IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1049-16

TEODORO MIGUEL HERNANDEZ, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS HAYS COUNTY

RICHARDSON, J., filed a concurring opinion in which WALKER, J. joined.

CONCURRING OPINION

I agree with the majority's decision to reverse the judgment of the court of appeals and reinstate Appellant's conviction. The evidence was sufficient to support the jury's verdict of aggravated assault with a deadly weapon. I write separately, however, because I arrive at that conclusion via a different route than the majority. In holding that the evidence was sufficient to support the conviction, the majority opines that the variance between what was alleged in Count 2 of the indictment and what was proved at trial is immaterial. I would instead hold that there was no variance at all.

The Testimony at Trial

The complainant, Melanie Molien, testified that she and Appellant had been dating, but their relationship had deteriorated, and they had broken up. Early one morning, close to 2:00 a.m., Appellant began texting Melanie because he was convinced that she had been cheating on him. He came to her house about 3:00 a.m., she let him come in, and she said he was acting "like a madman, trying to see if anybody was in [her] house." Melanie said that he looked "enraged" and "psychotic," so she tried to calm him down. She said that while she was sitting on the bed he "pulled off [her] clothes" to look for "signs of [her] cheating," and he "put his fingers inside of [her] vagina." Melanie made it clear that she had not consented to him putting his fingers inside of her. She then described the rest of his attack:

> Q. What did he do next?
>
> A. He asked me again who was I fucking. I told him nobody. And he punched me so hard on my face and my temple my ear was ringing. I fell from the bed to the ground.
>
> Q. So you were on the bed and he struck you in the face and you moved from the bed to the ground?
>
> A. Yes.
>
> Q. When you moved from the bed to the ground, just for clarification, you have no clothes on?
>
> A. No clothes on, my glasses flew off.
>
> Q. And what did he do?

A. He continued to say, "Who are you fucking?" and I would say "I'm not fucking anybody," and he would hit me over and over and over.

Q. About how many times did he hit you?

A. I said 20. I don't know because it lasted for hours.

Q. So this is about three in the morning when he showed up, marching around the house, you're sitting on the bed, he stripped your clothes off and stuck his finger inside of your vagina and started pummeling you with his fists?

A. Yes.

Q. Was there ever a time when he stopped and stepped back and said, "I'm sorry, I don't know what's going on?"

A. He never said sorry. The only time he would stop was in between – when he would ask me, "who are you fucking?" And just to get a breath of air, I'd say, "All right, hold on." And then I'd say, "I'm not fucking anybody," just so I could get a break so he'd stop hitting me.

Q. During this altercation, did you stay in that bedroom?

A. Up until we went outside, yes.

Q. When he was hitting you, was he using an open hand or a closed hand or something different?

A. He was punching me in my head, my temple, my face.

Q. Did he hit you anywhere else?

A. I remember mostly just my head and face because my ears were ringing and my head was killing me. I had bruises up and down, though.

* * *

Q. When you were able to calm him down, were you able to ask him to do something to get him to leave?

A. Yes. I asked him for water.

Q. Where was that water?

A. In the kitchen.

Q. Why did you ask him?

A. I was trying to get him to get out of the room so I could close the door.

Q. At that point, do you have a phone or anything else that you could grab and call for help?

A. No.

Q. Why?

A. Because he took apart my phone when he first got there.

Q. And when he left to get water, what did you do?

A. I tried to close the door.

Q. Were you able to close the door?

A. No, he saw me.

Q. And what did he do?

A. He was screaming, "Neither one of us are going to make it out alive." And then he rushed in there with the water bottle and he threw the water in my mouth and started choking me at the same time.

Q. So he came back into the room?

A. Yes.

Q. And where were you?

A. I was on the ground, lying on the ground by the TV.

Q. And where was he?

A. He was on top of me, standing, like hovering around me.

Q. So he was standing over you?

A. Yes.

Q. Was one leg on each side of your body or something?

A. Yes, he straddled over me.

Q. Straddled you?

A. Yes.

Q. And you said he was pouring water on your face?

A. Yes.

Q. And choking you at the same time?

A. Yes.

Q. What do you mean by choking?

A. He was using one hand to choke me while he was pouring water down my throat.

Q. Okay. Now, when you say "choking," what does that mean?

A. Where I could not breathe. He was cutting off oxygen. I felt like I was dying, like I almost blacked out.

Melanie described the water bottle as a gallon-size water jug that had been about three quarters full of water. She said Appellant had just grabbed it off of the kitchen counter, and he came back into the bedroom. As the prosecutor was trying to demonstrate how the water was being used by Appellant, Melanie testified that Appellant was "just pouring it down me," and it was "going into [her] orifices." She said multiple times that he was pouring the water from the jug directly into her mouth.

Melanie then said she was able to kick him away so he fell against the window, and she said that she kept thinking, "he's going to kill me, he's going to kill me, he's going to kill me." She said he then "snapped," and finally walked outside and she was able to put her clothes back on and calm him down. She went outside with him, and during that time she threw up and asked him to take her to the hospital, but he refused. Melanie said that when she threw up that triggered a reaction in Appellant and he became enraged again and grabbed her whole body. She started screaming, and he finally left. Melanie called 911 and told the dispatcher that her boyfriend just tried to kill her. She had a friend take her to the Women's Shelter, and she went to the hospital after that.

Michael Casillas, a detective with the San Marcos Police Department, testified about some of the State's exhibits. State's Exhibit 30 is a photograph of the top of the water bottle. Detective Casillas noted that there was a substance visible on the top of the water jug, which could have been either lipstick or blood. State's Exhibit 31 is a picture to represent how much water was left in the jug—it was almost empty. Detective Casillas also stated that, to

his knowledge, the water was used to "either drown her," or "to cause her enough panic to give answers to the questions he was asking." Detective Casillas testified as follows:

> Q. In the manner that was related to you and the way the water was used, could that potentially cause serious bodily injury or death?
>
> A. Yes.
>
> Q. Are you familiar with any other terminology that's consistent with the manner in which the water was used?
>
> A. Yes, sir.
>
> Q. What is that?
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> A. Waterboarding.
>
> Q. Okay. What is your familiarity with waterboarding?
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> A. That it's the act of pouring water into someone's mouth and/or nose to – what I've heard is it's like an interrogation technique and that it causes the sensations of drowning, which, in my opinion, that causes me fear. And it's used as an interrogation technique, which, again, from information Melanie gave me, appears that that's what was happening.

The next witness to testify was Janie Mott, the registered sexual assault nurse examiner (SANE) in this case. She examined Melanie to assess her injuries. Ms. Mott stated that Melanie had two black eyes, red marks across her nose, and a bruise on her forehead. Ms. Mott observed trauma on both sides of Melanie's face. She also testified that she observed "petechia," which are small red ruptured blood vessels that can be caused by choking, as can the bruising on her ears. She testified that when someone is lying flat on

their back, and water is poured into the mouth, it can go down the person's airway into the lungs and cause drowning. She agreed that, in the manner in which the water was used on Melanie, it could cause serious bodily injury or death. Her opinion was that Melanie could not breathe because Appellant was pouring water down her nose and into her mouth. On cross examination, Ms. Mott admitted that she did not see any marks on Melanie's neck other than the petechia.

Appellant testified in his own defense. He admitted to being at Melanie's house that morning. He admitted to having been in a physical fight with her—some slapping and grabbing. He denied pouring water down her throat.

The Indictment

The indictment against Appellant reads as follows:

> On or about the 21st day of March, 2014, in Hays County, Texas, the Defendant, Teodoro Miguel Hernandez, did the following:
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> COUNT 1 - A
> [AGGRAVATED SEXUAL ASSAULT]
>
> Did then and there intentionally or knowingly cause the penetration of the female sexual organ of Melanie Molien by defendant's finger, without the consent of Melanie Molien, and in the course of the same criminal episode the defendant attempted to cause the death of Melanie Molien by strangulation and waterboarding.
>
> COUNT 1 - B & C
> [AGGRAVATED SEXUAL ASSAULT]
>
> Did then and there intentionally or knowingly cause the penetration of the female sexual organ of Melanie Molien by defendant's finger, without the

consent of Melanie Molien, and the defendant did then and there by acts or words threaten to cause, or place, Melanie Molien in fear that death or serious bodily injury would be imminently inflicted on Melanie Molien, and said acts or words occurred in the presence of Melanie Molien.

COUNT 1 - D
[AGGRAVATED SEXUAL ASSAULT]

Did then and there intentionally or knowingly cause the penetration of the female sexual organ of Melanie Molien by defendant's finger, without the consent of Melanie Molien, and in the course of the same criminal episode the defendant used or exhibited a deadly weapon, to-wit: water.

COUNT 2
[AGGRAVATED ASSAULT WITH A DEADLY WEAPON]

Did then and there intentionally, knowingly, or recklessly cause bodily injury to Melanie Molien by striking the victim's head or body with the defendant's hands, and the defendant did then and there use or exhibit a deadly weapon, to-wit: water, during the commission of said assault.

COUNT 3
[ASSAULT FAMILY VIOLENCE/STRANGULATION]

Did then and there intentionally, knowingly, or recklessly cause bodily injury to Melanie Molien, a person with whom the defendant has or has had a dating relationship, by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of Melanie Molien by applying pressure to the throat or neck and blocking the nose or mouth of Melanie Molien.

The Jury's Verdicts on the Three Counts

As to Count 1, the jury found Appellant guilty of the lesser included offense of sexual assault, which was charged as intentionally or knowingly causing the penetration of the sexual organ of another person without that person's consent. The jury did not find an

aggravating factor. The aggravating factors were charged as either (1) attempting to cause the death by waterboarding and strangulation in the course of the same criminal episode, (2) placing the victim in fear that death or serious bodily injury would be imminently inflicted on the person, (3) threatening to cause death or serious bodily injury, or (4) using or exhibiting water as a deadly weapon in the course of the same criminal episode.

As to Count 2, the jury was given the choice to convict of either aggravated assault (with a deadly weapon) or the lesser included offense of assault (no deadly weapon). They convicted Appellant of aggravated assault with a deadly weapon, to-wit: water.

As to Count 3, the jury was instructed to find Appellant guilty if they found beyond a reasonable doubt that Appellant caused bodily injury to the victim by applying pressure to her throat or neck or blocking her nose or mouth and such conduct impeded her normal breathing or circulation of blood. The jury found Appellant not guilty of Count 3.

In assessing punishment, the jury agreed on ten years probation for the Count 1 sexual assault, and they gave Appellant seven years in prison for the Count 2 aggravated assault with a deadly weapon.

The jury's verdicts for Counts 1 and 2 are inconsistent.[1] In Count 1 the jury found that Appellant did not use water as a deadly weapon during the "same criminal episode" as the sexual assault. In Count 2, the jury found that Appellant *did* use water as a deadly weapon

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[1] I also note that the majority's opinion is inconsistent with the jury's verdict in Count 3. Appellant was acquitted by the jury of Count 3, which charged assault by strangulation or choking.

"during the commission" of the bodily injury assault. The reason these two findings are inconsistent is because the phrase "same criminal episode" involves an entire course of conduct, which is an even broader concept than "during the commission of the offense."[2] The sexual assault and the aggravated assault all clearly occurred during the "same criminal episode."[3]

Nevertheless, it would be inappropriate for us to speculate as to why the jury rendered the verdicts they did.[4] "[T]he law does not bar inconsistent verdicts."[5] Where a multi-count verdict appears inconsistent, our inquiry is limited to a determination of whether the evidence

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[2] *See Johnson v. State*, 777 S.W.2d 421, 423 (Tex. Crim. App. 1989) [hereinafter *Charles Johnson*] (construing Article 42.12, § 3g and distinguishing the phrase "in the course of the same criminal episode" from "during the commission of the offense"). In *Charles Johnson*, this Court held that the jury could consistently find that the appellant used or exhibited a deadly weapon during "the course of the same criminal episode" but, nonetheless, did not use or exhibit a deadly weapon during "the commission of the offense." In this case, however, the opposite conclusion was reached by the jury, which renders the verdicts inconsistent.

[3] The only statutory definition of "criminal episode" is in Texas Penal Code § 3.01, which prefaces and constrains the definition to the chapter: "In this chapter, 'criminal episode' means the commission of two or more offenses . . . pursuant to the same transaction." However, where words are not defined elsewhere in a statute, "the words employed are ordinarily given their plain meaning." *Campos v. State*, 623 S.W.2d 657, 658 (Tex. Crim. App. 1981). "Criminal episode" has been interpreted to mean "the period immediately before or after the actual act of sexual assault." *Burns v. State*, 728 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd.) (holding that, for the purposes of sections 22.011 and 22.021, the "criminal episode" commences when the attacker in any way restricts the victim's freedom of movement and it ends with the final release or escape of the victim from the attacker's control," and that "the use or exhibition of a weapon at any time during this period will elevate the crime to an aggravated status"). The commission of multiple offenses (whether the same or different statutory offenses) can occur during one criminal episode.

[4] *Dunn v. United States*, 284 U.S. 390, 393–94 (1932).

[5] *Guthrie-Nail v. State*, 506 S.W.3d 1, 6 (Tex. Crim. App. 2015) (first citing *United States v. Powell*, 469 U.S. 57, 68–69 (1984); and then citing *Dunn*, 284 U.S. at 393).

is legally sufficient to support the count on which a conviction is returned.[6] This rule was adopted in *Dunn v. United States*,[7] in which the United States Supreme Court held that a defendant may not attack a conviction on one count if there is sufficient evidence to support it, even though that conviction was inconsistent with an acquittal on another count in the same indictment.[8] In this case, despite seemingly inconsistent findings, so long as the evidence supports the finding of guilt under Count 2, the *Dunn* rule requires that the conviction be upheld.[9]

On Direct Appeal

Appellant argued on direct appeal that there was insufficient evidence to support his conviction of aggravated assault with a deadly weapon as charged in Count 2 because there was insufficient evidence to establish beyond a reasonable doubt that he used or exhibited water as a deadly weapon while he was striking Melanie. He claims that the evidence shows

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[6] *Powell*, 469 U.S. at 64–67 (1984) (holding that any attempt to determine the jury's reasons for reaching inconsistent verdicts would require pure speculation and involve an improper inquiry into jury's deliberations).

[7] *Dunn,* 284 U.S. at 393–94.

[8] *Id*.

[9] "We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground . . . of some error that worked against them. . . . [W]e note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. . . . Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt." *Powell*, 469 U.S. at 66–67.

that he had completed his act of striking Melanie before he went into the kitchen to get the water.[10] The court of appeals agreed with Appellant's argument.[11] They reformed Count 2 to reflect a conviction for the lesser included offense of assault.

On review before this Court, the majority has concluded that the court of appeals erred by failing to consider all of the evidence presented at trial that might have supported the aggravated assault offense alleged in the indictment when conducting its legal sufficiency analysis. Specifically, the court of appeals failed to consider the evidence supporting what the majority views as the second assaultive event—evidence showing that Appellant used one hand to choke Melanie while simultaneously using the other hand to pour water down her throat.

I, too, would reverse the court of appeals. But, under these particular facts, I disagree with the majority's approach holding that *if* there were two separate assaultive events, the variance still was not material.[12] I would hold that there was one bodily injury assault—one physical attack—during which Appellant caused bodily injury by hitting Melanie with his hands, *and* he used water as a deadly weapon when he tried to force it down Melanie's throat. As a result, there was no material variance in what was charged in Count 2 and what was

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[10] *Hernandez v. State*, No. 06-15-00167-CR, 2016 WL 4256938, at *4 (Tex. App.—Texarkana, Aug. 5, 2016).

[11] *Id*. at *8.

[12] The majority opinion avoids deciding whether this case involves one continuous assaultive even or two separate assaultive events because, either way, the majority finds that there is no *material* variance.

proved at trial.

The Evidence Was Sufficient To Support The Guilty Verdict in Count 2[13]

Appellant was charged in Count 2 under Texas Penal Code § 22.02(a)(2), which criminalizes using or exhibiting a deadly weapon during the commission of an assault.[14] The evidence presented at trial through Melanie's testimony was that,

- Appellant repeatedly struck Melanie with his fists.
- He left the room momentarily to retrieve a large water jug.
- He was not away from Melanie long enough for her to even get up from the floor and close the door.
- Melanie was in his sight the entire time.
- Appellant rushed back into the room with the water jug.
- He started pouring water down Melanie's throat while his hand was around her neck.

The physical beating continued from the bed to the floor of Melanie's bedroom, where Appellant continued to beat her in the face and head. The momentary break in time for Appellant to retrieve the water jug did not mean that the beating had finished. While a

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[13] When evaluating legal sufficiency, we must review all of the evidence in the light most favorable to the jury's verdict to determine whether any rational jury could have found, beyond a reasonable doubt, that Appellant was guilty of the charged offense. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)."This 'familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Klein v. State*, 273 S.W.3d 297, 302 (Tex. Crim. App. 2008) (citing *Jackson,* 443 U.S. at 319).

[14] The underlying assault alleged in Count 2 was causing bodily injury to another under Texas Penal Code § 22.01(a)(1).

bodily injury assault is not typically considered a continuing offense, under these particular facts, it is unrealistic not to view this as one bodily injury aggravated assault.

Thus, under the one-continuous-assault theory there is no variance between pleading and proof because the use of water as a deadly weapon occurred during the commission of the one continuous assaultive transaction.[15] However, rather than deciding between a finding of one assaultive transaction or two separate assaults, the majority first acknowledges that if there was one continuous assault, there would be no variance at all. And, in the alternative, the majority holds that if there were two assaults the variance between what was pled in Count 2 and what was proved was immaterial.

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[15] I realize that using the term "one continuous assaultive transaction" may be viewed as an attempt to resurrect a form of the carving doctrine, which this Court abandoned in favor of the *Blockburger* double jeopardy test. *See Ex parte McWilliams*, 634 S.W.2d 815, 817 (Tex. Crim. App. 1982) (op. on reh'g) (holding that the carving doctrine is unsound because its application has been erratic and it is not mandated by the Double Jeopardy Clauses of either the United States or Texas Constitutions); *Blockburger v. United States*, 284 U.S. 299 (1932). However, under the facts of this case, I would hold that the continuous assaultive transaction rule applies just as it did in 1905 when this Court decided *Paschal v. State*, 90 S.W. 878 (Tex. Crim. App. 1905). In *Paschal*, the evidence showed that Appellant, who was angry with his wife, went to find her at her friend's house. He was carrying a paper sack full of oranges, and threw one at his wife. It struck her between the eyes and she fell. "He then hit her with his fist, knocked her down, and kicked her, and then threw a rock and hit a cow." Then, he "stamped and choked his wife." She ran into the hogpen, and he followed and hit her again. She then ran to the house, and he caught her at the fence and cut her clothes. She then ran into the house and he jerked her to the floor and kicked her. He ran outside and grabbed a stick and came back into the house, but he did not hit her with the stick. The Court held that this was one aggravated assault. Although the "continuous assaultive transaction" test is disfavored because it has been "randomly applied," *see Ex parte McWilliams*, 634 S.W.2d at 823, I would hold that it is not an extinct concept, it applies under these facts, and its application here is not inconsistent with *Blockburger* since double jeopardy is not an issue in this case.

A variance between what is pled and what is proved occurs when the State proves the defendant guilty of a crime *in a manner* that varies from the allegations in the indictment.[16] A variance between an allegation in the indictment and the State's proof at trial is material if it prejudices the "substantial rights" of the defendant.[17] The court of appeals held that the State's evidence presented in support of the charge of aggravated assault with a deadly weapon differed materially from how that charge was pled in Count 2. The majority holds, however, that, assuming there were two separate assaults, the court of appeals failed to consider *all* of the evidence. In considering all of the evidence, the majority finds that it is sufficient to support the conviction for aggravated assault with a deadly weapon because even though the use of the water occurred during the second assaultive event, Appellant used his hands to choke Melanie during the commission of *that* assault. Thus the variance, according to the majority, is in the manner and means by which the bodily injury was caused—a "non-statutory" descriptive allegation.[18]

For several reasons, I would have avoided that approach. First, the evidence that Appellant's *hands* impeded Melanie's breathing is arguably slim. Although it is true that

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[16] *Gollihar v. State*, 46 S.W.3d 243, 246-47 (Tex. Crim. App. 2001).

[17] *Id*. at 248.

[18] The majority cites to *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) [hereinafter *Perry Montez Johnson*]. In *Perry Montez Johnson*, the State alleged that Johnson hit the victim with his hands; however, the victim testified that he threw her against a wall. This Court found that variance immaterial.

portions of Melanie's testimony could be interpreted as evidence that Appellant's hands were impeding her breathing, the greater weight of the evidence supports the finding that the impediment to her breathing was caused by the water being poured down her throat, not by pressure from Appellant's hands. Second, the jury acquitted Appellant of the choking/strangulation charge in Count 3. Although we must ignore inconsistencies in the jury's verdicts, the fact that Appellant was found not guilty of the choking assault as alleged in Count 3 is troublesome. That acquittal undermines the strength of an aggravated assault conviction if we say that the underlying assault supporting that conviction is the same act of choking for which Appellant was acquitted. Finally, I disagree with the majority's conclusion that "exactly how Appellant used his hands to cause the bodily injury is inconsequential to the legal sufficiency analysis." A criminal defendant has the right to fair notice of the specific charged offense in order to be able to prepare a defense.[19] It is bad precedent to uphold Appellant's conviction for Count 2 on the basis that it is supported by the same evidence that was used to support the charge Appellant was acquitted of. If, in evaluating sufficiency, we must view the verdict under Count 2 independently of the other verdicts, then shouldn't we view the evidence supporting *the offense charged* in Count 2 independently of the evidence supporting the offense charged in Count 3—at least under the unusual circumstances of this case?

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[19] *State v. Barbernell*, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008).

Under these facts, I find it a more accurate and realistic evaluation of the facts supporting the jury's verdict to hold that there was no variance at all. Appellant committed one continuous assault on Melanie during which he beat her and tried to choke her by pouring water down her throat. Count 2 alleged that Appellant committed aggravated assault by causing Melanie bodily injury by striking her with his hands (which is supported by the evidence) and that he used water as a deadly weapon during the commission of that assault. The deadly weapon alleged does not have to be what caused the bodily injury.[20] It need only be used or exhibited during the commission of the offense. Use of a deadly weapon during the commission of the offense means that "the deadly weapon was employed or utilized in order to achieve its purpose."[21] Appellant's purpose in physically assaulting Melanie was to cause her bodily injury. There was ample testimony to support the finding that water could constitute a deadly weapon if it were forced down someone's airway and into their lungs. Even though, in this case, the water was not what caused the trauma to Melanie's head and face, it was used during the commission of the continuous physical assault on her.

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[20] *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008) ("The State is not required to show that the 'use or intended use causes death or serious bodily injury' but that the 'use or intended use is *capable* of causing death or serious bodily injury.") (emphasis in original). The allowable unit of prosecution in a result-of-conduct offense is each victim, so how the victim's injuries were caused was not the gravamen of the offense.

[21] *Plummer v. State*, 410 S.W.3d 855, 858 (Tex. Crim. App. 2013) (quoting *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989)). "A weapon can be deadly by design or use. . . . An object is deadly weapon by usage if 'in the manner of its use or intended use,' the object 'is capable of causing death or serious bodily injury.'" *Tucker*, 274 S.W.3d at 691 (first quoting TEX. PENAL CODE § 1.07 (a)(17)(B); and then citing *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000)).

Reviewing all of the evidence in the light most favorable to the jury's verdict in Count 2, I agree that the evidence presented at trial supported the jury's verdict that Appellant was guilty of aggravated assault with a deadly weapon, as charged in Count 2. With these comments, I concur.

FILED: October 18, 2017

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