



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00333-CR

DANIEL GRISSOM, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

**On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2012-434,721; Honorable John J. McClendon III, Presiding**

May 15, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, Daniel Grissom, was convicted following a jury trial for intoxication assault and was sentenced to confinement for eight years.¹ The trial court subsequently suspended the sentence and placed Appellant on community supervision for eight years.

¹ See TEX. PENAL CODE ANN. § 49.07(a)(1), (c) (West 2011) (a third degree felony).

In his initial brief, by two issues, Appellant asserted there was insufficient evidence at trial to establish that (1) he had caused the victim's injuries and (2) whether those injuries constituted a "serious bodily injury" as required by the intoxication assault statute. Specifically, he contended that based on the definition of "serious bodily injury" provided by the trial court (which only included the "protracted loss or impairment" portion of the definition) the only evidence of a protracted loss or impairment was the victim's testimony concerning her arthritis. He then surmised that the evidence was insufficient to support a finding that he caused the victim's arthritis or that the arthritis constituted a serious bodily injury.

The State responded to Appellant's argument by arguing that, irrespective of the definition actually given by the trial court, this court was required to judge the sufficiency of the evidence according to a hypothetically correct jury charge. By way of a reply brief subsequently filed, Appellant raised two new issues contending (1) the application of a hypothetically correct jury charge to determine legal sufficiency in this case violated Appellant's due process rights and the double jeopardy clause and (2) the trial court's jury charge was erroneous. We affirm.

BACKGROUND

In May 2012, an indictment was filed alleging that on or about March 24, 2012, Appellant "operat[ed] a motor vehicle in a public place while intoxicated, and did by reason of such intoxication cause serious bodily injury to another, Lori Little, through accident or mistake, namely: by driving said motor vehicle into and against a motor vehicle occupied by the said Little." The indictment also alleged that during the commission of the offense, Appellant used or exhibited a deadly weapon, to-wit: an

automobile that in the manner of its use and intended use was capable of causing a death or serious bodily injury. In March 2014, a two-day jury trial was held.

At trial, the evidence established that on March 24, 2012, Appellant was driving his SUV while intoxicated at a high rate of speed with his headlights off at 5:00 a.m. when his SUV struck Little's car from behind. Both vehicles flipped over several times after leaving the roadway. Little was taken to a nearby hospital. She testified that, as a result of the accident, she suffered a severe head injury and two years later, suffered from arthritis in her hip. Appellant defended against the indictment asserting that he was not driving the SUV when it struck Little's car and she did not suffer a serious bodily injury as a result of the accident.

The trial court submitted its charge to the jury, defining "serious bodily injury" as "bodily injury that causes protracted loss or impairment of the function of any bodily member or organ." A "Special Issue" presented to the jury as a part of the court's charge further asked whether "the defendant did then and there use or exhibit a deadly weapon, to-wit: an automobile, that in the manner of its use or intended use was capable of causing death or serious bodily injury." This portion of the court's charge defined "serious bodily injury" as "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."² The jury convicted Appellant of

² This definition conforms to the definition of "serious bodily injury" contained in the general definitions provisions of the Texas Penal Code. See TEX. PENAL CODE ANN. § 1.07(a)(46) (West Supp. 2016) (defining "serious bodily injury" as "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." Compare TEX. PENAL CODE ANN. § 49.07(b) (West 2011) (defining "serious bodily injury" as "injury [omitting the modifier 'bodily'] that creates a substantial risk of death [omitting 'or causes death'] or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ").

intoxication assault with a vehicle, declined to find the SUV was a deadly weapon, and assessed punishment at confinement for eight years. The trial court suspended the sentence imposed by the jury and placed Appellant on community supervision for eight years. This appeal followed.

DISCUSSION

Appellant asserts Little's lay testimony was insufficient to establish two things: (1) that her arthritis, manifested two-and-a-half years after the accident, was caused by Appellant and (2) that her arthritis caused a protracted loss or impairment. On appeal, he does not challenge whether he was intoxicated or the driver of the SUV that struck Little's car.

ISSUES ONE AND TWO

Appellant's issues focus solely on Little's testimony that (1) she developed arthritis two-and-a-half years after the accident, (2) the use of her hip was impaired due to the arthritis, and (3) the accident caused her arthritic condition. In his initial brief, Appellant dismisses the testimony concerning Little's head wound, concluding she did not suffer a serious bodily injury because her wound did not cause a "protracted loss or impairment of the function of any bodily member or organ," her wound was fully healed, and the scar was not visible when she combed her hair over that scar. Because we find there was sufficient evidence that Little's head wound was a serious bodily injury, we overrule the issues raised in Appellant's initial brief.

In so doing, we find it unnecessary to address Appellant's conclusion that, in determining "serious bodily injury," the jury was limited to only considering Little's

testimony concerning her arthritis due to the trial court's limited definition because Appellant makes this assumption without any legal citation or analysis. In order to assert an issue on appeal, an appellant's "brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities." TEX. R. APP. P. 38.1(i); and an appellant waives an issue on appeal if he does not adequately brief that issue, i.e., by presenting supporting arguments and authorities. *Id.* See *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000). Accordingly, we will consider the entire record to determine if the evidence is sufficient to support a finding of serious bodily injury.

STANDARD OF REVIEW

We review the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). See *Fernandez v. State*, 479 S.W.3d 835, 837 (Tex. Crim. App. 2016). We view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Blea v. State*, 483 S.W.3d 29, 32 (Tex. Crim. App. 2016) (citing *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014)). In making that review we are mindful of the fact that the "jury is the sole judge of credibility and weight to be attached to the testimony of witnesses." *Id.* "When the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of the verdict, and we defer to that determination." *Id.* Further, when the charge authorizes the jury to convict the defendant on more than one theory or manner and means, the verdict of guilt will be upheld if the evidence is

sufficient on any theory authorized by the jury charge. *Anderson v. State*, 416 S.W.3d 884, 889 (Tex. Crim. App. 2013).

With this standard in mind, we measure the sufficiency of evidence “by the elements of the offense as defined by a hypothetically correct jury charge.” *Morgan v. State*, 501 S.W.3d 84, 89-90 (Tex. Crim. App. 2016) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). A hypothetically correct jury charge “sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.* Further, the *Jackson* standard coupled with the *Malik* measurement meet the Fourteenth Amendment’s guarantee of due process of law. See *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009).

INTOXICATION ASSAULT—SERIOUS BODILY INJURY

A person commits intoxication assault when (1) the person, (2) by accident or mistake, (3) while operating a motor vehicle, (4) causes serious bodily injury (5) to another. See TEX. PENAL CODE ANN. § 49.07(a) (West 2011). “Serious bodily injury” is defined as an “injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.” *Id.* at § 49.07(b). It is well-established that the relevant question is whether there was a serious bodily injury *as the wound was inflicted*, not after the effects have been ameliorated or exacerbated by other actions such as medical treatment. *Sizemore v. State*, 387 S.W.3d 824, 828 (Tex. App.—Amarillo 2012, no pet.) (citing *Stuhler v. State*, 218 S.W.3d 706, 714 (Tex. Crim. App. 2007)).

Whether an injury constitutes a serious bodily injury is decided on a case-by-case basis, evaluating each case on its own facts to determine whether the evidence is sufficient to permit a reasonable finder of fact to conclude that the injury fell within the definition of “serious bodily injury.” *Id.* Moreover, a serious bodily injury may be established without a physician’s testimony when the injury and its effects are obvious; *id.* (citing *Carter v. State*, 678 S.W.2d 155, 157 (Tex. App.—Beaumont 1984, no pet.)), and, in evaluating evidence supporting serious bodily injury, courts do consider as a relevant factor whether the injury would be permanently disfiguring without medical treatment. *Sizemore*, 387 S.W.3d at 829 (citing *Brown v. State*, 605 S.,W.2d 572, 575 (Tex. Crim. App. [Panel Op.] 1980)).

At trial, an eyewitness to the accident, Orthia Smith, described Little as bloody all over, crying, and upset at the scene of the accident. Little testified that, after her car was struck by Appellant’s SUV, she was very shook up and realized that, when she was trying to push the hair out of her eyes, “there was a big flap there.” She was bleeding profusely from an elongated gash on the back of her head exposing a large portion of her skull. She was immediately placed in an ambulance with her head braced as she fell back on the stretcher. At the hospital, grass and dirt were cleaned from the wound and she received fourteen staples to her head to close the gash. After treatment, she was released from the hospital. The next morning, her entire body was screaming in pain and she went back to the hospital where she received further treatment and underwent an MRI.

Due to her head injury, she was out of work for a week or more and missed additional work to return to the hospital for approximately ten appointments with

physicians. The wound hurt “for a long, long time” and took a long time to heal, and she received prescriptions for its treatment. She also went to psychiatrists for approximately five appointments to be treated for post-traumatic stress. As a result of her head injury, she continues to have a tingling similar to an electric shock that runs down her neck.

Photographs admitted into evidence indicated the damage to Little’s car was quite extensive, i.e., the make and model of her car were unrecognizable, the car’s rear end was demolished and pushed up over the rear wheels, its rear seat was jammed up against the front seats, its front fenders and side panels were demolished, and its shattered windshield penetrated the car’s interior. Given this evidence, we cannot say the jury lacked sufficient evidence to find that Little suffered an injury that, without medical treatment, created a substantial risk of death or would have been permanently disfiguring. TEX. PENAL CODE ANN. §§ 1.07(a)(46), 49.07(b) (West Supp. 2016 and West 2011); *Boney v. State*, 572 S.W.2d 529, 532 (Tex. Crim. App. 1978) (laceration one quarter of an inch deep and eight-and-a-half inches long sufficient evidence of a wound causing a substantial risk of death). See *Brown*, 605 S.W.2d at 575.

Appellant asserts this case is similar to *Gonzales v. State*, No. 07-01-0367-CR, 2002 Tex. App. LEXIS 8890 (Tex. App.—Amarillo Dec. 12, 2002, no pet.) (mem. op., not designated for publication), where this court determined that a cut within the hairline on the back of the head requiring seven staples to close was not evidence of a “serious permanent disfigurement.” 2002 Tex. App. LEXIS 8890, at *5-7. Evidence of the injuries in *Gonzales*, however, did not describe injuries comparable to Little’s injuries either in their cause or degree. In *Gonzales*, the injury was caused by a beer bottle; *id.* at *3, rather than a fast-traveling SUV, there was no evidence that the cut was anything

more than superficial, and the victim's only treatment was to receive pain medication. *Id.* at *5.

Here, the jury was free to apply common sense, knowledge, and experience gained in the ordinary affairs of life in drawing reasonable inferences from the evidence presented to it. See *Eustis v. State*, 191 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Given the extensive evidence of the severe damage done to Little's vehicle, the photographs of the elongated gash in her head and exposed skull, the testimony of the eyewitness to the accident, and Little's testimony regarding the after-effects of the head injury and extensive treatment, we find there is sufficient evidence to find that, without medical treatment, Little's head injury created a substantial risk of death or would have been permanently disfiguring. See *Brown*, 605 S.W.2d at 575. Having found there was sufficient evidence of Little's head injury to satisfy the element of a serious bodily injury, we need not address Appellant's arguments concerning evidence related to Little's arthritic condition. See *Anderson*, 416 S.W.3d at 889. Accordingly, Appellant's original two issues are overruled.

APPELLANT'S REPLY BRIEF

In his reply brief, Appellant asserts the evidence is insufficient to establish that the scar on Little's head constituted a serious permanent disfigurement and raises two new issues contending: (1) the application of a hypothetically correct jury charge to determine sufficiency in this case violates his due process rights and the double jeopardy clause and (2) the trial court's jury charge was erroneous. Generally, the purpose of a reply brief is to address "any matter in the appellee's brief." TEX. R. APP. P. 38.3. The State did not discuss either of these issues in its response brief. Because

these new issues were not addressed in either Appellant's or the State's briefs, inclusion of these new issues would generally be inappropriate for a reply brief. *Houston v. State*, 286 S.W.3d 604, 612 (Tex. App.—Beaumont 2009, pet. ref'd), cert. denied, 558 U.S. 1124, 130 S. Ct. 1082, 175 L. Ed. 2d 906 (2010) (citing *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)). Nevertheless, in the interest of justice, we address these issues.

Appellant asserts that Little's injury does not represent a permanent disfigurement because, at trial, she was able to hide the scar by combing over her hair. This assertion overlooks the requirement that, in evaluating evidence supporting serious bodily injury, courts consider as a relevant factor whether the injury presented a substantial risk of death or would be permanently disfiguring *without* medical treatment. *Sizemore*, 387 S.W.3d at 829 (finding the relevant issue is whether there was a serious bodily injury *as the wound was inflicted*, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment). Considering the aforementioned evidence in the preceding section of this memorandum opinion, we cannot say that the evidence was insufficient that she was permanently disfigured or that she suffered from a wound that presented a substantial risk of death at the time of her injury.

Regarding Appellant's issue concerning the use of a hypothetically correct jury charge in evaluating the sufficiency of the evidence, *Malik* is binding precedent for this court, and we will continue to apply its analysis to our sufficiency review. *Morgan*, 501 S.W.3d at 89-90. An appellate court is duty bound to follow precedent issued by the Texas Court of Criminal Appeals in this matter. *Kiffe v. State*, 361 S.W.3d 104, 109-10

(Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). See *Erwin v. State*, 331 S.W.3d 39, 52-53 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). The Court of Criminal Appeals “is the highest court on matters of criminal law, and when it has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation.” *Rodriguez v. State*, 47 S.W.3d 86, 94-95 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

In his second new issue, Appellant asserts the trial court’s jury charge was erroneous because its definition of “serious bodily injury” did not include an injury that created a substantial risk of death or serious permanent disfigurement. Assuming, without deciding the charge was erroneous, we review the issue of harm for egregious error because Appellant’s contention was not preserved for appeal by objection before the trial court. *Fabela v. State*, 431 S.W.3d 190, 196 (Tex. App.—Amarillo 2014, pet. dism’d). See *Celis v. State*, 416 S.W.3d 419, 423 n.3 (Tex. Crim. App. 2013). As a reviewing court, to determine egregious error we must examine the entire jury charge and the state of the evidence, including any contested issues, and we must consider the probative weight of that evidence, arguments of counsel, and any other relevant information revealed by the record of the trial as a whole. *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008).

Here, there were two definitions of “serious bodily harm” provided by the trial court’s charge to the jury—neither of which was incorrect. The first definition (the one provided in the main body of the court’s charge) omits language describing serious bodily harm as “injury that creates a substantial risk of death or that causes serious permanent disfigurement”; whereas, the other definition (the one provided in the deadly

weapon special issue) includes that language, albeit tracking the definition of “serious bodily harm” found in the general definitions section of the Texas Penal Code rather than the definition found in the intoxication assault section. *Supra*, note 2. In addition, the issues of substantial risk of death and serious permanent disfigurement were tried before the jury, and as discussed in the preceding section, there was sufficient evidence of both a substantial risk of death and serious permanent disfigurement at the time Little was injured. Moreover, Appellant’s defense theories, i.e., (1) he was not driving the SUV that crashed into Little’s car and (2) the State’s witnesses were not credible, were unaffected by the omission of the full definition in the first definition contained in the charge.

In his reply brief, Appellant assumes the trial court determined there was insufficient evidence to include “substantial risk of death” and “serious permanent disfigurement” in the first definition of the jury charge. There is no record support for any assumption that the trial court’s omission of this language in the first definition of the jury charge was either a mistake or intentional on the part of the trial court. If anything, the record indicates the trial court affirmatively found that sufficient evidence existed to send these two issues to the jury. Immediately prior to the charge conference, the trial court denied Appellant’s motion for a directed verdict on these two issues indicating the trial court concluded there was sufficient evidence to create jury issues. Moreover, during the parties’ arguments on Appellant’s motion for directed verdict, the State specifically asserted there was sufficient evidence to send the issues of “substantial risk of death” and “serious permanent disfigurement” to the jury while Appellant specifically contended the opposite. Thus, Appellant understood that the State was seeking a

conviction based on these two grounds and the trial court denied Appellant's motion for a directed verdict on those grounds.

Having reviewed the entire record, we cannot say that the error, if any, affected the very basis of the case, deprived Appellant of a valuable right, or vitally affected any defensive theory. *Sanchez v. State*, 209 S.W.3d 117, 121-23 (Tex. Crim. App. 2006). Accordingly, the two issues raised in Appellant's reply brief are also overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

Do not publish.