



**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**NO. PD-1248-19**

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**CHRISTOPHER SIMMS, Appellant**

**v.**

**THE STATE OF TEXAS**

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

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**SLAUGHTER, J., delivered the opinion of the Court in which HERVEY, RICHARDSON, NEWELL, and WALKER, JJ., joined. YEARY, J., filed a dissenting opinion in which KELLER, P.J., KEEL and MCCLURE, JJ., joined.**

**OPINION**

Appellant Christopher Simms was convicted of aggravated assault for causing a fatal head-on car accident. At trial, Appellant acknowledged that he was speeding immediately before the accident, but testified that he dozed off or passed out, which then caused him to veer into oncoming traffic and resulted in the collision. Despite this

testimony, the trial court refused Appellant's request for a lesser-included-offense instruction on deadly conduct. Did such refusal violate Appellant's right to have a valid lesser-included offense submitted to the jury for consideration? The answer is yes because there was some evidence that would have allowed the jury to rationally conclude that the cause of the accident and the injury to the victim was Appellant's involuntary loss of consciousness, rather than Appellant's reckless speeding. Therefore, we reverse the judgment of the court of appeals which upheld the trial court's ruling denying Appellant's requested instruction, and we remand the case for a harm analysis.

## **I. Background**

On the morning of February 18, 2016, Appellant was returning home after driving his sister-in-law to work. On his route home, Appellant drove through the Washburn Tunnel in Houston. The tunnel consists of a narrow stretch of two-lane road extending between three-quarters of a mile to a mile long with traffic traveling in opposite directions. The speed limit in the tunnel is 35 miles per hour. Appellant was driving through the tunnel at between 58 and 62 miles per hour. According to the tunnel's surveillance video, Appellant was initially driving in the correct lane. But he then drifted into the oncoming lane of traffic and caused a head-on collision with a van driven by the complainant, Eduardo Gonzales Pineda. As a result of the collision, Pineda was seriously injured and ultimately died about a week later. Appellant was charged with aggravated assault.<sup>1</sup> The indictment alleged that Appellant recklessly caused Pineda serious bodily injury by "failing

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<sup>1</sup> TEX. PENAL CODE § 22.02(a)(1).

to control speed, failing to maintain a single lane of traffic, and failing to keep a proper lookout.”

At Appellant’s jury trial, two investigators with the Harris County Sheriff’s Office testified regarding the crash scene. Deputy Roger Swaney testified based on the surveillance video that Appellant’s vehicle was entirely in the oncoming lane of traffic immediately before the accident, such that no part of his vehicle was in the correct lane of travel. Deputy Brian Wilbanks analyzed the crash data retrieved from the “black box” of Appellant’s car. Wilbanks testified that just before the crash, Appellant “floored” the accelerator, meaning he had his foot all the way down on the gas pedal, but the car did not have time to respond before impact. According to the report, Appellant’s car was travelling at 62 miles per hour two-and-a-half seconds before the crash, 61 miles per hour one second before the crash, and 58 miles per hour a half second before the crash. The report further showed that Appellant’s brakes never activated despite the surveillance video appearing to show the bright red glow of Appellant’s brake lights at the moment of impact. Wilbanks testified that it is possible for a driver to apply brake pedal pressure that would activate the brake-switch light without actually pressing hard enough to activate the brakes. Wilbanks also noted that the surveillance video showed Appellant swerving at the last second as if to try to get back into his lane.

Appellant took the stand at his trial. He testified that he had no memory of the accident but that he believed he “dozed off” or “passed out” while driving through the tunnel. He denied being under the influence of drugs or alcohol prior to the accident, and there was no evidence showing otherwise. He denied feeling tired while driving, having a

known medical condition that would cause him to pass out, or being suicidal. He acknowledged speeding in the tunnel, but maintained that it was his falling asleep that caused his failure to maintain a single lane of traffic and failure to keep a proper lookout, which ultimately caused the crash:

- Q. You recall him saying that you were going 62, 58 and 58 prior to the crash?
- A. Yes, sir, I dozed off.
- Q. Right. You dozed off. So you would agree that you failed to also stay in your lane, right?
- A. I couldn't help it.
- Q. Because you fell asleep, so you failed to stay in your lane, right?
- A. It's on video.
- Q. Okay. Is that correct, you failed to stay in your lane?
- A. Yes, sir.
- Q. And you also failed to keep a proper lookout because you fell asleep, right?
- A. Yes, sir.

After the close of evidence, Appellant requested lesser-included-offense instructions on regular assault and deadly conduct. The State argued that there was no evidence presented that could entitle Appellant to any lesser-included-offense instructions. The trial court agreed and denied Appellant's request. Appellant was found guilty and, finding two enhancement paragraphs to be true, the jury sentenced him to 45 years' imprisonment.

In his sole point of error on direct appeal, Appellant challenged the trial court's denial of his request for the lesser-included-offense instruction on deadly conduct. *Simms v. State*, No. 01-18-00539-CR, 2019 WL 5996378, at \*3 (Tex. App.—Houston [1st Dist.] Nov. 14, 2019) (mem. op., not designated for publication). Appellant's position was that if

the jury believed his testimony that he passed out or dozed off prior to the accident, it could have rationally concluded that he was reckless only with respect to his speeding, but not with respect to actually causing the head-on collision. This is because the collision was a result of his involuntary (and therefore not reckless) loss of consciousness. Under this theory, he suggested, he would be guilty only of deadly conduct for recklessly speeding in a manner that placed the victim in imminent danger of serious bodily injury. In addition, he would not be guilty of aggravated assault because he was not reckless in causing the victim's serious bodily injury. In rejecting Appellant's argument, the court of appeals reasoned that Appellant conceded he was reckless in speeding into the tunnel, and that that act of recklessness alone "supports both deadly conduct and aggravated assault." *Id.* (citing *Guzman v. State*, 188 S.W.3d 185, 193 (Tex. Crim. App. 2006)). Moreover, Appellant testified that he was speeding, failed to keep a proper lookout, failed to stay in his lane, and caused serious bodily injury to the victim. *Id.* Thus, because Appellant conceded that he had a reckless state of mind and that his conduct resulted in serious bodily injury to the victim, the court concluded that there was no evidence that would permit a rational jury to find him guilty only of deadly conduct and not guilty of aggravated assault. *Id.*

Appellant filed a petition for discretionary review challenging the court of appeals' holding. We granted review to consider whether the court erred by concluding that Appellant was not entitled to the instruction on deadly conduct.<sup>2</sup>

## II. Analysis

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<sup>2</sup>The question on which we granted review asks "[w]hether the court of appeals properly protected Appellant's right to an instruction on a lesser included offense by failing to consider his testimony regarding an intervening circumstance that caused the accident resulting in death?"

In his arguments on discretionary review, Appellant re-urges his position that the jury could have rationally concluded that he was guilty of deadly conduct for his reckless speeding, but not guilty of aggravated assault because it was his involuntary unconsciousness that caused the collision, such that he did not recklessly cause Pineda's serious bodily injury. We agree with Appellant that such a view of the evidence, if believed by the jury, would have allowed it to rationally conclude that Appellant was guilty only of deadly conduct. Therefore, Appellant was entitled to the lesser-included-offense instruction, and the court of appeals erred in holding otherwise.

To determine whether a defendant was entitled to a lesser-included-offense instruction, we apply a two-part test. First, we must determine whether the proof necessary to establish the charged offense also includes the lesser offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). This is a question of law, and it does not depend on the evidence to be produced at trial. *Safian v. State*, 543 S.W.3d 216, 220 (Tex. Crim. App. 2018). Second, if this requirement is met, we must further determine whether there is some evidence in the record that would permit the jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011). Under this second step, "anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge." *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). A defendant is entitled to an instruction on a lesser-included offense regardless of whether the evidence supporting the instruction "is weak, impeached, or contradicted." *Cavazos*, 382 S.W.3d at 383. The threshold showing for entitlement to the instruction is "low" and may be satisfied by

evidence that “refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations.” *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). However, “it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.” *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016). Ultimately, the inquiry is whether the evidence establishes the lesser-included offense as a valid, rational alternative to the charged offense. *Hall*, 225 S.W.3d at 536.

In this case, there is no dispute that the first step of the two-part test is satisfied. Thus, our analysis is limited to evaluating whether the second step is satisfied—was there some evidence in the record that would have allowed the jury to rationally conclude that Appellant was guilty only of deadly conduct?

We begin by comparing the elements of the charged aggravated assault to the elements of deadly conduct. As alleged here, to find Appellant guilty of aggravated assault, the jury had to conclude that he *recklessly caused* Pineda serious bodily injury by failing to control his speed, failing to maintain a single lane of traffic, or failing to keep a proper lookout. *See* TEX. PENAL CODE §§ 22.01(a)(1), 22.02(a)(2). Thus, the reckless act must actually cause the end result. In contrast, a person commits deadly conduct if he “*recklessly engages* in conduct that places another in imminent danger of serious bodily injury.” *Id.* § 22.05(a) (emphasis added). The definition for the culpable mental state of recklessness, applicable to both offenses, is as follows:

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

*Id.* § 6.03(c).

Bodily-injury assault is a result-oriented offense. *See Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008). To find Appellant guilty of aggravated assault as charged, the jury would have had to find that he was reckless with respect to the result—Pineda's serious bodily injury—caused by one or more of the alleged manner and means (failing to control speed, failing to maintain a single lane, or failing to maintain a proper lookout). *Id.*; *see also Rodriguez v. State*, 538 S.W.3d 623, 629 (Tex. Crim. App. 2018) (in context of aggravated assault, culpable mental state attaches to the act of “causing bodily injury”). Deadly conduct, on the other hand, is not a result-oriented offense. Thus, it requires proof of Appellant's reckless state of mind with respect to his actions placing Pineda in imminent danger of serious bodily injury, but not with respect to any particular result. *See Guzman v. State*, 188 S.W.3d 185, 190 & n.11 (Tex. Crim. App. 2006) (stating that deadly conduct is “not a result oriented offense;” State can prove guilt of deadly conduct “by merely proving appellant engaged in the conduct without the additional requirement that a specific result was caused with the requisite criminal intent”). It is uncontested that Pineda suffered serious bodily injury as a result of the accident. This necessarily encompasses a finding that Pineda was placed in imminent danger of serious



bodily injury.<sup>3</sup> The key difference between the two offenses for our purposes is the culpable mental state requirement. For deadly conduct, the jury would have to merely conclude that Appellant engaged in some reckless conduct. But to support aggravated assault, the jury would have to conclude that he was reckless with respect to the result of his actions in actually causing Pineda's serious bodily injury.

Based on the totality of the evidence in the record, we conclude that there was some evidence from which the jury could have rationally found that Appellant was guilty of deadly conduct, but not guilty of aggravated assault as alleged. If the jury believed Appellant's testimony that he was speeding through the tunnel and then passed out or dozed off, then the jury could have rationally concluded that Appellant's conduct in speeding was reckless (e.g., that he was aware of but consciously disregarded a substantial and unjustifiable risk regarding the dangerous circumstances), but that he was not reckless with respect to actually *causing* Pineda's serious bodily injury because the conduct leading to

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<sup>3</sup> As we explained in *Guzman v. State*, to establish that a defendant caused serious bodily injury, "the State necessarily must prove that the defendant placed [the victim] in imminent danger of serious bodily injury." 188 S.W.3d 185, 192 (Tex. Crim. App. 2006). In other words, proof of causing serious bodily injury as is necessary to establish aggravated assault also automatically establishes proof of placing the victim in imminent danger of serious bodily injury for purposes of establishing deadly conduct. *Id.*

In *Guzman*, we also clarified that the fact that the victim actually suffered serious bodily injury did not categorically preclude a charge on deadly conduct. *Id.* at 190 n. 11 ("While deadly conduct is generally aimed at capturing conduct that falls short of harming another, we cannot say that all shootings resulting in death or injury are inevitably and necessarily beyond the scope of the offense of deadly conduct. . . . Certainly there is nothing in the statute which expressly or even implicitly limits prosecution (or conviction) for the offense of deadly conduct to only that conduct which threatens, but fails, to cause injury to another. The offense of deadly conduct neither requires nor excludes proof of physical injury."). Thus, the fact that Pineda actually suffered serious bodily injury here does not preclude a charge on deadly conduct.

that result was committed involuntarily and unconsciously.<sup>4</sup> Specifically, the jury could have rationally concluded that: (1) Appellant's involuntary unconsciousness caused him to veer into oncoming traffic which then caused the accident; (2) because the accident was caused by Appellant's unconscious acts, he was not reckless with respect to the result (e.g., he was not "aware of but consciously disregard[ed] a substantial and unjustifiable risk" that Pineda would suffer serious bodily injury because of his actions in veering into the oncoming lane); (3) Appellant's involuntary unconsciousness was not reckless (as there was no evidence of the involvement of drugs or alcohol, and Appellant testified that he was not tired); and (4) Appellant's speeding alone did not cause the accident but did amount to reckless conduct that placed another in imminent danger of serious bodily injury. After all, if Appellant had instead continued speeding while maintaining his own lane of traffic, this specific accident would not have occurred. The jury would have had to ask the following question: What caused Appellant to veer into the oncoming lane of traffic? It could have been a loss of control based on Appellant's speeding, but a jury could also have rationally concluded that Appellant's veering into oncoming traffic was caused not by speeding but by his involuntary loss of consciousness. Under this view of the evidence, it would be rational to find Appellant guilty of deadly conduct for his reckless speeding, but not guilty

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<sup>4</sup> We also note that Appellant's version of events was supported by the testimony of Deputy Wilbanks, who indicated that Appellant never braked prior to impact but instead floored the accelerator, as well as the surveillance video showing Appellant's car drifting into the oncoming lane one to two seconds prior to the accident, and only swerving to avoid the impact at the very last moment. Based on the circumstances and Appellant's testimony, it would have been rational for the jury to infer that Appellant fell asleep or passed out, drifted into oncoming traffic, and then regained consciousness only immediately prior to the accident, at which time he attempted to swerve out of the way and brake, but instead hit the accelerator.

of aggravated assault because he would lack the required culpable mental state of recklessness regarding the result of the collision, Pineda's serious bodily injury. *See* TEX. PENAL CODE §§ 22.01(a)(1), 22.02(a)(1) (defining offense of aggravated assault for recklessly *causing* serious bodily injury); 22.05 (defining deadly conduct as “recklessly [*engaging*] in conduct that places another in imminent danger of serious bodily injury”) (emphasis added).

In concluding that Appellant was not entitled to the instruction on deadly conduct, the court of appeals reasoned that his reckless speeding alone, coupled with the undisputed proof of Pineda's serious bodily injury, necessarily meant that the elements of aggravated assault were established. 2019 WL 5996378, at \*3. Thus, in the court of appeals' view, even if the jury believed Appellant's testimony that he passed out or dozed off, there was no plausible basis for the jury to have found him guilty only of deadly conduct because his reckless speeding alone was a sufficient cause of Pineda's serious bodily injury. The court's analysis, however, fails to properly address the questions of voluntariness and causation that are raised by these facts. Under Penal Code Section 6.01(a), a person commits an offense “only if he voluntarily engages in conduct, including an act, an omission, or possession.” TEX. PENAL CODE § 6.01(a); *see Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014) (stating that under Section 6.01(a), if a person's physical body movements “are the nonvolitional result of someone else's act, are set in motion by some independent non-human force, are caused by a physical reflex or convulsion, or are the product of unconsciousness, hypnosis, or other nonvolitional impetus, that movement is not voluntary”) (quoting *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003)).

Relatedly, under the law of causation as set forth in Penal Code Section 6.04(a), a person is criminally responsible for a result if that result “would not have occurred but for his 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. PENAL CODE § 6.04(a); *see also Robbins v. State*, 717 S.W.2d 348, 351 (Tex. Crim. App. 1986) (stating that a “‘but for’ causal connection must be established between the defendant’s conduct and the resulting harm”; conduct that merely “contributes to” a result, without more, does not prove causation).<sup>5</sup>

Here, consistent with these provisions, if the jury believed that Appellant dozed off or passed out while driving and thus involuntarily veered into oncoming traffic, the jury could have then further concluded that: (1) the voluntary conduct for which he was responsible, his speeding prior to the collision, was not sufficient by itself to cause Pineda’s serious bodily injury, and, (2) that while his speeding contributed to Pineda’s injury, Appellant’s loss of consciousness was an intervening cause that was “clearly sufficient” to produce the result, and that his speeding alone was “clearly insufficient.” Under such a

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<sup>5</sup> In *Robbins*, we further explained,

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.

possible view of the evidence, Appellant could have rationally been found guilty of deadly conduct for his reckless speeding, but not guilty of aggravated assault because his speeding alone was not a sufficient cause of Pineda's serious bodily injury.<sup>6</sup> Given the existence of these fact questions which were properly left to the jury, the court of appeals erred by presuming that Appellant's speeding alone necessarily caused Pineda's serious bodily injury, when the evidence raised the possibility of an intervening circumstance—Appellant involuntarily falling asleep or dozing off.<sup>7</sup>

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<sup>6</sup> Similar to the reasoning employed by the court of appeals, the dissenting opinion would hold that Appellant's reckless speeding was a sufficient cause of Pineda's serious bodily injury, such that it was immaterial whether his veering into Pineda's van was in fact the product of his involuntary unconsciousness. Dissenting op., at 3-4. In support of this conclusion, the dissent reasons that "[f]ailure to control speed can be an independent cause of an increase in the severity of both the crash and the resulting injury." *Id.* at 4. But, as we have noted above, it is not enough to say that Appellant's reckless speeding increased the severity of the crash and resulting injury. Rather, the law of causation precludes holding Appellant responsible for the result (Pineda's serious bodily injury) if an intervening cause (Appellant's involuntary unconsciousness and veering into oncoming traffic) was clearly sufficient on its own to produce the result, and Appellant's speeding clearly insufficient to produce that result. *See* TEX. PENAL CODE § 6.04(a); *see also* *Robbins*, 717 S.W.2d at 351-52 (in case involving alleged concurrent causes, rejecting jury instruction that allowed the jury to convict if the defendant's conduct "contributed to cause" a particular result; such language "does not provide the required standard with which the jury must consider the causes"). Furthermore, because it implicates fact issues, this question of causation should be left to the jury to decide. *See Turner v. State*, 435 S.W.3d 280, 283 (Tex. App.—Waco 2014, pet. ref'd) ("Whether [ ] a causal connection exists [under Section 6.04(a)] is a question for the jury's determination."). Viewing the particular facts at hand under the appropriate standard for causation, it would have been rational for the jury to find that Appellant's involuntary loss of consciousness and veering head-on into Pineda's van was a sufficient concurrent cause of Pineda's serious bodily injury. As such, we cannot agree that Appellant's speeding alone was necessarily shown to have caused Pineda's serious bodily injury, such that Appellant was automatically guilty of aggravated assault and could not rationally be found guilty only of deadly conduct.

<sup>7</sup> For similar reasons, we reject the court of appeals' reliance on our decision in *Guzman v. State*. *See* 188 S.W.3d 185. In *Guzman*, there was no dispute that the defendant engaged in voluntary reckless conduct that actually caused the victim's serious bodily injury (putting a gun to the victim's head and intentionally pulling the trigger). *See id.* at 193-94. Thus, we upheld the denial of the deadly-conduct instruction because Guzman was "consciously aware of the risk of harm his conduct posed to [the victim], and thus [he] acted recklessly[.]" *Id.* Here, by contrast, there were legitimate fact questions about whether Appellant's conduct in veering into Pineda's van was

### III. Conclusion

If the jury had believed Appellant's testimony that he was speeding but that the actual cause of the accident was his falling asleep or passing out, then it could have rationally found him guilty of deadly conduct for his reckless speeding prior to losing consciousness, but not guilty of aggravated assault because the act causing the victim's serious bodily injury (Appellant's veering into oncoming traffic) was committed unconsciously and involuntarily. As such, deadly conduct was a valid, rational alternative to the charged aggravated assault. The court of appeals erred by holding to the contrary. Accordingly, we reverse the judgment of the court of appeals and remand the case for a harm analysis.

DELIVERED: September 15, 2021  
PUBLISH

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voluntary and whether his remaining conduct (his reckless speeding) was on its own sufficient to establish the causation necessary to support aggravated assault. Given these distinctions, we cannot say with certainty that Appellant was "consciously aware of the risk of harm his conduct posed to" Pineda, as was the case in *Guzman*. *See id.* The court of appeals' reliance on that decision to justify its holding here was misplaced.