COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LONNIE DELMAR GADSON,	§	No. 08-15-00108-CR
Appellant,	§	Appeal from
v.	§	77th District Court
THE STATE OF TEXAS,	§	of Limestone County, Texas
Appellee.	§	(TC # 13403-A)

O P I N I O N

Appellant was convicted of aggravated assault on a public servant. His appeal challenges: (1) the denial of a continuance following the State's deletion of language from the indictment; (2) the sufficiency of the evidence to support the jury's finding of his use of an automobile as a deadly weapon; (3) the un-objected to omission of a jury instruction; and (4) an incorrect recitation in the judgment. Other than the recitation in the judgment which we correct, we find no error and affirm the conviction.[1]

FACTUAL SUMMARY

This case arises from a high speed police chase of Appellant during which he struck a police cruiser with his pickup truck, not once, but twice. Officer William Rogers was inside the

[1] This case was transferred from the Tenth Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX.GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedents of that court to the extent they might conflict with our own. *See* TEX.R.APP.P. 41.3.

police cruiser at the time of the first impact, but was just outside the cruiser when the second impact occurred. Following Appellant's eventual apprehension, the State charged him with aggravated assault with a deadly weapon upon a public servant. TEX.PENAL CODE ANN. § 22.02(b)(2)(B)(West 2011). The original indictment alleged in part that on June 11, 2014:

> [Appellant] did then and there intentionally, knowingly, and recklessly cause bodily injury to William Rodgers by striking a vehicle William Rogers was standing outside of with a motor vehicle….[2]

Three days before the scheduled trial, the trial court granted the State's oral motion to abandon language from the indictment and it literally struck through the following language:

> [Appellant] did then and there intentionally, knowingly, and recklessly cause bodily injury to William Rodgers by striking a vehicle ~~William Rogers was standing outside of~~ with a motor vehicle….

The State contended that it was "trimming some of the fat out of the indictment" which was no surprise to Appellant and did not change the elements of the offense. The State had informed Appellant's counsel seven days earlier of its intent to abandon this language. Appellant argued that the State changed the means and manner of how the offense was committed, and while not a surprise, the change entitled Appellant to at least a ten day postponement of the trial. *See* TEX.CODE CRIM.PROC.ANN. art. 28.101(a)(West 2006)("[o]n the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information."). The trial court denied the postponement.

At the ensuing jury trial, the testimony of three peace officers, buttressed by video footage from two police cruisers, established the following version of the events. On the afternoon of June 11, 2014, Officer Dustin Davis of the Mexia police department responded to a

[2] The indictment also alleged the other elements of the crime, including proper venue, that Appellant used or exhibited a motor vehicle as a deadly weapon, and that he knew William Rogers was a police officer discharging official duties at the time of the assault.

theft report at a local grocery store. When Officer Davis arrived at the scene, a store employee pointed out a red pickup truck in the parking lot, occupied by the suspect. The pickup began to drive off, and Officer Davis turned on his overhead lights and siren. At that point, the pickup accelerated out of the parking lot beginning a somewhat spectacular police pursuit.

During the pursuit, which involved speeds of up to ninety miles an hour through residential neighborhoods, the pickup ran multiple stop signs and a red light. At one point, the pickup ran off the road through a bar ditch and into an elementary school parking lot, and then back onto the roadway. The entire pursuit took a little over four minutes, until the pickup eventually stopped, and the driver, identified at trial as Appellant, exited the vehicle and fled on foot. He was eventually apprehended after being tasered.

Central to this case is an earlier segment of the chase when the pickup pulled onto a lawn in a residential neighborhood after the police had briefly lost sight of the vehicle. Corporal William Rogers, who had joined the pursuit, spotted the red pickup in the yard and pulled up behind it. Appellant's pickup then pulled out of the yard and back onto the road, but then swung back around and ran into the driver's side rear panel of Corporal Rogers's unit, just at the point of the rear tire. Corporal Rogers testified that this impact caused his head to slam into the vehicle's door frame.[3] The impact pushed the rear of the police cruiser about three feet to one side and folded the back tire in, rendering the unit inoperable.

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[3] Corporal Rogers is a large individual who by his own account barely fits into the driver's seat of his unit and cannot wear a seat belt:

> Q. Is it fair to say you're a fairly hefty guy?
> A. I'm a big boy, ain't no doubt about that.
> …
> Q. All right. So how--what's it like inside your patrol car when you sit down? What are the things that are around you as you sit in it?
> …
> A. Basically, it's the equivalent of me climbing into the cockpit of a jet.

At that point, Corporal Rogers exited his car and pointed his service revolver at Appellant, telling him to get out of the pickup. Appellant revved the engine, laid down in the seat, but grabbed at his gear shift to put the truck into drive. Officer Davis had arrived by this time, and he testified to hearing "the engine rev, and then I heard the vehicle go back towards Corporal Rogers." The pickup then struck Corporal Rogers' unit on the open driver's side door. Rogers jumped out of the way in time to avoid being hit in this second impact. He was injured in the first, but not the second impact.[4]

The jury returned a guilty verdict to the single aggravated assault count. Appellant elected to have the trial judge sentence him. The State enhanced the punishment based on two prior felony convictions from Louisiana -- a 1988 conviction for attempted murder and a 1988 conviction for receipt of stolen items. Appellant pled true to the enhancement, admitting to both prior convictions. The punishment phase included evidence of Appellant's problems with drug use, including testimony from a DPS chemist that a blood sample taken from Appellant contained methamphetamines.[5] The trial judge assessed a forty-five year sentence. Appellant brings four issues challenging the conviction below.

DENIAL OF CONTINUANCE

In his first issue, Appellant contends that the trial court abused its discretion in denying him a statutorily mandated ten day continuance of the trial. Article 28.10 accords a defendant the right to ten days following any "amendment" of an indictment. TEX.CODE CRIM.PROC.ANN. art. 28.10(a). Appellant claims the State amended the indictment three days prior to the trial.

[4] Corporal Rogers was driven by another officer to a local hospital. He had a severe headache by the time he arrived at the hospital. CT scans of his head were negative, and he returned to work that same day. He testified that the headaches continued for two weeks. After that, however, he fully recovered.

[5] The actual draw time is not in our record, but the sample was received by the DPS within a week of the chase, and was presumably drawn sometime shortly after Appellant's arrest. Appellant admitted on the record in a pretrial hearing that he was "strung out on ice" and was "high" at the time of incident.

The State responds that the deleted text from the indictment was an "abandonment" and not an amendment. Both parties agree that Article 28.10 does not apply to abandonment, so the first question is whether the State abandoned a portion of its indictment, or whether it amended it. *See Alston v. State*, 175 S.W.3d 853, 854 (Tex.App.--Waco 2005, no pet.)(noting abandonment does not invoke right to continuance).

Amendment or Abandonment?

An amendment is an alteration to the face of the charging instrument which affects its substance. *Mayfield v. State*, 117 S.W.3d 475, 476 n.1 (Tex.App.--Texarkana 2003, pet. ref'd). By contrast, an abandonment does not affect the substance of the charge and is best defined by the three scenarios in which it might occur: (1) abandonment of one or more alternative means of committing an offense; (2) abandonment of an allegation which reduces the prosecution to a lesser included offense; or (3) abandonment of "surplusage." *Eastep v. State*, 941 S.W.2d 130, 132 (Tex.Crim.App. 1997).[6]

The deleted language here does not squarely fit into the first two classes. It was not abandonment of one of several alternative means of committing the offense. That type of abandonment occurs when a statute provides multiple ways that the offense might occur, and the State then drops one of those from the indictment. *Id*. at 133. For example, when the State indicts a person for manufacturing, exhibiting, and advertising an obscene device, the State might freely abandon one of those means (either the manufacture, exhibition, or advertisement). *Yates v. State*, 766 S.W.2d 286, 290 (Tex.App.--Dallas 1989, pet. ref'd). But that is not the

[6] While *Eastep* is the seminal case in this area, several of its subsidiary holdings have subsequently been overruled. For instance, *Eastep* holds that an amendment must be by an actual interlineation on face of the original indictment. That holding was overruled by *Riney v. State*, 28 S.W.3d 561, 565-66 (Tex.Crim.App. 2000). *Eastep* also discusses what was called the *Burrell* exception to surplusage, but that exception was overruled in *Gollihar v. State*, 46 S.W.3d 243, 256-57 (Tex.Crim.App. 2001). Nonetheless, "surplusage law is still viable in cases concerning whether an alteration of an indictment constitutes an amendment." *Hall v. State*, 62 S .W.3d 918, 920 (Tex.App.--Dallas 2001, pet. ref'd). Finally, *Eastep* holds that a harmless error analysis does not apply to Article 28.10, but that holding is no longer correct, as we discuss *infra*.

situation here, as the State only alleged one means of assault, namely causing bodily injury to Corporal Rogers. Nor does the situation here fit the lesser included offense scenario.

The most analogous scenario, and that urged by the State, is that the deleted language was mere surplusage. Surplusage is unnecessary language not legally essential to constitute the offense alleged in the charging instrument. *Eastep*, 941 S.W.2d at 134. For this offense, it was immaterial whether Corporal Rogers was inside or outside his vehicle when Appellant's pickup struck the police cruiser, just so long as Rogers sustained bodily injury, and that wherever Rogers was located, the pickup was capable of causing serious injury or death. The core of the allegation was that Appellant used his pickup as a deadly weapon in striking another vehicle.

Appellant counters that the deleted language here changed the manner and means of committing the offense, which constitutes an amendment such as in *Hillin v. State*, 808 S.W.2d 486 (Tex.Crim.App. 1991) and *Westfall v. State*, 970 S.W.2d 590 (Tex.App.--Waco 1998, pet. ref'd). In *Hillin*, the State had charged the defendant with striking an officer with "porcelain," and during trial, amended the indictment to replace "porcelain" with "commode." *Hillin*, 808 S.W.2d at 486-87. The defendant apparently built his entire defense around proving the item was not porcelain. *Id.* *Westfall* also deals with an amendment occurring after trial commenced (changing the location of the offense from "Rice, Texas" to "Navarro County"). *Westfall*, 970 S.W.2d at 591-93. In neither case did the courts examine whether the language at issue was mere surplusage. In our view, both cases fit into an exception to the surplusage rule that is now abandoned.

That now abandoned exception provided that when an unnecessary allegation "is descriptive of that which is legally essential to charge a crime, the State must prove it as alleged though needlessly pleaded." *See Eastep*, 941 S.W.2d at 134 n.7. Accordingly, "when an

indictment describes a necessary person, place, or thing with unnecessary particularity, the State must prove all circumstances of the description." *Eastep*, 941 S.W.2d at 134 n.7, *citing Burrell v. State,* 526 S.W.2d 799 802 (1975). The focus of this exception was on whether the allegation at issue described an element of the offense with more particularity than necessary. *See Curry v. State*, 30 S.W.3d 394, 399 (Tex.Crim.App. 2000). The Court of Criminal Appeals referred to this as "the *Burrell* exception." *See Gollihar v. State*, 46 S.W.3d 243, 250 (Tex.Crim.App. 2001). However, the Court of Criminal Appeals expressly overruled the *Burrell* exception in *Gollihar*. *Id.* at 256; *see also Santana v. State*, 59 S.W.3d 187, 195 (Tex.Crim.App. 2001)(recognizing overruling of *Burrell* exception); *Hoisager v. State*, 03-13-00328-CR, 2015 WL 4537581, at *3 (Tex.App.--Austin July 17, 2015, pet ref'd)(mem. op.)(not designated for publication)(rejecting claim that deleting the place of confinement was amendment of indictment for kidnapping based on the overruling of *Burrell* exception); *Alston v. State*, 175 S.W.3d 853, 855 (Tex.App.--Waco 2005, no pet.)(deletion of word "Volunteer" from name of fire department was abandonment of surplusage, noting overruling of *Burrell* exception). Accordingly, we conclude the language in this indictment that was deleted was surplusage. The *Burrell* exception that might have dictated otherwise is no longer applicable.

Harmless Error

Additionally, even if the deletion could be viewed as an amendment, we conclude any error in denying a ten day continuance of the trial was harmless. The denial of a continuance, like the amendment of an indictment, is non-constitutional error. *See Gray v. State*, 159 S.W.3d 95, 98 (Tex.Crim.App. 2005)(when only a statutory violation is claimed, the error must be treated as non-constitutional for the purpose of conducting a harm analysis); *Wright v. State*, 28 S.W.3d 526, 531 (Tex.Crim.App. 2000)(any error in denying ten day continuance did not harm

defendant and thus did not warrant reversal); *Curry v. State*, 1 S.W.3d 175, 179 (Tex.App.--El Paso 1999), aff'd, 30 S.W.3d 394 (Tex.Crim.App. 2000)(claimed error in amendment of indictment subject to harm analysis). Accordingly, Appellant carries the burden to show that any error affected his substantial rights. *See* TEX.R.APP.P. 44.2(b); *Gonzales v. State*, 304 S.W.3d 838, 842-43 (Tex.Crim.App. 2010)(harm standard for denial of continuance); *see also Mason v. State*, 10-05-00053-CR, 2006 WL 348578, at *3 (Tex.App.--Waco Feb. 15, 2006, pet. ref'd)(mem. op.)(not designated for publication)(applying harm analysis for claimed error in amendment of indictment during trial).

Appellant attempts to meet this burden by suggesting that the deletion of the language switched the factual basis of the case from one that the State could not prove, to one that it might, which correspondingly affected his trial strategy. He contends the misapprehension of the charge affected his decision to plea bargain. He also claims the officer's injuries, and the cause of those injuries "for the first time" became relevant. We find these arguments unpersuasive.

Appellant suggests that the deletion of the indictment language affected his trial strategy and plea decisions. The implicit assumption in this argument is that Appellant intended to go to trial, confident that the State could never prove that Corporal Rogers suffered bodily injury while outside of the police cruiser. But even had the State gone to trial on the original indictment, the language placing Corporal Rogers outside the vehicle would not guarantee an acquittal. Legal sufficiency of the evidence is measured against a hypothetically correct charge, which 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 offense. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). Thus "a hypothetically correct charge need not incorporate allegations that give rise to immaterial

variances." *Gollihar*, 46 S.W.3d at 256. For non-statutory elements, such as at issue here, courts will tolerate "little mistakes" in the variance of proof and allegations that do not prejudice the defendant's substantial rights. *Johnson v. State*, 364 S.W.3d 292, 294 (Tex.Crim.App. 2012).

In *Johnson*, for instance, the State alleged an aggravated assault by the defendant causing serious bodily injury by twisting the victim's arm behind her. The State proved the serious bodily injury, but by the defendant throwing the victim up against a wall. The variance was immaterial because the "focus or gravamen" of the offense is that the bodily injury was inflicted; "The precise act or nature of conduct in this result-oriented offense is inconsequential." *Id*. at 298, *quoting Landrian v. State*, 268 S.W.3d 532, 533, 537 (Tex.Crim.App. 2008). Appellant presents no proof, and we think it an inherently risky proposition, for Appellant to have banked on the assumption that the "standing outside" the car language of the indictment would have created a fatal (material) variance. The gravamen of this charge was injury to Corporal Rogers, and not where Rogers was located at the time the injury was sustained.

Nor does Appellant seriously press an argument that he needed additional time to prepare a defense. There is nothing in our record to show what additional investigation he would have undertaken, or what it would have yielded.[7] The indictment was always premised on bodily injury to Corporal Rogers. At most, the deletion of the language narrowed the time of the injury to the first crash. The record does not suggest that prior to trial Appellant believed the bodily injury came only from the second impact, and that lack of record support undermines any claim of prejudice. As the Court of Criminal Appeals suggests in *Gonzalez*, the prejudice from denial

[7] At the hearing on the abandonment of the indictment language, Appellant testified, but only about issues he had with his court appointed counsel. Appellant desired a continuance not to gather any specific information, but rather to borrow funds to obtain a new lawyer. In his words, "I feel like I'm being railroaded into a trial, and I would like some time, Your Honor, for my mom to be able to try to get me a sufficient lawyer." His court appointed lawyer disputed his specific complaints, and stated that she had reviewed the State's file and was ready for trial. The record also indicates several previous continuances had been granted in this case.

of a continuance is best proved at the motion for new trial stage, when the defendant can show what he or she might have developed with more time. 304 S.W.3d at 842-43, *quotin*g George E. Dix & Robert O. Dawson, 42 Texas Practice: Criminal Practice and Procedure § 28.56 (2d ed. 2001), at 532-33. No such showing is made here.

When a defendant claims that the trial court errs in allowing the State to amend an indictment after trial has started, courts have looked to two factors as relevant to the harm analysis:

> whether the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime.

Flores v. State, 139 S.W.3d 61, 66 (Tex.App.--Texarkana 2004, pet. ref'd), *quoting Gollihar*, 46 S.W.3d at 248; *Mason v. State*, 10-05-00053-CR, 2006 WL 348578, at *3 (Tex.App.--Waco Feb. 15, 2006, pet. ref'd)(mem. op.)(not designated for publication)(citing test for claimed error in amending indictment during trial). Citing this standard, Appellant also contends that he is subject to an additional prosecution from the second collision if the State later indicted him for aggravated assault by threat (as distinct from aggravated assault by causing bodily injury). But because Appellant's complaint is the denial of a continuance, and not the decision to allow the abandonment in the first place, we are less certain *Flores* is the correct error standard. And even if it were, we fail to see how allowing a ten day continuance would have ameliorated the risk of a second indictment. We overrule Issue One.

SUFFICIENCY OF THE EVIDENCE

In his second issue, Appellant contends the evidence is legally insufficient to show he used or exhibited his pickup truck as deadly weapon. Specifically, he contends that the State failed to prove that his use of the truck could have put Corporal Rogers in actual danger of death

or serious bodily injury. Instead, he claims at most the State has proved the danger was hypothetical.

Standard of Review

Our legal sufficiency standard is articulated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). *See Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex.Crim.App. 2010)(finding no meaningful distinction between the legal and factual sufficiency standards and applying *Jackson v. Virginia* as the only standard in Texas). The relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Emphasis in original]. *Jackson*, 443 U.S. at 318-19, 99 S.Ct. at 2789.

Under the *Jackson* standard, the jury is the sole judge as to the weight and credibility of evidence. *Brooks*, 323 S.W.3d at 894-95. If the record contains conflicting inferences, we must presume the jury resolved such facts in favor of the verdict and defer to that resolution. *Id.* We consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from the evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007); *Arzaga v. State*, 86 S.W.3d 767, 777 (Tex.App.--El Paso 2002, no pet.). On appeal, we serve only to assure that the jury reached a rational verdict; we may not reevaluate the weight and credibility of the evidence; nor may we substitute our judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex.Crim.App. 2000).

Analysis

We begin with what the State needed to prove by measuring the evidence against the elements of the offense as defined in a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex.Crim.App. 2009). An "aggravated assault" first must constitute an

assault, which as charged here required proof that Appellant intentionally, knowingly, or recklessly caused bodily injury to Rogers. TEX.PENAL CODE ANN. § 22.01(a)(1). The assault rises to the level of an aggravated assault when a person uses or exhibits a deadly weapon during the commission of the assault. TEX.PENAL CODE ANN. § 22.02(a)(2).[8] A deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 1.07(a)(17)(B)(West Supp. 2016). "Case law has made it clear that the word 'anything' in the definition of a deadly weapon means just that: anything." *Mills v. State*, 440 S.W.3d 69, 72-73 (Tex.App.--Waco 2012, pet. ref'd), *citing Guzman v. State*, 188 S.W.3d 185, 198 (Tex.Crim.App. 2006)(Keller, P.J., concurring).

Given the ubiquitous nature of motor vehicles, it is no surprise courts have given considerable attention to the automobile as a potential deadly weapon. Prior cases leave no doubt that a motor vehicle can become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury. *Brister v. State*, 449 S.W.3d 490, 494 (Tex.Crim.App. 2014)("By statute, a motor vehicle is not a deadly weapon *per se*, but it can be found to be one if it is used in a manner that is capable of causing death or serious bodily injury. Therefore, sufficiency of the evidence is dependent upon the specific testimony in the record about the manner of use."); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex.Crim.App. 2005); *Ex parte McKithan*, 838 S.W.2d 560, 561 (Tex.Crim.App. 1992). The State need not prove a specific intent to use the motor vehicle as a deadly weapon. *Drichas*, 175 S.W.3d at 798. However, to sustain a deadly-weapon finding, there must be evidence that others were "actually endangered;" and the mere existence of a "hypothetical potential for danger if others had been present" is

[8] It might also be aggravated when the actor actually causes serious bodily injury to another, which fortunately was not the case here. *Id*. at § 22.02(a)(1).

insufficient. *Cates v. State*, 102 S.W.3d 735, 738 (Tex.Crim.App. 2003), *quoting Mann v. State*, 13 S.W.3d 89, 92 (Tex.App.--Austin 2000), aff'd, 58 S.W.3d 132 (Tex.Crim.App. 2001).

Stated otherwise, we first evaluate the manner in which the defendant used the motor vehicle during the felony. *Sierra v. State*, 280 S.W.3d 250, 255 (Tex.Crim.App. 2009). Then we "consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury." *Id.*; *see also Turner v. State*, 08-11-00318-CR, 2013 WL 5516447, at *4 (Tex.App.--El Paso Oct. 2, 2013, no pet.)(not designated for publication).

Applying that rubric here, we conclude that a rationale jury could have found that Appellant used or exhibited his pickup truck as a deadly weapon during this assault. As to the manner of its use, the pickup truck was used as a battering ram to disable his pursuer. Corporal Rogers pulled up behind Appellant's truck which was apparently stopped in hiding in a residential yard. Appellant then left the yard, briefly got back on the street, and then came back onto the yard to put itself in a position to T-bone Rogers' vehicle. The manner of use was no longer for transport, but instead to inflict damage.

Appellant is correct that the use of the pickup here did not actually cause serious injury or death. Nonetheless, 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. *Mills*, 440 S.W.3d at 73. "The placement of the word 'capable' is crucial to understanding this method of determining deadly-weapon status. *Tucker v. State*, 274 S.W.3d 688, 691 (Tex.Crim.App. 2008), *citing McCain v. State*, 22 S.W.3d 497, 503 (Tex.Crim.App. 2000).

The jury could have concluded the pickup could have inflicted death or serious bodily injury. The jury had before it evidence of the damage to the police cruiser from the first impact.

The rear wheel of the police cruiser from the first impact was "folded in" rendering the vehicle non-operational. The impact itself moved the rear of the police cruiser three feet to the side. The impact also knocked the pickup backward. The impact was significant enough to cause Roger's body to move inside his vehicle, causing his head to strike the door frame. A rationale jury could conclude that the force of impact in a T-bone collision as described here was sufficient to cause serious bodily injury.

In making a deadly weapon finding, the jury can look to the use of the weapon "during the transaction" from which the felony occurs. *Ex parte Jones*, 957 S.W.2d 849, 851 (Tex.Crim.App. 1997). Appellant asks that we cabin the transaction to only the assault, obviously trying to avoid inclusion as a part of the transaction Appellant driving through a residential neighborhood at ninety miles an hour while ignoring several stop signs. But even if we look only to what happened with respect to the two impacts of Rogers' vehicle, the evidence would be sufficient. The second impact occurred when Rogers was just outside the open door to his police cruiser. Appellant's pickup hit the door hard enough to damage the door and front driver's side panel of the police unit, such that the door would no longer close. Rogers had to jump out of the way to avoid being directly struck. This second impact, certainly part of the same transaction, implicates a vehicle to pedestrian type accident, which is certainly capable of causing death or serious bodily injury. *See Dobbins v. State*, 228 S.W.3d 761, 763 (Tex.App.--Houston [14th Dist.] 2007, pet ref'd untimely filed)(defendant driving vehicle at officer standing in parking lot); *Dolkart v. State*, 197 S.W.3d 887, 891 (Tex.App.--Dallas 2006, pet. ref'd)(evidence was sufficient to show motorist who struck cyclist used vehicle as deadly weapon); *Green v. State*, 831 S.W.2d 89, 93 (Tex.App.--Corpus Christi 1992, no pet.)(suddenly

accelerating towards pedestrian in threatening manner sufficient to support deadly weapon finding).

Appellant is correct in postulating that not every vehicular collision will justify a deadly weapon finding. The court of criminal appeals rejected the State's contention in *Brister v. State* that any use of an automobile while intoxicated was *per se* use of a deadly weapon. 449 S.W.3d at 494. At the same time, the court reaffirmed its earlier jurisprudence, such as *Drichas,* that an intoxicated driver can use a vehicle as a deadly weapon under the particular circumstances of a given case. In *Drichas*, for instance, the defendant fled the police in a high speed chase wherein he drove erratically, disregarded traffic signs and signals, and made abrupt turns, sometimes while other vehicles were present. 175 S.W.3d at 798. The court agreed the evidence supported the use of the auto as a deadly weapon in *Drichas*, and we similarly believe the evidence here is sufficient to allow a reasonable jury to reach the same conclusion. We overrule Issue Two.

CHARGE ERROR

In Issue Three, Appellant complains that the trial court erred in omitting a definition of "knowingly" in the jury charge which addressed the circumstance of Appellant's knowledge that Corporal Rogers was a peace officer acting in the line of duty at the time of the aggravated assault.

As we note above, the State had the burden to prove that Appellant intentionally, knowingly, or recklessly committed an aggravate assault. The charge included a definition of "knowingly" that defined the term in context of a person's knowledge of the result of their conduct:

> A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

But the State here was also was required to show that Appellant knew that Corporal Rogers was a law enforcement officer discharging his official duties. The charge did not contain a definition of "knowingly" that addressed Appellant's appreciation of that circumstance. To be sure, the application portion of the charge explicitly told the jury that it could not find Appellant guilty unless the evidence proved that Appellant "did then and there *know* that William Rogers was then and there a public servant" and that Rogers was "lawfully discharging an official duty." [Emphasis added]. Appellant's argument is that the jury had no definition of knowingly to guide them in that aspect of the case.

We review alleged jury charge error using a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex.Crim.App. 2012); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984)(op. on reh'g). First, we must determine whether error occurred. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex.Crim.App. 2013). If there is error in the charge, we must then analyze whether sufficient harm resulted from the error to require reversal. *Id*. Under this second step, the degree of harm necessary for reversal usually depends on whether the defendant properly preserved the error by objection. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App. 2003). Appellant did not object to the omission of the definition from the charge, and accordingly our harm analysis focuses on whether Appellant suffered "egregious harm." *Price v. State*, 457 S.W.3d 437, 440 (Tex.Crim.App. 2015), *citing Almanza*, 686 S.W.2d at 171. Egregious harm is the type that deprives a defendant of a "fair and impartial trial." *Id*. In deciding whether egregious harm occurred, we look to: "1) the entire jury charge; 2) the state of the evidence; 3) the arguments of counsel; and 4) any other relevant information in the record." *Ngo v. State*, 175 S.W.3d 738, 750 n.48 (Tex.Crim.App. 2005), *citing Almanza*, 686 S.W.2d at 171.

The State here agrees the charge should have included a definition of "knowingly" with respect to whether or not Appellant knew Corporal Rogers was a peace officer. Instead, it argues (and we agree), that on this record any error was not egregious.

Looking to the charge as a whole, the jury was instructed that it must find that Appellant "knew" that Corporal Rogers was a peace officer and in the line of duty at the time of the assault. Appellant does not suggest what specific definition of "knowingly" should have been included here, but the Texas Court of Criminal Appeals has previously approved this language for the mental state of knowing whether the victim was a peace officer: "A person acts 'knowingly' or with knowledge, with respect to circumstances surrounding his conduct when he is aware that the circumstances exist." *Hughes v. State*, 897 S.W.2d 285, 296 n.16 (Tex.Crim.App. 1994). Appellant does not explain how a definition such as this would vary from the commonly understood meaning of the word to "know" which was already in the application portion of the charge.[9]

Nor does the evidence admitted at trial suggest that there was egregious harm. Appellant was being pursued by police cruisers with their sirens on, and lights flashing. The videos show Appellant's efforts to evade the police, and thus show his knowledge of their focus on him. Corporal Rogers' cruiser was a marked vehicle with the word "police" clearly visible. Corporal Rogers was in uniform, and after the first impact, exited his vehicle and pointed his gun at Appellant, instructing him to show his hands. The evidence amply supports that Corporal Rogers was a peace officer who was doing his job at the time of the assault and that Appellant would have appreciated that fact.

[9] The jury was also generally instructed that "A person commits the offense of aggravated assault of a public servant if he commits assault, as heretofore defined, when the defendant *knows* the person assaulted is a public servant while the public servant is lawfully discharging an official duty." [Emphasis added].

In final arguments, neither the State nor Appellant argued this particular element of the offense. Appellant's focus in closing was the lack of medical documentation of injury. The State's prosecutors focused on the credibility of its witnesses, and how the two impacts proved an intentional and dangerous act. From the argument of counsel, it appeared the circumstances of Corporal Rogers' status as an on-duty peace officer was an uncontested issue. Appellant now argues that the State's attorneys focused the jury on the term "recklessness" in the charge, suggesting that the jury might have used that standard for every element of the offense. We have carefully reviewed the final argument and conclude the prosecutor's reference to the recklessness standard was either so generic as to be of little import, or was directed to Appellant's actions in turning his pickup around and accelerating toward Corporal Rogers' vehicle (and not whether Appellant "recklessly" concluded that Rogers was a peace officer in the line of duty).

. Nor do any other considerations in the case suggest that the error here was egregiously harmful. Appellant's defense at trial largely questioned why the police would engage in a high speed chase to pursue a person accused of a misdemeanor theft. Appellant also challenged the proof of physical injury by the officer. Nothing in our record suggests a different definition of "knowingly" would have affected the jury's view of an element of the offense that everyone at trial appeared to take as a given. We overrule Issue Three.

ERROR IN JUDGMENT OF CONVICTION

Appellant also complains that the judgment erroneously recites that he pled true to only one enhancement allegation, when in fact he pled true to two distinct allegations. The enhancement notice alleged two distinct prior convictions from Louisiana: an attempted murder conviction; and a possession of stolen items conviction. Appellant pled true to both convictions. The judgment, however, states only that Appellant pled true to the "1st Enhancement

Paragraph." Article 42.01 generally requires the trial court's judgment to reflect "[t]he plea or pleas of the defendant to the offense charged." TEX.CODE CRIM.PROC.ANN. art 42.01, § 1(3)(West Supp. 2016). Appellant asks that we reform the judgment to accurately reflect the plea of true to the second enhancement allegation. The State agrees. Accordingly, we sustin Issue Four. Assuming but not deciding that a complete recitation of the pleas is required by Article 42.01, we modify in the judgment to reflect that Appellant pled true to both enhancement allegations. We affirm the judgment as modified.

February 24, 2017

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ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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