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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0126**

State of Minnesota,
Respondent,

vs.

Joshua Alan Galle,
Appellant.

**Filed April 13, 2020
Affirmed in part, reversed in part, and remanded
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-17-19854

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

JESSON, Judge

While waiting at a stoplight, appellant Joshua Alan Galle assaulted another driver by, among other things, kicking him in the head “like you’d kick a soccer ball.” As a result

of the assault, the other driver suffered a concussion and a fracture in his left tibia. Based on Galle's actions, a jury convicted him of first, third, and fifth-degree assault. Because we conclude that the victim's injuries do not amount to "great bodily harm," we reverse Galle's first-degree assault conviction. But because the evidence supports the conviction of third-degree assault, we affirm that conviction and reverse the fifth-degree assault conviction as a lesser-included offense. As a result, we remand to the district court for resentencing and correction of the warrant of commitment.

FACTS

At around 10:30 in the morning in late July 2017, D.E. invited some friends over to use his pool. Although he had to work that afternoon, D.E. hung out with his friends for about 45 minutes, drinking one or two gin and tonics. D.E. left for work around 3:30 in the afternoon.

While D.E. was waiting at a stoplight on the drive, he briefly exchanged words with the driver of the car next to him, who was later identified as appellant Joshua Alan Galle. D.E. described the exchange as a "what's your problem" situation. D.E. recalled that the driver of the other vehicle suddenly opened his door and ran toward him at full speed with rage in his eyes. D.E. remembered getting out of his car to approach the driver and "deflect" him. According to D.E., in an effort to defend himself, he "[put] his foot to [the driver's] chest to change [his] trajectory." The next thing D.E. remembered was waking up to police tapping on his car window.

Although D.E. did not remember what happened during the bulk of his encounter with the other driver, two witnesses provided details. One witness, A.J., was getting off

work when she saw one man attacking another person at a stoplight. According to A.J., the “bigger guy” (Galle) dragged D.E. out of his car, slammed him to the ground, kicked him in the head, and punched him. A.J. believed that the attacker “put [D.E.] to sleep” and that D.E. appeared to be unconscious on the ground for “a good minute.” A.J. called the police.

The second witness, J.D., also observed the attack. J.D. saw two vehicles next to each other at a stoplight and noticed a man get out of one of the vehicles. J.D. thought the man looked angry and “could tell it was gonna get bad.” J.D. heard yelling and everything “went south really fast.” Again, he saw the bigger man (Galle) kick D.E. in the head while he was on the ground “like you’d kick a soccer ball.” This caused D.E. to go “limp.” J.D. told the man “I think you just killed him,” which caused the man’s demeanor to change. The man made some comments indicating D.E. was okay and helped D.E. to the curb. But then the man got in his car and drove away. J.D. took some photos and a short video of the encounter, including a photo of the man’s license plate.

Meanwhile, D.E. appeared to be “coming to,” although he seemed groggy. J.D. told him that he probably should not drive, but D.E. got back in his car and drove away. Shortly after, police found D.E. in his car in a parking lot not far from where the attack occurred. An officer noticed a lump on D.E.’s head and blood on his lip and observed that D.E. seemed confused and could not answer basic questions. The officer called an ambulance, which took D.E. to the hospital. According to the paramedic, D.E.’s mental state seemed to improve during the ride to the hospital.

At the hospital, doctors evaluated D.E., including performing tests to check for head and neck injuries. Those tests revealed no intracranial injury, brain bleed, or skull fracture. Accordingly, the doctor diagnosed D.E. with a concussion and an abrasion to his elbow and released him a few hours later. During the hospital evaluation, D.E. did not complain of leg pain.

When D.E. woke up the next morning, his knee was swollen to “the size of a football.” When the swelling did not go away the next day, D.E. went to get his knee x-rayed. Although initially missed by doctors, a plateau fracture in his left tibia¹ and an ACL sprain were revealed by a subsequent MRI. The orthopedic doctor gave D.E. crutches and a leg brace and told him to avoid bearing weight on his leg for four to six weeks.

While D.E. was recovering from his injuries, police searched for the driver who attacked him. Using the photo of the license plate, police identified the vehicle’s owner as Galle. Police arrested him, and the state charged him with one count of third-degree assault. Several months later, the state amended the complaint, adding one count of first-degree assault, and the case proceeded to a jury trial.

At trial, both witnesses testified about what happened, as described above. Additionally, both witnesses stated that they did not remember seeing D.E. kick Galle. And one witness explained that D.E. was on the defensive during the attack. D.E. also testified about what he remembered and his injuries, as noted above.

¹ D.E.’s sports medicine physician described this injury as a break in the tibia, the larger bone located in a person’s shin. According to the physician, the injury occurred on the outside of the bone, near the top.

Much of the trial testimony focused on the nature and extent of D.E.'s injuries. D.E. described the symptoms stemming from his concussion. Initially, he could only stay awake for 15 to 20 minutes at a time, had terrible headaches, and was very bothered by any background noise. As time progressed, D.E. developed "debilitating" headaches that would last for 10 to 20 seconds and "stop [him] in [his] tracks." He also experienced difficulty sleeping and eating. D.E. stated that his vision was "noticeably worse," although he testified that he had an eye condition prior to the attack that affected his eyesight. Regarding the leg fracture, D.E. testified that, at the time of trial, his knee still ached from time to time and was not "100 percent" better. Ultimately, D.E. testified that he was unable to work for about four months, mostly related to his concussion symptoms.

To recover from his injuries, D.E. attended physical therapy, occupational therapy, and consulted with a speech-language pathologist. Each of those professionals testified at trial. D.E.'s sports medicine physician testified about the leg fracture. She described the injury as the outside part of the tibia bone being broken and noted that the fracture extended into D.E.'s cartilage. And although D.E. had an ACL sprain, it was not significant. According to the orthopedic doctor, at a follow-up appointment roughly five to six weeks after the assault, D.E.'s x-rays appeared normal, and the swelling had improved.

D.E.'s speech-language pathologist testified about D.E.'s concussion. A concussion, according to the speech-language pathologist, is a mild traumatic brain injury. She explained that D.E. described difficulty tolerating noise, slow thinking, and memory issues. Although it is common for patients with a concussion to perceive their memory as affected, she testified that memory loss is not a common symptom of a concussion. Rather,

people believe that they experience memory changes because the concussion impacts their speed of thinking and ability to pay attention. Further, she explained that D.E.'s performance on tests was consistent with someone who experienced a concussion.

Finally, D.E.'s occupational therapist described evaluating him for post-concussion syndrome. Post-concussion syndrome involves headaches, eyestrains, and decreased endurance and tolerance, all of which D.E. reported. As a result, she diagnosed D.E. with post-concussion syndrome. To manage his symptoms, she recommended that he wear sunglasses and headphones (even while indoors), avoid screen time, and take frequent breaks. After three sessions, D.E. stopped attending occupational therapy, reporting that he could complete work-related tasks without difficulties caused by his concussion symptoms.

At the close of the state's case, Galle moved for a judgment of acquittal for the first-degree-assault charge, arguing that D.E.'s injuries did not amount to great bodily harm. The district court denied his motion, reasoning that the totality of the circumstances, construed in favor of the state, presented a question for the jury about whether the fracture and head injury amounted to great bodily harm. Galle then requested a jury instruction on fifth-degree assault, which the district court granted. After closing arguments, the case was submitted to the jury. After deliberating, the jury returned a verdict of guilty on all three counts of assault.²

² During deliberations, the jury inquired about the meaning of "protracted" in the statutory definition of great bodily harm. The district court directed the jury to the instructions, which did not define protracted. Later, the jury asked what to do if they were in agreement about the third-degree-assault charge but could not agree about first-degree assault. The

At sentencing, Galle again moved for a judgment of acquittal on the first-degree-assault charge, which the district court denied. The district court sentenced Galle to the presumptive guidelines sentence of 146 months in prison for first-degree assault. And the district court did not pronounce sentences for third and fifth-degree assault, stating that they would “merge” with the first-degree-assault conviction. But the warrant of commitment reflects that convictions were entered for all three counts of assault. This appeal follows.

D E C I S I O N

Galle raises several arguments, both through counsel and on his own behalf. First, Galle contends that sufficient evidence does not support his conviction for first-degree assault because D.E.’s injuries do not amount to great bodily harm. Additionally, Galle argues that the district court improperly entered convictions of lesser-included offenses. And Galle points to several other instances of alleged error in his pro se supplemental brief, including ineffective assistance of counsel and the denial of a self-defense jury instruction. We address each argument in turn.

I. Sufficient evidence does not support Galle’s first-degree-assault conviction.

Galle first argues that D.E.’s injuries do not amount to great bodily harm. As a result, he maintains that his conviction of first-degree assault is not supported by sufficient evidence. To assess whether sufficient evidence supports a conviction, this court “carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn

district court directed the jury to attempt to reach a consensus on the first-degree-assault charge and to inform the court if they could not do so.

from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). When direct evidence supports an element of an offense, this court’s review is limited “to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). We assume that the jury believed the state’s witnesses and did not credit any testimony to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not overturn a jury verdict if the jury could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the burden of proof beyond a reasonable doubt. *Griffin*, 887 N.W.2d at 263.

Additionally, when evaluating a sufficiency-of-the-evidence claim, it is often necessary to interpret a criminal statute because the statute’s meaning is intertwined with whether the state met its burden of proof. *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). And we consider questions of statutory interpretation de novo. *Id.*

To obtain a conviction for first-degree assault, the state must prove that an individual “assault[ed] another and inflict[ed] great bodily harm.” Minn. Stat. § 609.221, subd. 1 (2016). “Great bodily harm” is defined as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2016). Whether an injury

constitutes great bodily harm is a question for the jury. *State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005).

Both Galle and the state agree that the victim suffered a fractured tibia, a concussion, and the subsequent symptoms stemming from his concussion. And both parties appear to agree that the primary duration of D.E.’s injuries was roughly five to six weeks.³ Accordingly, the question is whether these injuries—individually or collectively—amount to great bodily harm. Although the definition of great bodily harm contains four potential ways an injury may constitute that level of harm, only two of those ways appear possible here: “protracted loss or impairment of the function of any bodily member or organ” and “other serious bodily harm.” Minn. Stat. § 609.02, subd. 8.

Protracted Loss or Impairment of the Function of any Bodily Member or Organ

An injury that causes “protracted loss or impairment of the function of any bodily member or organ” constitutes great bodily harm. *Id.* The statute does not define “protracted.” Further, caselaw does not provide an explicit time frame for an injury to qualify as such. However, the term “protracted” is commonly understood to mean drawn out, prolonged, or lengthened in time.⁴ *The American Heritage Dictionary* 1417-18 (5th ed. 2011).

With this understanding of the meaning of “protracted” in mind, we must determine whether D.E.’s injuries—a fracture and a concussion—caused a drawn out or prolonged

³ The state notes that D.E. testified that he was unable to work for nearly four months and points out that D.E. experienced symptoms of post-concussion syndrome “for a number of weeks.”

⁴ This interpretation of “protracted” is consistent with our unpublished caselaw.

impairment of the functioning of his leg or his brain. After careful review of the record, we conclude that D.E.’s injuries—considered separately or in total—did not. Although a fracture, a concussion, or the combination of the two injuries could cause a protracted loss of functioning in some cases, nothing in the record indicates that is the case here.

With respect to the fracture, D.E. had to use crutches and avoid bearing weight on his leg for four to six weeks. This is not a protracted period of recovery. Further, D.E.’s orthopedic doctor explained that, roughly five to six weeks after the assault, D.E.’s x-rays appeared normal. Regarding his concussion, D.E. suffered from symptoms including headaches, sensitivity to light and noise, a disrupted sleep schedule, difficulty chewing, and an inability to multitask for at least six weeks, though D.E. testified he was unable to return to work for four months. But his occupational therapist testified that D.E. stopped attending therapy after three sessions because he could complete work-related tasks without difficulties stemming from his concussion symptoms. Based on the nature of D.E.’s injuries and recovery, we conclude that he did not experience a “protracted loss or impairment of the function of any bodily member or organ” amounting to great bodily harm.⁵

⁵ A potential separate basis for finding great bodily harm is D.E.’s loss of consciousness. Both A.J. and J.D. testified that D.E. appeared unconscious during at least a portion of the assault. In *State v. Stafford*, the supreme court stated that, “[a]rguably, ‘great bodily harm’ is inflicted if one knocks someone out briefly.” 340 N.W.2d 669, 670 (Minn. 1983). But in making that assertion, the supreme court cited *State v. Jones*, a case where the victim was “unconscious and on the verge of shock . . . had to be put in a ‘shock suit’ for transfer to the hospital . . . [and] did not regain consciousness until the following day.” 266 N.W.2d 706, 710 (Minn. 1978). It is evident from the record that any loss of consciousness D.E. may have experienced does not rise to the level contemplated by caselaw to constitute great bodily harm. *See id.*

Other Serious Bodily Harm

Having concluded that D.E.'s injuries did not result in "protracted loss or impairment of the function of any bodily member or organ," we consider whether D.E.'s injuries amounted to "other serious bodily injury." In doing so, we must consider that phrase "in the context of the other three alternative definitions." *Moore*, 699 N.W.2d at 739. And we consider the totality of the injuries, rather than evaluating them in isolation. *See, e.g., State v. Barner*, 510 N.W.2d 202, 202 (Minn. 1993); *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. App. 1985), *review denied* (Minn. Sept. 19, 1985).

Again, the totality of D.E.'s injuries included a tibia fracture, a concussion, and symptoms stemming from the concussion, including headaches, light and noise sensitivity, a disrupted sleep schedule, and an inability to multitask for at least six weeks. Considering these injuries in the context of the alternative definitions of great bodily harm—which include a high probability of death or permanent disfigurement—we conclude that D.E.'s injuries do not amount to "other serious bodily harm." D.E.'s leg fracture and his concussion—both of which appeared to resolve within a normal time frame for recovery—are not the type of severe, long-lasting injuries that support a finding of great bodily harm.

Our conclusion that D.E.'s injuries do not amount to great bodily harm is bolstered by caselaw. In *State v. Dye*, this court concluded that a victim who was shot in the abdomen did not suffer great bodily harm because the bullet did not hit any major organs and the victim did not testify about permanent pain or scarring. 871 N.W.2d 916, 922 (Minn. App. 2015). And in *State v. Gerald*, we concluded that two knife cuts on the back of the victim's neck and near his ear did not amount to great bodily harm. 486 N.W.2d 799, 802

(Minn. App. 1992). In contrast, the supreme court determined that a victim's injuries including multiple stab wounds that left scars, a swollen head making eating difficult for three days, and a hand injury amounted to "other serious bodily harm" under the definition of great bodily harm. *Barner*, 510 N.W.2d at 202; *see also State v. Ali*, 752 N.W.2d 98, 103 (Minn. App. 2008) (concluding that a victim who lost nearly an inch off one finger suffered great bodily harm), *review denied* (Minn. May 27, 2009); *Anderson*, 370 N.W.2d at 706 (noting that when considered as a whole, injuries including a lacerated liver, a head laceration requiring stitches, a scar running the length of the victim's torso, bruises, and other head injuries causing lapses of consciousness amounted to "other serious bodily harm"). These cases demonstrate the type of severity necessary for an injury to amount to great bodily harm. And when examining the injuries suffered by the victim in this case, we are not persuaded that they amount to the level of severity necessary to support a finding of great bodily harm necessary for a first-degree-assault conviction.

By concluding that D.E.'s injuries do not amount to great bodily harm, we do not dispute that D.E. suffered a horrific assault. Indeed, Galle's actions in assaulting another driver at a stoplight by kicking him in the head "like you'd kick a soccer ball" represent disregard for the life of another. And the district court correctly noted that Galle is fortunate that the victim did not suffer more serious injuries. But the fact that the victim's injuries *could* have been more serious—or even life-threatening—cannot support a finding of great bodily harm where the actual injuries themselves did not rise to that level of severity. *See Gerald*, 486 N.W.2d at 802-03. This conclusion is grounded in the assault statute, where the legislature chose to focus on the injury to the victim rather than the

actions of the assailant in evaluating whether great bodily harm occurred. *Id.* And as we have previously stated, “[a]lthough we find it anomalous that an individual who commits a grievous assault on another may escape a first degree assault conviction because the victim is fortunate enough to escape serious injury, we are constrained by the language of the statute.” *Id.*

Finally, although we reverse Galle’s first-degree-assault conviction, we are more than satisfied that sufficient evidence supports his conviction of third-degree assault. In contrast to the requirement of great bodily harm for first-degree assault, third-degree assault requires proof that an individual “assault[ed] another and inflict[ed] substantial bodily harm. Minn. Stat. § 609.223, subd. 1 (2016). And “substantial bodily harm” means “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” Minn. Stat. § 609.02, subd. 7a (2016). Here, Galle’s injuries—a tibia fracture and a concussion—clearly fall within the level of injury amounting to substantial bodily harm. Indeed, both parties agree that the record supports a finding of substantial bodily harm. Accordingly, we affirm Galle’s third-degree-assault conviction and remand for resentencing on that count.

II. Galle’s conviction of fifth-degree assault is a lesser-included offense of his third-degree-assault conviction.

Because we affirm Galle’s third-degree-assault conviction, we must decide whether his conviction of fifth-degree assault must be vacated as a lesser-included offense. The state concurs with Galle that the fifth-degree-assault conviction should be vacated.

Whether an offense is a lesser-included offense is a legal question, which we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

A criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). One type of included offense is “a lesser degree of the same crime.” *Id.*, subd. 1(1). Here, fifth-degree assault is a lesser degree of third-degree assault. *See State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995) (“If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an ‘included offense’ under section 609.04.”). Because it is a lesser-included offense, the district court erred by entering a conviction for fifth-degree assault.⁶ Accordingly, we reverse Galle’s conviction of fifth-degree assault and remand for correction of the warrant of commitment. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

III. Galle’s pro se arguments do not warrant relief.

Finally, Galle raised arguments in his pro se supplemental brief, which we briefly address below.⁷

⁶ At sentencing, the district court stated that “counts two and three are lesser included offenses and convictions which will merge to count one and so I am not pronouncing a sentence for counts two and three.” But the warrant of commitment reflects that convictions were entered on all three counts. *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (stating that this court may look to the official judgment of conviction in the district court’s file to determine whether an offense was adjudicated).

⁷ In addition to the arguments addressed in this opinion, Galle raised arguments concerning the effectiveness of his appellate counsel and his sentence. Because the record does not contain sufficient information regarding the ineffective-assistance-of-appellate-counsel claim, we decline to address it. *See Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007) (stating that claims of ineffective assistance of appellate counsel during a direct appeal may be properly raised as part of a first postconviction appeal). Further, because our reversal

Ineffective Assistance of Counsel

Galle argues that at trial, his attorney made several decisions—including not introducing D.E.’s prior medical records or calling a retained expert witness—that amounted to ineffective assistance of counsel. In general, when the trial record provides a sufficient basis to adjudicate an ineffective-assistance-of-counsel claim, the claim must be brought on direct appeal. *Leake v. State*, 737 N.W.2d 531, 535-36 (Minn. 2007). “But a claim of ineffective assistance of trial counsel that cannot be resolved on the trial court record alone need not be brought in a direct appeal and may be brought in a postconviction petition.” *Id.* We conclude that the record before us is insufficient to fully resolve Galle’s arguments. Accordingly, we decline to decide this argument.

Self-Defense Jury Instruction

Galle also contends that he was entitled to a self-defense jury instruction. But at multiple points throughout the trial, Galle’s counsel clearly indicated that he was not asserting the affirmative defense of self-defense. And a district court is not required to give such an instruction where self-defense is not affirmatively asserted. *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000). This argument does not present a basis for relief.

In sum, because the record does not contain sufficient evidence that Galle’s assault victim suffered great bodily harm, we reverse his conviction of first-degree assault. But because the record supports a conviction of third-degree assault, we affirm that conviction

of Galle’s first-degree assault conviction requires resentencing, we decline to address his arguments pertaining to his sentence.

and remand for resentencing. *See* Minn. R. Crim. P. 28.02, subd. 12. And because we affirm that conviction, we vacate Galle's fifth-degree-assault conviction as a lesser-included offense and remand for correction of the warrant of commitment.

Affirmed in part, reversed in part, and remanded.