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

YEARY, J., delivered the opinion of the Court in which KELLER, P.J., and KEASLER, HERVEY, ALCALA and KEEL, JJ., joined. RICHARDSON, J., filed a concurring opinion in which WALKER, J., joined. NEWELL, J., concurred in the result.

O P I N I O N

Appellant was convicted of aggravated assault with a deadly weapon. TEX. PENAL CODE § 22.01(a)(2). The Court of Appeals held the evidence to be legally insufficient to establish the deadly-weapon element of the offense, reformed the judgment to reflect a conviction for the lesser-included offense of simple assault, and remanded for a new punishment hearing. *Hernandez v. State*, No. 06-15-00167-CR, 2016 WL 4256938, at *15

(Tex. App.—Texarkana 2016). We reverse the opinion of the court of appeals and reinstate the trial court's judgment of conviction for aggravated assault with a deadly weapon.

I. BACKGROUND

Facts and Procedural Posture

Appellant and Melanie Molien had been involved in a volatile dating relationship for approximately two years. The relationship had recently ended, and Molien moved into a separate residence. In the early morning hours of March 21, 2014, the two exchanged several text messages in which Appellant accused Molien of being unfaithful to him. Appellant went to Molien's duplex around 3 a.m., she let him inside, and the two argued. Appellant began to search for any sign of another man. He also removed all of Molien's clothing and digitally penetrated her sexual organ. Appellant repeatedly demanded to know with whom she was cheating on him. Each time that Molien replied that she had remained faithful to him, he struck her with his hands in the head/face region.[1] At some point while Appellant was striking her, in an attempt to get him to leave the room, Molien asked appellant to get her a glass of water. When Appellant briefly left the room to retrieve the water, Molien attempted to shut the bedroom door, but Appellant returned and was able to prevent her from doing so. While she was lying on the floor, Appellant used one hand to choke her while simultaneously pouring water from a jug down her throat. There is no indication in the record that he struck

[1] Molien testified that appellant struck her with his hands in the head/face region for hours, but Appellant testified this went on for only a few minutes, not hours. Asked specifically whether Appellant had struck her with "an open hand" or "a closed hand," Molien simply responded that Appellant had "punched" her repeatedly.

her with his hands at *this* point, however. Molien was eventually able to kick Appellant off of her and get dressed, and then the two of them went outside.

After Appellant left, Molien reported the assault. Appellant was later arrested and charged in a three-count indictment with aggravated sexual assault, assault/family violence, and aggravated assault with a deadly weapon. *See* TEX. PENAL CODE §§ 22.021, 22.01, 22.02(a)(2), respectively.[2] The count of the indictment charging aggravated assault with a deadly weapon alleged that Appellant:

> cause[d] bodily injury to Melanie Molien by striking [her] head or body with [his] hands, and [he] did then and there use or exhibit a deadly weapon, to-wit: water, during the commission of said assault.

After trial, the jury convicted Appellant of non-aggravated sexual assault and of aggravated assault with a deadly weapon while acquitting him of assault/family violence. The jury assessed a seven year sentence for the aggravated assault with a deadly weapon conviction and a ten year sentence, suspended to community supervision, for the sexual assault conviction.

---

[2] For the purposes of this opinion, Section 22.02 (a) is the only relevant statute. There the offense of aggravated assault is defined as follows:

> (a) A person commits an offense if the person commits assault as defined in § 22.01 and the person:
>
> > (1) causes serious bodily injury to another, including the person's spouse; or
> >
> > (2) uses or exhibits a deadly weapon during the commission of the assault.

Court of Appeals

Among other claims on appeal, Appellant challenged the aggravated assault with a deadly weapon conviction, arguing that the evidence was legally insufficient to show that water was either used or exhibited as a deadly weapon at the time he was striking Molien with his hands. In response, the State argued that it had presented sufficient evidence to show both that *water* and/or Appellant's *hands* were used as a deadly weapon. The court of appeals rejected the State's arguments and agreed with Appellant. *Hernandez*, 2016 WL 4256938, at *8. It relied on an opinion from another court of appeals to hold that assault is not a continuous offense and that the deadly weapon must be used "at some point at or before the offense is complete." *Id.* at *6 (citing *Johnson v. State*, 271 S.W.3d 756, 761 (Tex. App.—Waco 2008, pet. ref'd)). Because the evidence failed to show Appellant used the water as a deadly weapon at the same time that he was striking her with his hands, the court of appeals held, there was insufficient evidence to support the deadly weapon element of the aggravated assault offense. Further, the court of appeals relied on this Court's opinion in *Gollihar* for the proposition that the State was bound to prove what it had pled in the aggravated assault count of the indictment—water as the deadly weapon—and that proof of a different deadly weapon would constitute a material variance. *Id*. (citing *Gollihar v. State*, 46 S.W.3d 243, 258 (Tex. Crim. App. 2001)). The court of appeals reformed the judgment to reflect a conviction for the lesser-included offense of simple assault and remanded the cause to the trial court for a new punishment hearing. *Id*. at *15 (citing *Thornton v. State*, 425

S.W.3d 289 (2014) (ruling that a court of appeals has the authority to, and should, reform a judgment to reflect conviction for a lesser-included offense where it finds that some element of the greater offense is not supported by the evidence but that the jury necessarily found, and the evidence suffices to show, every element of the lesser-included offense)).

In its petition for discretionary review, the State contends that the court of appeals' opinion is in conflict with precedent from this Court and that any variance between the specific deadly weapon pled in the indictment and the one proved at trial is a non-statutory immaterial variance.[3] *See Johnson v. State*, 364 S.W.3d 292 (Tex. Crim. App. 2012) (holding that a hypothetically correct jury charge need not incorporate immaterial variances). We granted the State's petition in order to address these contentions.

II. THE LAW

Malik/Gollihar

We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular

[3]Appellant filed his own petition for discretionary review seeking to upend the court of appeals' ruling affirming his sexual assault conviction, which he had also challenged, unsuccessfully, on direct appeal. We refused Appellant's petition for discretionary review.

offense for which the defendant was tried." *Id*.

With respect to variances between allegations in the indictment and the State's proof at trial, we have declared that only material variances will affect the hypothetically correct jury charge. *Gollihar*, 46 S.W.3d at 256. A variance will be considered material if the variance prejudices the defendant's "substantial rights." *See id*. at 248 ("[A] variance that is not prejudicial to a defendant's'substantial rights' is immaterial."). "Allegations giving rise to immaterial variances may be disregarded in the hypothetically correct [jury] charge," while "allegations giving rise to material variances must be included." *Id*. at 257.

Johnson

In *Johnson v. State*, we had the opportunity to explain further the ways in which a material variance may arise.[4] Johnson was charged with aggravated assault that caused serious bodily injury by "hitting [the victim] with his hand or by twisting her arm with his

[4] Even before *Johnson*, this Court had confronted the question of the materiality of a variance with respect to a deadly weapon finding. In *Flenteroy v. State*, 187 S.W.3d 406 (Tex. Crim. App. 2005), the indictment charged the appellant with aggravated robbery with a deadly weapon, to wit, a screwdriver. *Id.* at 407. The jury convicted the appellant of the lesser-included offense of simple robbery, but it nevertheless made a deadly weapon finding at the punishment phase that the appellant had used a "hard metal-like object" during the offense. *Id.* at 409. The trial court reasoned that submitting the deadly weapon charge to the jury was proper because the aggravated robbery count of the indictment provided sufficient notice for the appellant to be aware that a deadly weapon issue would arise. *Id.* at 410. This Court agreed, holding that, because the State gave sufficient notice of a deadly weapon issue and proved the appellant used some variety of deadly weapon, the variance between the specific deadly weapon alleged in the indictment and that which was proved at trial was immaterial because the indictment language was adequate to inform the appellant of the charge against him so that he might prepare a defense. *Id*. The Court explained that the appellant's defense was not affected by the screwdriver allegation because the foundation of his defense was that he had not used a deadly weapon *at all,* and that any variance with respect to what the deadly weapon may have been was inconsequential to that defense. *Id.* at 411.

hand." *Johnson,* 364 S.W.3d at 293. However, at trial the victim testified that her arm was broken as a result of her falling after Johnson threw her against a wall. *Id*. This Court concluded the variance was immaterial and upheld Johnson's conviction because the specific aggravated assault charge at issue was a result-of-conduct offense and the "'precise act or nature of conduct . . . [was] inconsequential.'" *Id*. at 298 (quoting *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)).

In the course of explaining the difference between a material variance and an immaterial variance, we described two ways in which variances can occur. The first type of variance occurs when the State's proof deviates from the *statutory theory* of the offense as alleged in the indictment; the State may not plead one specific statutory theory but then prove another. *Id*. Under *Gollihar*, we said, this type of variance is always material and renders the evidence legally insufficient. *Id*. at 294–95. The example we gave in *Johnson* derived from the retaliation statute, which "makes it a crime to threaten a 'witness' or 'informant.'" *Id*. at 294 (discussing *Cada v. State*, 334 S.W.3d 766 (Tex. Crim. App. 2011)). "This first type of variance will occur if the State only pleads 'witness' in the charging instrument and proves only . . . 'informant' at trial." *Id*. Under these circumstances, the hypothetically correct jury charge would require the jury to find that the defendant threatened a witness. Proof that he threatened an informant only, and not a witness, would amount to a material variance between pleading and proof that would result in an acquittal (even though it constitutes an offense to threaten an informant).

The second type of variance that *Johnson* identified is a "non-statutory allegation that is descriptive of the offense in some way." *Id*. This type of variance can be either material or immaterial, we said, depending upon whether it would result in conviction for a different offense than what the State alleged. *Id*. at 295. One example of a case in which the Court found a variance to be material is *Byrd v. State*, 336 S.W.3d 242 (Tex. Crim. App. 2011). There, the indictment alleged an individual owner in a theft case, but the evidence at trial showed only that the property was taken from a Wal-Mart store; the individual identified as the owner in the indictment was "never mentioned." *Id*. at 244. The Court held the variance in the name of the owner of the stolen property "was significant enough that we could not conclude that the State had proved the same theft when it alleged that property was taken from [an individual] but proved, instead, that property was taken from Wal-Mart." *Johnson*, 364 S.W.3d at 297 (describing the gist of our holding in *Byrd*).

We provided an example of an immaterial variance in *Johnson*. There we gave a hypothetical involving a prosecution for the result-oriented offense of murder in which the indictment alleges death by stabbing. *Id*. at 296. If the proof at trial shows that the victim was instead bludgeoned to death, we said, this would not constitute a material variance because the manner in which the murder was perpetrated does not affect how many murder offenses occurred. *Id*. at 297. Because the different means of causing death do not result in separate offenses, the variance in pleading and proof would not be material and would not inform the hypothetically correct jury charge or implicate legal sufficiency. *Id*. at 298. Similarly, we

reasoned, in a prosecution for aggravated assault under Section 22.02(a)(1) of the Penal Code, the gravamen of the offense is causing serious bodily injury. *Id*. at 298 (citing *Landrian*, 268 S.W.3d at 537). How that serious bodily injury was caused does not "help define the allowable unit of prosecution for this type of aggravated assault offense, so the variance at issue [in *Johnson*] cannot be material." *Id*.

III. ANALYSIS

This case involves a prosecution for aggravated assault under Section 22.02(a)(2) of the Penal Code rather than, as in *Johnson*, Section 22.02(a)(1). Under Section 22.02(a)(2), a simple assault becomes aggravated if the assailant uses or exhibits a deadly weapon in committing the assault. Of course, the gravamen of the offense remains the resulting bodily injury. *Landrian*, 268 S.W.3d at 537. For reasons we now address, we need not ultimately decide whether this case involves one continuous assaultive event or discretely prosecutable assaultive events; either way, we conclude there is no material variance.

The State's Theory: One Assault

The State argues that the facts of this case present but a single assault; that the striking with hands and the retrieval and use of water while choking the victim all occurred within an integrally actionable assaultive episode. Appellant's retrieval of water from another room did not sever the episode into two distinct offenses, in the State's view. If the State is correct, then a conviction for assault with a deadly weapon is supported for the simple reason that no variance between pleading and proof would exist. In that instance, it would be irrelevant that

Appellant used the water as a weapon only after returning to the bedroom and did not use it earlier while striking Molien with his hands. The exact sequence in which the water was used would make no difference because the deadly weapon—water—was used or exhibited during the commission of the same assault in which Appellant struck Molien with his hands. Therefore, the evidence presented at trial would be legally sufficient to support a conviction for aggravated assault with a deadly weapon.

Appellant's and the Court of Appeals' Theory: Discrete Assaults

But even if the facts of this case present more than one actionable assault, as Appellant and the court of appeals believed, we conclude that there is still no material variance between allegation and proof. Even assuming there were two assaults, one in which Appellant struck Molien with his hands and another in which he choked her with his hands while pouring water down her throat, only one of those assaults involved the use of a deadly weapon, and in that assault, the deadly weapon used was, indeed, water, as alleged in the aggravated assault count of the indictment.

In a legal sufficiency analysis, evidence is considered sufficient to support a conviction when, after considering all of the evidence in the light most favorable to the prosecution, a reviewing court concludes that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We reiterate that, in Texas, the essential elements of the offense are "the elements of the offense as defined by the hypothetically correct jury charge *for the case*."

Johnson, 364 S.W.3d at 294 (emphasis added) (quoting *Malik*, 953 S.W.2d at 240). Therefore, a hypothetically correct jury charge reflects the governing law, the indictment, the State's burden of proof and theories of liability, and an adequate description of the offense for the particular case. *Malik*, 953 S.W.2d at 240.

Here, the court of appeals reasoned that, because aggravated assault is not a continuing offense, the on-going incident split into two discrete assaultive episodes when Appellant left the room to retrieve the water. The court of appeals believed it was the first assaultive episode, before Appellant left the bedroom, that was the assault pled in the indictment because it was during that first assault that Appellant struck Molien with his hands. Focusing thus on the initial assaultive conduct, the court of appeals concluded that, in order to justify a deadly weapon finding, a fact-finder would have to find the deadly weapon had been used or exhibited even as Appellant was striking Molien with his hands. Because there was no evidence that appellant used water at the same time that he was striking her with his hands, the court of appeals concluded, the evidence failed to show that the deadly weapon alleged was actually used "during the commission of the offense," as required by Section 22.02(a)(2).

But this analysis fails to consider *all* of the evidence. When focusing properly on *all* of the evidence presented at trial that might have supported the guilty verdict, we must also consider the evidence demonstrating the second assaultive event—during which Appellant actually used water. With a proper focus on all of the evidence that might have supported a

guilty verdict, it becomes clear that the variance between the pleading and proof in this case is immaterial. If sufficiency of the evidence is measured against the second rather than the first assaultive event, then there does indeed appear to be a variance, but it is a variance that stems from the allegation in the indictment that Appellant struck Molien with his hands. The language of the aggravated assault count alleges "striking with the hands," but the testimony at trial showed that when Appellant returned to the bedroom with the water, he used one hand to choke Molien while simultaneously using the other to pour the water down her throat, and the evidence does not show that he "struck" her at that point in time.

But this particular variance between the pleading and the proof should not be considered to be material in the sufficiency analysis because it would be patently immaterial under *Johnson*. 364 S.W.3d at 292. The variance regarding Appellant's use of his hands would be one describing only the manner and means by which the bodily injury was caused. Under *Johnson*, this would fall into the second category of variance, a "non-statutory allegation that describes the offense in some way." *Id.* at 295. Such a variance is material only when it converts the offense proven at trial into a different offense than what was pled in the charging instrument, which could potentially subject a defendant to another prosecution for the same offense. *Id.* There is no such danger here, however, because the fact that Appellant caused Molien to suffer bodily injury with his hands *not* by striking her with them, but instead by choking her,[5] does not make the aggravated assault that was proved at

[5] The Court recently held that any action that impedes normal breathing causes bodily injury *per se*. *Marshall v. State*, 479 S.W.3d 840, 844 (Tex. Crim. App. 2016). Thus, pursuant to our

trial different than the aggravated assault that was pled in the indictment. What was pled and proved was that Appellant committed aggravated assault against Molien by causing her bodily injury and that he used water as a deadly weapon while doing so. The indictment did not specify the precise injury that would be shown by the evidence, and exactly how Appellant used his hands to cause the bodily injury is inconsequential to the legal sufficiency analysis.

IV. CONCLUSION

We hold 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. The evidence presented in this case was not legally insufficient to support a conviction for aggravated assault with a deadly weapon. Accordingly, we reverse the judgment of the court of appeals to the extent that it reformed the trial court's judgment, and we reinstate the judgment of the trial court.

DELIVERED: October 18, 2017
PUBLISH

---

precedent, Appellant committed at least a simple assault when he re-entered the bedroom. If he also used water as a deadly weapon at that time, then the assault was aggravated under Section 22.02(a)(2).