IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1248-19

CHRISTOPHER SIMMS, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY**

YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEEL and MCCLURE, JJ., joined.

DISSENTING OPINION

Appellant argues in his brief that "speed did not cause the collision." Appellant's Brief at 11. But he points to no evidence that would have permitted a rational juror to draw that conclusion. And, perhaps more importantly, it is not *the collision* that is alleged to have been ultimately *caused* by Appellant. Instead, the indictment alleges, among other things, that Appellant's "FAILING TO CONTROL SPEED" is what *caused* serious bodily injury to Pineda. Common life experience demonstrates that not all automobile collisions

necessarily result in injury. This one did, and in fact, the evidence showed it resulted in serious bodily injury—the worst kind, death—to Pineda.

As I understand Appellant's argument, he concedes that the jury could have reasonably found that he failed to control his speed when he traveled through the tunnel. In fact, his argument for the submission of the requested lesser-included offense of deadly conduct *depends* on evidence supporting his recklessness by failing to control his speed. Appellant admits that this evidence would have supported a jury finding that he was reckless with respect to whether his conduct placed another in imminent danger of serious bodily injury, *i.e.*, deadly conduct. Appellant's Brief at 4, 11. But this argument completely disregards the evidence showing that his reckless conduct also caused someone to suffer serious bodily injury and to die. When conduct not only puts someone in imminent danger of serious bodily injury, but also actually causes them serious bodily injury, that person is not guilty *only* of deadly conduct. They are instead guilty of recklessly causing serious bodily injury, which is one of the ways a person commits the offense of aggravated assault. *See* TEX. PENAL CODE § 22.02(a)(1).

Appellant's brief characterizes his loss of consciousness and subsequent veering into the oncoming lane as an "intervening factor." Appellant's Brief at 9 ("[I]n the instant case, appellant was reckless by speeding, but he testified that he crossed into another lane of traffic and hitting [sic] another vehicle only after losing consciousness, an intervening factor. This 'intervening factor' is important to the analysis."). This is the point that Appellant contends the court of appeals failed to consider. According to Appellant, if the jury believed that the collision occurred because he lost consciousness and only then veered into the oncoming lane of traffic, it could rationally have concluded that he was not reckless

with respect to causing Pineda's serious bodily injury—because he was not even conscious at that point—and he therefore could not have "consciously disregard[ed] a substantial and unjustifiable risk" that he would cause Pineda serious bodily injury. TEX. PENAL CODE § 6.03(c).

But even if Appellant was unconscious by the time his car veered into the on-coming lane, Pineda's indictment also alleged that his reckless failure to control his speed, which he admits he engaged in, *caused serious bodily injury* to Pineda. And the evidence presented by the State proved that at his trial. And what is most damaging to Appellant's claim in this appeal is that no evidence suggested otherwise. The jury, therefore, had no evidentiary basis to reject the evidence proving that his reckless failure to control his speed is what caused Pineda's serious injury.

Under our law, if evidence admitted at trial does not provide a basis to permit a jury to rationally reject the offense charged in favor of a lesser included offense, the lesser is not raised by the evidence. *See Richerson v. State*, 568 S.W.3d 667, 671 (Tex. Crim. App. 2018) (the "requirement is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense."). The evidence relied upon by Appellant to raise the lesser-included offense in this case could only have excluded his responsibility for two of the acts of recklessness alleged and proved as the causes of Pineda's serious bodily injury: "failing to maintain a single lane of traffic" and "failing to keep a proper lookout." Because the evidence did not exclude his responsibility for the additional reckless act of "failing to control [his] speed," the evidence offered no rational

basis upon which the jury might have rejected his criminal responsibility for Pineda's serious bodily injury.

Appellant does not contest the allegation that he recklessly failed to control his speed. He seems to also underestimate, or undervalue, the impact of this undisputed evidence. Failure to control speed can be an independent cause of an increase in the severity of both the crash and the resulting injury. The evidence in this case did not simply demonstrate that Appellant exceeded the posted speed limit. It demonstrated that he caused his vehicle to reach a minimum speed of 58 miles per hour—which was *at least* 23 miles-per-hour over the posted speed limit—on a two-lane road, in a very long tunnel. Even assuming that Appellant was unconscious by the time of the collision, which he claims the evidence showed, speed limits exist, at least in part, to reduce the severity of collisions when they sometimes and inevitably happen. Had Appellant not been traveling at such a high rate of speed, Pineda himself might have been able take some action on his own to minimize the seriousness of the collision; or perhaps he might have avoided the collision entirely; or perhaps he might not have been injured at all; or perhaps he might have suffered bodily injury but not serious bodily injury.

Under these circumstances, one of the alleged acts of recklessness that resulted in serious bodily injury to Pineda remains unrebutted. In other words, no matter how you look at it, the offense alleged, and not some lesser offense, is shown by the evidence. This is true, even according to Appellant's own preferred view of the evidence. *Cf. DeMary v. State*, 423 S.W.2d 331, 334 (Tex. Crim. App. 1967) (where the indictment in a negligent homicide prosecution alleged multiple manners and means by which the appellant acted negligently, but the evidence positively rebutted several, there was still no fatal variance

because the indictment also alleged speeding as an alternative manner of negligence, and the evidence bore that theory out). Thus, even if Appellant's recklessness was limited to his failure to control his speed, which he conceded, the evidence still showed that he was guilty only of the greater offense of aggravated assault because, after all, Pineda suffered serious bodily injury as a result of the collision with Appellant's vehicle, which happened while Appellant was operating his vehicle at a dangerously excessive rate of speed, and Pineda died, and those facts are not even contested. *Cf. Jackson v. State*, 992 S.W.2d 469, 475 (Tex. Crim. App. 1999) ("A murder defendant is not entitled to an instruction on the lesser included offense of aggravated assault when the evidence showed him, at the least, to be guilty of a homicide.").

Alternatively, if the jury were to have found that Appellant was already unconscious even by the time he began to *speed*, then the State would be correct in its assessment that the evidence would only show Appellant to be not guilty of *either* aggravated assault *or* deadly conduct. In that event, he also would not have been entitled to the lesser-included offense instruction, because there would have been no basis for the jury to conclude he possessed any mental state at all regarding any of the acts of recklessness alleged and proved by the evidence. If the jury were to have believed that evidence, it might have reasonably concluded that Appellant was not guilty of either offense. But no evidence showed that Appellant was unconscious even before he began to speed. And consequently, the court of appeals correctly concluded that the trial court was justified in refusing the lesser-included offense instruction on deadly conduct. Its judgment ought to be affirmed.

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