In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-17-00376-CR

EVAN SCOTT GUSTIN, Appellant

V.

THE STATE OF TEXAS

On Appeal from County Court at Law No. 2
Parker County, Texas
Trial Court No. CCL2-15-0899

Before Kerr, Pittman, and Womack, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

A jury found Evan Scott Gustin guilty of assault causing bodily injury and assessed his punishment at 365 days in jail and a $4,000 fine—the maximum punishment for a Class A misdemeanor. *See* Tex. Penal Code Ann. §§ 12.21, 22.01(a)(1), (b). After the trial court sentenced Gustin accordingly, he appealed.

In two points, Gustin contends that (1) the jury charge contained objected-to error on his defensive "consent" issue—that is, whether the complainant had consented to the assault or whether Gustin reasonably believed that the complainant had consented—and (2) the evidence was insufficient to prove that he caused bodily injury. We agree that the charge contained error to which Gustin objected but hold that the error was harmless, and we disagree that the evidence failed to prove bodily injury. We thus overrule both points and affirm the trial court's judgment.

The Information

In the information, the State alleged that on or about February 7, 2015, Gustin intentionally, knowingly, or recklessly caused bodily injury to Charles Alvarez by

- forcing Alvarez to the ground,
- kicking Alvarez with Gustin's foot, or
- striking Alvarez with Gustin's hand.

The Evidence

A. Deputy Hanna arrests Alvarez for public intoxication.

While returning to the police station around 3:30 a.m. on February 7, 2015, Deputy Joe Hanna of the Parker County Sheriff's Department saw a car parked in a lane of traffic with its lights on. As Hanna pulled behind the parked car, he saw Gustin walking from Hanna's left to his right and saw Alvarez lying shirtless in the middle of the turn lane of a three-lane street. Hanna turned on his overhead lights, got out of his patrol car, called for backup, and approached the other car.

As Hanna approached the car, its two occupants—Aaron Webster and Rachel Dover—got out, and Gustin, who had continued to walk off farther to Hanna's right, returned to join Hanna, Webster, and Dover. While Hanna spoke with the three, Alvarez, who was still lying in the roadway, started to roll away from the group and into the oncoming lane of traffic.

Because of the danger, Hanna went to Alvarez and encouraged him to roll all the way to the curb and from there onto the sidewalk, where Hanna told him to stay. Hanna could smell alcohol on Alvarez and thought that Alvarez was intoxicated and possibly combative, so—to be safe—he handcuffed Alvarez. Alvarez told Hanna nothing more than his name and birth date. About this time Officer Meza pulled up, so Hanna asked Meza to keep an eye on Alvarez while Hanna talked to Gustin, Webster, and Dover, all of whom provided their names and addresses.

Gustin told Hanna that they were all friends, that they worked at the Olive Garden together, that there had been a misunderstanding, and that when Alvarez had taken off running, they had run after him out of concern for his safety. Because Alvarez had run away and because Gustin, Webster, and Dover reportedly had been unable to control him, Hanna told them that he was arresting Alvarez for public intoxication.

B. Alvarez goes from the jail to the hospital, Hanna alerts Alvarez's father, and Alvarez's father visits his son.

Hanna released Gustin, Webster, and Dover from the scene, arrested Alvarez, and took him to the jail, only to have the jail sergeant tell Hanna that Alvarez was too intoxicated for the jail to accept. So Hanna called for an ambulance to transport Alvarez to a hospital to be checked out, but when Alvarez's condition seemed to worsen, Hanna called a second time to have the ambulance come quickly.

Hanna's sergeant, Wendy Field, then advised Hanna that the two of them needed to go to Alvarez's friends' apartment to find out what else Alvarez had been doing. At the apartment, Dover answered the door reluctantly. Webster was lying on a couch, and Gustin never came out of his bedroom, although he was apparently awake because when Dover could not answer some of the officers' questions, she would go back to Gustin's bedroom and return with the answers. Despite the officers' making Alvarez's three friends aware of his worsened condition, no one expressed any concern.

By 5:00 a.m., Hanna was at Alvarez's father's home, pounding on the door to wake him up. Within ten minutes, Alvarez's father was on his way to the hospital, where he found his son unconscious. What shocked Alvarez's father, though, was that his son looked like he had been beaten up. As a military veteran and as a person who had both witnessed and participated in fights, Alvarez's father stated that his son's injuries did not look like they had been sustained in a fight; rather, they looked like someone had attacked and beaten him.

After leaving the hospital, Alvarez's father went to pick up his son's car and found his son's bloody shirt; he then went to the police department.

C. Detective Goff is assigned to investigate.

1. Goff talks to numerous witnesses.

At some later time on February 7, Alvarez died. Contacted by Field that evening, Detective Jason Goff was assigned to investigate a possible assault, and by 10:00 p.m., he was working the case. Goff talked to Field and Hanna, who both said that they had not observed any signs of an assault when they had seen Alvarez but that Alvarez's father was claiming that Alvarez had been assaulted. Similarly, Meza reported not having seen any injuries. On the other hand, Goff heard from an investigator with the Tarrant County Medical Examiner's office that Alvarez showed "signs of assault," such as a "swollen eye, bruised arms, face, and other indications that it might have been an assault." Goff then spoke with Alvarez's father.

Before interviewing Gustin, Goff also spoke to a "codefendant" and to "a person that another codefendant [had] talked to" to get their side of the story.

2. Goff reviews Hanna's dashcam video.

Also before interviewing Gustin, Goff watched Hanna's in-car video, which corroborated Hanna's testimony but also revealed considerably more to Goff.[1]

Hanna had said nothing about a possible assault, but because Goff's investigation had suggested there might have been one, Goff was examining the video for such evidence. After viewing certain portions of the video multiple times, Goff asserted that, despite the darkness, the camera had caught images of Alvarez running from Gustin and showed the two running past the parked car's taillights (obscuring them momentarily) from the passenger side (the side nearest the right curb) to the driver's side (the side closest to the center turn lane). Goff also claimed to be able to see Gustin push Alvarez down onto the street and then stand over him, but Goff could not tell what, if anything, occurred while Gustin stood over Alvarez.

Our own review of the video shows, at a minimum, that as Hanna approaches the stopped car, the car's rear-passenger-side light goes black twice in quick

[1]Gustin objected to Goff's testifying about seeing something on the video that Hanna had not testified to observing himself. The State's position was that Hanna did not see certain events that Goff claimed were visible on close review of the video because Hanna was "obviously distracted throughout the whole thing with everything that's going on; he can't see everything at one time." After lengthy back and forth, the trial court allowed the testimony. Goff then explained that after watching the video multiple times, he was able to make out details that were "difficult to see" but that corroborated Gustin's having assaulted Alvarez.

succession, its rear driver's side light goes black once, and moments later Gustin emerges from the darkness, walking from the left toward the right.

Goff further stated that he could see that a car coming from the other direction had almost run over Alvarez.[2]

The video captures the near miss. It shows that as Hanna approaches in his patrol car, Gustin emerges from the darkness on the left and is already behind the stopped car; Gustin continues walking to the far right. Meanwhile, Hanna's headlights do not clearly illuminate Alvarez until moments later when Hanna gets much closer to the stopped car; Alvarez is on the ground to the extreme left of the camera frame and is close to if not actually on the line dividing the center turn lane from the oncoming-traffic lane. As Gustin walks off the screen to the right, on the extreme left an oncoming vehicle that is crowding the dividing stripe makes no attempt to avoid Alvarez, who at the time is lying motionless, and comes close to striking him. When Alvarez later starts to move, he rolls into the oncoming traffic lane, and it is at this point that Hanna tends to Alvarez.

The video also catches something else that Hanna had apparently not witnessed. The video shows Gustin, Webster, and Dover engaging in what Goff agreed could be described as "celebratory activity": "The hand slaps; the bro hugs, is what I'm calling it; the hugs; the smiling; the celebratory things; best I can describe it."

[2]While testifying, Hanna also mentioned that a car had almost hit Alvarez. And according to Goff, Gustin too admitted having seen the car coming.

He added, "There was another gesture that piqued my interest" but he "didn't know what they said." Goff agreed that Hanna might not have seen this interaction because it occurred while Hanna was preoccupied with Alvarez. Hanna himself had confirmed earlier in the trial that while he was helping Alvarez to the curb—which on the video occurs offscreen—he did not see what Gustin, Webster, and Dover were doing.

After reviewing the video, Goff, who tried to amass all the evidence he could before interviewing someone, "[e]specially the suspect," was ready to talk with Gustin.

3. Goff interviews Gustin.

After a nearly two-hour interview with Gustin, Goff learned the rest of the story.

The event that put in motion Hanna's encounter with Alvarez, Gustin, Webster, and Dover had occurred at an unspecified earlier time when the police had arrested another Olive Garden employee, Brandon Esquivel, for driving while intoxicated. Gustin had blamed Alvarez for tipping off the police and thus for Esquivel's getting arrested.

According to Gustin, initially he and Alvarez argued only verbally, but they ended up going outside, taking their shirts off, and fighting. But Gustin also said that he had "kind of instigated" the fight by giving Alvarez the option of leaving or fighting and that Alvarez responded by looking for his car keys, which in Goff's mind contradicted Alvarez's wanting to fight. Gustin disclosed to Goff that he had been trained in "Muay Thai, Jiu-Jitsu, boxing, and wrestling."

Despite Gustin's training, he asserted that Alvarez, who weighed 268 pounds, got the upper hand by pinning Gustin to the ground; this apparently prompted Dover to jump in, because she uttered an obscenity and started throwing punches, in the process hitting both Alvarez and Gustin. At this point, Alvarez got up and started running; Gustin acknowledged to Goff that when Alvarez ran, the fight had ended and that Alvarez was trying to get away from him. Speculating on why Alvarez had run, Gustin said that Alvarez probably felt like he was "getting jumped" when Dover joined the fray.

Still angry, Gustin ran after Alvarez and shouted, "Get back here, motherfucker, this ain't over." Gustin admitted punching Alvarez (or at least trying to punch him), pushing Alvarez to the ground in the street, and kicking Alvarez in the chest while Alvarez was on the ground. Describing the kick, Gustin said that it was a "fuck you" kind of kick—one done out of anger.

Asked why he had chased Alvarez, Gustin admitted that it was so he could "hurt" him. And Gustin said that his motive for pushing, punching, and kicking Alvarez was for Alvarez "to get what's coming to [him]" and to "get what [he] deserve[d]." Out of curiosity, Goff also asked Gustin what he had said to Webster at the scene (apparently referring to the moment in the video that piqued Goff's interest), and Gustin replied that he had said something like, "Fuck that motherfucker." In short, Gustin admitted that he had wanted Alvarez to hurt.

4. An inconclusive autopsy precludes Goff from pursuing a manslaughter warrant.

Despite Alvarez's death having occurred shortly after the night's events, analytically the medical examiner could not connect them.

Dr. Tasha Greenberg, who performed Alvarez's autopsy, testified that she could not determine what caused the cardiac arrest from which Alvarez died: "I have had a lot of findings that fit with him going into cardiac arrest, but I didn't have a good reason for why he had gone into cardiac arrest." In the end, as she stated at trial, Dr. Greenberg could conclude only that the manner of death was "undetermined."

That ruling limited what Goff could do. Goff testified that after he had interviewed Gustin, "[W]e were going to wait on the results of the autopsy. And, of course, the autopsy turned out that it was undetermined. So instead of doing a manslaughter warrant, I ended up getting assault, causing bodily injury warrant. So there's nothing that I could have done better or different . . . ."

Arguments

A. The charge contains error, but the error is harmless.

1. Gustin sought and the trial court agreed to submit a "consent" defense.

In his first point, Gustin argues that the trial court erred by submitting an erroneous jury charge because although the State bore the burden of persuasion on his consent defense, the charge as worded eliminated that burden. Put another way, Gustin contends that he "had a right to the submission of a proper consent

instruction and was harmed by the court's charge." Understanding his argument requires understanding penal code § 22.06—"Consent as Defense to Assaultive Conduct," which provides:

> (a) The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault) . . . if:
>
> (1) the conduct did not threaten or inflict serious bodily injury . . . .

Tex. Penal Code Ann. § 22.06(a)(1). Although § 22.06 is written affirmatively—that is, whether the victim consented or whether the defendant reasonably believed that the victim had consented—because the State retains the burden of persuasion, the State is effectively left having to prove a negative: that the victim did not consent or that the defendant did not reasonably believe that the victim consented. *See* Tex. Penal Code Ann. §§ 2.03, 22.06(a); *see also id.* § 2.04.

The State's theory was that Alvarez consented to the fight up until the time he fled but not after that, so it opposed making consent part of the charge.

Gustin's competing theory was that after Alvarez ran away, he and Alvarez were still engaging in consensual mutual combat or, alternatively, that he reasonably believed that they were still engaging in consensual mutual combat.[3]

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[3]Within his brief, Gustin uses the term "mutual combat" 11 times. Even though Gustin objected to the trial court's expressly refusing to include "mutual combat" in the charge, on appeal he does not complain of that omission, so we need not parse any interrelationships between the concepts of "consent" as used in § 22.06(a)(1) and "mutual combat."

Erring on the side of caution, the trial court agreed to submit a consent instruction.

Gustin's proposed instruction followed § 22.06(a)(1):

> A person's use of force against another is not a criminal offense if the other person effectively consented or the citizen accused reasonably believes the other person consented and the conduct did not threaten or inflict serious bodily injury.
>
> Therefore, the State must prove, beyond a reasonable doubt one of the following:
>
> 1. Both that - - -
>
> (a) The other person did not effectively consent; and
>
> (b) The defendant did not reasonably believe the other person had consented or
>
> 2. Defendant's conduct threatened or inflicted serious bodily injury.
>
> Burden of Proof
>
> The defendant is not required to prove consent. Rather, the State must prove, beyond a reasonable doubt, that the defense of consent does not apply to the defendant's conduct.

See Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Crim. Pattern Jury Charges—Crimes against Persons & Prop.*, CPJC 85.23 (2016).

2. At the State's request, the trial court submitted a variation of the consent defense.

At this stage the State took another tack and argued that the dispositive issue was not whether Alvarez had consented but whether he had later withdrawn his consent. The trial court agreed.

As a result, the jury received this instruction:

> You have heard evidence that, when the defendant forced Charles Alvarez to the ground or by kicking Charles Alvarez with his foot or by striking Charles Alvarez with his hand, he believed that Charles Alvarez had effectively consented to this.
>
> A person's use of force against another is not a criminal offense if the other person effectively consented or the person reasonably believed the other person consented and the conduct did not threaten or inflict serious bodily injury.
>
> Therefore the state must prove, beyond a reasonable doubt, that either—
>
> 1. Both that—
>
> a. The other person did not effectively consent or did not effectively withdraw his consent; and
>
> b. The defendant did not reasonably believe the other person had consented or that the other person did not effectively withdraw his consent; or
>
> 2. The defendant's conduct threatened or inflicted serious bodily injury.

Consistent with the instruction, the charge's application portion read:

> If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that consent does not apply to the defendant's conduct.

To decide the issue of consent, you must determine whether the state has proved, beyond a reasonable doubt, either—

1. Both that –

    a. Charles Alvarez did not effectively consent or did not effectively withdraw his consent; and

    b. The defendant did not reasonably believe Charles Alvarez consented or that Charles Alvarez did not effectively withdraw his consent; or

2. The conduct threatened or inflicted serious bodily injury.

You must all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of the elements the state has proved.

If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

3. The charge contains error.

The first question is whether charge error exists. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). We hold that it does.

Section 22.06(a) focuses on whether the complainant consented or the defendant reasonably believed that the complainant had consented. *See* Tex. Penal Code Ann. § 22.06(a). But the charge submitted to the jury asked different factual issues not contemplated by § 22.06(a): whether Alvarez had not withdrawn his consent or whether Gustin reasonably believed that Alvarez had not withdrawn his consent. As Gustin argues in his brief (and as seems readily apparent), adding the withdrawal-of-consent language—stacking double negatives on top of proving a

negative—convolutes the analysis considerably and also departs from the statutory language.

In contrast to the consent statute, the self-defense statute lists numerous variables that affect when a defendant may rely on its provisions. *See id.* § 9.31. One example in which self-defense is not justified is when the defendant consented to the exact force used or attempted by the other. *See id.* § 9.31(b)(3). Another is when the defendant provoked the other's use or attempted use of unlawful force, unless (1) the defendant abandoned the encounter or (2) (a) the defendant clearly communicated to the other his intent to abandon the encounter, (b) the defendant reasonably believed he could not do so safely, and (c) the other nevertheless continued or attempted to use unlawful force against the defendant. *See id.* § 9.31(b)(4)(A), (B). The legislature thus knows how to draft a statute allowing for variations.

Unlike § 9.31, § 22.06(a)'s language provides for no alternative scenarios. *Id.* § 22.06(a). The only question was whether Alvarez had consented or whether Gustin reasonably believed that Alvarez had consented to the assault that took place after Alvarez ran away from Gustin. *See id.* The charge erroneously deviates from what § 22.06(a) specifies.

4. Gustin preserved the error and thus benefits from a less-demanding harm analysis.

During the charge conference, Gustin won the initial dispute about whether consent should be an issue for the jury to resolve. The State then responded by

proposing the "withdrawal" language, to which Gustin objected because "it put[] a focus on my client to disprove something other than what the consent statute allow[ed.]" We hold that Gustin sufficiently objected to the withdrawal-of-consent language. *See* Tex. R. App. P. 33.1.

We must review "all alleged jury-charge error . . . regardless of preservation in the trial court." *Kirsch*, 357 S.W.3d at 649. When an appellant has not preserved error, we reverse only when the erroneous charge resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see* Tex. Code Crim. Proc. Ann. art 36.19.

But when, as here, an appellant has preserved error, we need only be persuaded that the error was "calculated to injure" the defendant's rights, which means no more than that there must be some harm to the accused from the error. Tex. Code Crim. Proc. Ann. art 36.19; *Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994); *Almanza*, 686 S.W.2d at 171; *see also Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). In other words, properly preserved charge error, unless harmless, requires us to reverse. *Almanza*, 686 S.W.2d at 171.

5. The error was harmless.

When determining harm, a reviewing court must consider (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record. *Reeves*, 420 S.W.3d at 816; *see also Almanza*, 686 S.W.2d at 171.

Even under the less-demanding harm analysis that applies here, we hold that the error was harmless.

First, Gustin's theory was that Alvarez initially consented to fight him. The evidence supporting consent was Gustin's testimony and his assertion that after they had agreed to fight but before they had actually started fighting, they had taken their shirts off; Detective Goff acknowledged that if Alvarez had removed his shirt, Alvarez would have indicated a desire to fight. But Alvarez's father found his son's shirt bloodied, which would not logically have been the case if Alvarez had removed his shirt before the fight. And in Hanna's dashcam video, Gustin is not shirtless but is wearing what is colloquially referred to as a "wife-beater"-style undershirt. Finally, Gustin told Goff that he had given Alvarez the option of leaving or fighting, but Gustin also said that Alvarez had started looking for his keys, a fact that, to Goff, belied Alvarez's willingness to fight. In short, whether Alvarez initially agreed to fight Gustin depended primarily on Gustin's credibility.

And despite Gustin's not testifying at trial, his credibility took a series of hits. The jury could have concluded that Gustin had lied to Hanna at the scene—telling Hanna that he, Alvarez, Webster, and Dover were all friends and that he, Webster, and Dover were just looking out for Alvarez's safety. And the jury also saw how Gustin had repeatedly changed his story during his interview with Goff. For example,

- Gustin initially told Goff that he had run after Alvarez to make sure Alvarez was okay but later admitted that he had run after Alvarez to hurt him.

- Gustin denied touching Alvarez after Alvarez had run and before Hanna had arrived but then admitted punching Alvarez (or at least trying to), pushing him down, and kicking him while he was down.

- Gustin denied running after Alvarez; rather, he maintained that he had only been speed walking. But on the dashcam video, given the rapidity with which the shadows moved, the jury might have reasonably concluded that Alvarez and Gustin were running or sprinting.

Although no one directly contradicted Gustin's story that he and Alvarez had agreed to fight, nothing required the jury to believe him. *See Evans v. State*, 202 S.W.3d 158, 163 (Tex. Crim. App. 2006). Indeed, the evidence gave the jury reasons not to believe Gustin.

Next, Gustin's theory was that Alvarez's consent to the initial fight extended to the events that occurred after Alvarez ran away. Assuming the jury believed that Alvarez had consented to the initial fight, no rational juror could have believed that Alvarez had consented—or that Gustin reasonably believed that Alvarez had consented—to what happened to him while running away. In fact, during Gustin's interview with Goff, Gustin acknowledged that the fight had ended when Alvarez got up and ran away. *See* Tex. Penal Code Ann. § 22.06(a).

Finally, apart from any § 22.06(a) consent issue, the evidence also showed that Gustin's conduct threatened serious bodily injury under § 22.06(a)(1) when he

- chased Alvarez into a dark street at night,

- pushed him down hard enough to leave Alvarez lying motionless in that same street, and

- then walked away, leaving Alvarez lying helpless near where oncoming traffic might hit him.[4]

Because it was nighttime, Alvarez was less visible to traffic—and the video shows an oncoming car driving perilously close to Alvarez and making no attempt to avoid him. Moments later, Alvarez rolls not farther back into the center turn lane with its relative safety but directly into the oncoming-traffic lane.

"Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code Ann. § 1.07(a)(46). Where serious bodily injury is either threatened or incurred, it effectively vitiates any consent. *See Miller v. State*, 312 S.W.3d 209, 214 n.2 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

Based on the above facts, the jury could have reasonably found beyond a reasonable doubt that chasing someone into a street in the dark of night, pushing that person to the ground in the street, and then leaving that person motionless in the street despite seeing an oncoming car constituted conduct threatening serious bodily injury. *See In re J.A.P.*, No. 03-02-00112-CV, 2002 WL 31317256, at *4 (Tex. App.—Austin Oct. 17, 2002, no pet.) (mem. op.) ("Because we hold that a rational trier of fact could have found beyond a reasonable doubt that J.A.P.'s act of choking the

[4]Moreover, Goff said that Gustin admitted having seen the car coming.

complainant created a substantial risk of death, this conduct threatened serious bodily injury and therefore negates the defense of consent.").

For the above reasons, we hold that the charge contained error but that the error was harmless. We overrule Gustin's first point. *See Almanza*, 686 S.W.2d at 171.

B. The evidence suffices to show bodily injury.

In his second issue, Gustin argues that the evidence was insufficient to find that he caused bodily injury.[5] We disagree.

1. The standard of review: factfinders can and should draw reasonable inferences.

Federal due process requires that the State prove beyond a reasonable doubt every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979); *see* U.S. Const. amend. XIV. In our due-process evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the

[5]Gustin's second issue deals with the "bodily injury" element of the assault for which he was convicted, s*ee* Tex. Penal Code Ann. § 22.01, and differs from the threat of "serious bodily injury" that can negate a consent defense (and which we analyzed immediately above). *See id.* § 22.06(a)(1).

evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman*, 520 S.W.3d at 622.

2. The factfinders' inferences here were reasonable.

The penal code defines "bodily injury" to mean "physical pain, illness, or any impairment of physical condition." Tex. Penal Code Ann. § 1.07(8). Ordinary people understand physical pain and what naturally causes it. *Ramirez v. State*, Nos. 02-18-00152-CR, 02-18-00153-CR, 2018 WL 2248668, at *3 (Tex. App.—Fort Worth May 17, 2018, no pet.) (mem. op., not designated for publication) ("The terms 'physical pain,' 'illness,' and 'impairment of a physical condition' are terms of common usage that a person of ordinary intelligence is capable of understanding; therefore, a fact-finder may reasonably infer that a person felt physical pain because people of common intelligence understand what naturally causes pain."); *see also Tyler v. State*, 563 S.W.3d 493, 498–99 (Tex. App.—Fort Worth 2018, no pet.); *Church v. State*, No. 02-17-00049-CR, 2018 WL 4183076, at *2 (Tex. App.—Fort Worth Aug. 31, 2018, no pet.) (mem. op., not designated for publication); *Shah v. State*, 403 S.W.3d 29, 34–35 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).

A reasonable factfinder could determine beyond a reasonable doubt that when Gustin punched Alvarez, pushed him down onto the pavement, and kicked him,

Gustin caused Alvarez pain. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman*, 520 S.W.3d at 622; *Ramirez*, 2018 WL 2248668, at *3.[6]

We overrule Gustin's second point.

Conclusion

Having overruled Gustin's two points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: May 9, 2019

[6]Gustin himself even admitted that was his intent.