th Dist.] 2001, pet. ref'd). The record must show that the defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Almanza* at 174.

In examining the record to determine whether such harm occurred, a reviewing court considers (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the argument of counsel and (4) any other relevant information revealed by the record of the trial court as a whole. *Almanza* at 171.

1. The entire jury charge

The improper lesser culpable states were submitted in the only application section that set out all of the elements of the underlying felonies. This section was followed by a more general and less comprehensive application section that mirrored

the indictment in requiring the jury to find that Ellis "intentionally and knowingly" committed the underlying felonies, but left out the elements of the underlying felonies. It is unlikely that the jury disregarded the lesser culpable mental states set out in the initial application section because the follow-up section explicitly referenced the prior section, stating, "Now, bearing in mind the foregoing instructions…". CR80.

The jury likely relied on the comprehensive application paragraphs in evaluating the elements of the underlying felonies, including the improperly-submitted lesser culpable mental states.

2. The state of the evidence

Whether Ellis acted intentionally, knowingly, recklessly, or negligently was a hotly contested issue. Undoubtedly, Colleson suffered extreme abuse and neglect from an objective standpoint. But the deplorable and unsanitary conditions of the living premises showed that his caretakers were not in good mental health. The State even admitted in argument that Ellis's thought processes were irrational, as evidenced by his conversations with police and hospital staff. 5RR180.

Ellis did not plead the insanity defense, but under the indictment the State was still required to prove that he either intended to harm Colleson or was aware that his acts were harming him. Ellis showed no consciousness of guilt, and nearly every

witness who had contact with Ellis testified that he appeared to sincerely believe that his misguided remedies and interventions were helping Colleson, not harming him.

EMS responder Jeremy Progner recounted that Ellis said he was a healer, knew how to cure cancer, and used turmeric to treat Colleson. 4RR114.

Ellis candidly described for the police, with graphic detail, how he treated Colleson's infected ear by cutting it and sewing it up, and how he restrained Colleson to keep him from further injuring the ear. 4RR126, 129. Hitchcock PD Officer Sanford testified that Ellis was fully cooperative, considered himself a holistic healer, and was extremely relieved to hear Colleson was stable at the hospital. 4RR130-31. Numerous bottles of herbs and essential oils were documented in the RV. 5RR32-36.

The treating nurse, Cassidy Wise, testified that she believed that Ellis called the hospital with the sincere intent to help with treatment by providing background information. 4RR151. Ellis explained to her how he used cloves as an anesthetic and turmeric to treat inflammation. 5RR149. Wise testified that Ellis was proud of his attempts at treatment and told her multiple times, "You wouldn't have been able to do better than I did." 5RR147.

Even Colleson's mother testified that Ellis believed he had the skill to treat Colleson because he had medical field training, and that he restrained Colleson only to prevent him from scratching his ear. 5RR125-27.

The undisputed evidence showed that Ellis made numerous efforts – however bizarre and misguided – to treat or heal Colleson, even going so far as to coat Colleson's entire body in herbs. This conduct is logically incompatible with an intent to cause harm. A rational juror could find that someone mentally disturbed enough to believe in demonic possession might lack an awareness that his home remedies were unsafe and harmful, and thus might be guilty only of recklessness or negligence.

Considering the weight of the probative evidence, the submission of reckless and negligent culpable mental states greatly increased the likelihood of conviction.

3. The arguments of counsel

Ellis's mental state was a major theme in closing arguments. Defense counsel's argument focused on two points: (1) the causation element of murder was not proven, and (2) Ellis's conduct was at most negligent. 5RR188. The defense argument emphasized that Ellis acted with "good intentions" and was "trying to help" Colleson. 5RR183-84.

The State repeatedly conceded that the evidence showed that Ellis genuinely believed he was helping Colleson. The State point out that Ellis candidly admitted all the things he did to Colleson. 5RR190. The State argued that the facts were not in dispute because "this Defendant is so damn arrogant that he just talked and he was almost proud of everything that he did." 5RR179. The State reminded the jury that

Appellant even "[told] the hospital they couldn't have done any better." 5RR190. The State acknowledged that "the facts are that he admits to, sure, his thoughts are pretty irrational." But the State urged the jury to find that Ellis had to have known from Colleson's appearance that he was hurting him. 5RR180-81.

The State argued that the requisite intent was proven if Ellis's acts were deliberate: "His beliefs in what he can do are pretty fanciful, but his actions were deliberate." 5RR180. This argument misstated the required mental state because injury to a disabled individual and illegal restraint are both result-of-conduct offenses. *Stuhler v. State*, 218 S.W.3d 706, 718 (Tex. Crim. App. 2007); *Rudd v. State*, No. 02-19-00024-CR, 2020 WL 938188, at *10 (Tex. App.—Fort Worth Feb. 27, 2020, pet. ref'd) (not desig. for pub.). To prove an actor committed these offenses intentionally or knowingly, the evidence must show that that the actor consciously intended to cause the result or acted with awareness that his conduct is reasonably certain to cause the result. Tex. Pen. Code Ann. § 6.03(a), (b). A mere deliberate or volitional act is not sufficient.

The closing arguments demonstrate that whether Ellis acted intentionally, knowingly, recklessly, or negligently was a hotly contested issue.

In this case, the harm is egregious. Egregious harm occurs if the error (1) affects the very basis of the case; (2) deprives the defendant of a valuable right; (3) vitally affects a defensive theory; or (4) makes the case for guilt or punishment

clearly and substantially more compelling. *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006); *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). The harm here is actual and non-theoretical because it impacted the most contested issue: whether Ellis intended to harm Colleson or sincerely believed he was helping him. The improperly submitted lesser mental states allowed the jury to convict even it found that Ellis did not know or appreciate that his actions were harmful, affecting the very basis of the case. The errors deprived Ellis of a valuable right and made the case for guilt clearly and substantially more compelling by relieving the State of its burden to prove the required culpable mental states for each underlying felony, a contested issue.

The cumulative harm of the charge errors is egregious and calls for a new trial.

Prayer

Appellant respectfully requests that the Court reverse the conviction and render an acquittal as to Issue One, or reverse the conviction and remand for new trial as to Issue Two.

Respectfully submitted,

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Certificate of Service

This document has been served on the following parties electronically through the electronic filing manager on April 24, 2025.

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Certificate of Compliance

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that the relevant sections of this computer-generated document have **7,314** words, based on the word count function of the word processing program used to create the document.

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