



**NUMBERS 13-18-00353-CR & 13-18-00354-CR**

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI - EDINBURG**

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**CHARLES NICKOLOUS LINZEY,**

**Appellant,**

**v.**

**THE STATE OF TEXAS,**

**Appellee.**

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**On appeal from the 33rd District Court  
of Burnet County, Texas.**

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**MEMORANDUM OPINION**

**Before Chief Justice Contreras and Justices Longoria and Hinojosa  
Memorandum Opinion by Justice Hinojosa**

Appellant Charles Nickolous Linzey was convicted by a jury of intoxication manslaughter, a second-degree felony, see TEX. PENAL CODE ANN. § 49.08, and intoxication assault, a third-degree felony.<sup>1</sup> See *id.* § 49.07. Both convictions were

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<sup>1</sup> Pursuant to a docket-equalization order issued by the Supreme Court of Texas, this case was transferred to this Court from the Third Court of Appeals in Austin. See TEX. GOV'T CODE ANN. § 73.001.

enhanced for punishment by Linzey's prior felony convictions. *See id.* § 12.42. The jury assessed punishment of fifty years and ten years respectively, and the trial court ordered the sentences to run consecutively. In two issues, Linzey argues that: (1) the evidence supporting his convictions was legally insufficient; and (2) the trial court erred in denying his request for a criminally negligent homicide instruction. We affirm.

## I. BACKGROUND

Linzey was driving his vehicle southbound on Highway 281 in Burnet County around noon, when his vehicle veered into the northbound lanes and collided head on with a vehicle driven by Michelle Light. The collision resulted in serious bodily injury to Michael Peyton, a passenger in Linzey's vehicle, and the death of Nancy Parrish, a passenger in Light's vehicle. Parrish was pronounced dead at the scene as a result of blunt force trauma. Peyton was removed from Linzey's vehicle with the "jaws of life," and he was transported by helicopter to a nearby hospital where he was treated for broken bones throughout his body.

In a two-count indictment, Linzey was charged with intoxication manslaughter and manslaughter for causing the death of Parrish by driving his motor vehicle into a vehicle occupied by Parrish. *See id.* §§ 19.04, 49.08. By a separate three-count indictment, Linzey was charged with intoxication assault, aggravated assault causing serious bodily injury, and aggravated assault with a deadly weapon for the injuries suffered by Peyton.<sup>2</sup>

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The two indictments were prosecuted in a single trial. Linzey's appeal from trial court cause number 47692 has been docketed as appellate cause number 13-18-00353-CR and his appeal from trial court cause number 47693 has been docketed as appellate cause number 13-18-00354-CR. For the sake of judicial economy, we will consider both causes in this consolidated memorandum opinion.

<sup>2</sup> The State abandoned the aggravated assault with a deadly weapon count at trial.

*See id.* §§ 22.02(a), 49.07. The two indictments were prosecuted in a single trial.

Light testified that she was driving from Marble Falls to Burnet with her grandmother Parrish. She recalled seeing a white pickup truck traveling in the opposite direction veer into the turn lane and then into oncoming traffic. Light attempted to move her vehicle into the center turn lane to avoid the collision, but the white pickup truck, driven by Linzey, collided head on with her vehicle.

Alan Whitehead, a paramedic, arrived at the scene and attended to Linzey. According to Whitehead, Linzey informed him that he used methamphetamine and marijuana early that morning. Linzey also stated that he pulled over once prior to the collision because he was tired and “he didn’t feel like he needed to be driving.” Whitehead noticed “track marks” on Linzey’s arms indicating intravenous drug use. Whitehead took Linzey’s vitals and noted that his blood pressure and pulse rate were elevated.

Steven Vollmar, an officer with the City of Burnet Police Department, responded to the scene. He observed an SUV and a truck in the northbound lanes. The trial court admitted photographic exhibits from the accident scene showing that the vehicles were virtually destroyed. Officer Vollmar discovered a hypodermic needle on the floorboard of Linzey’s truck near the “center hump.”

Frank Randolph, a trooper with the Texas Department of Public Safety, investigated the crash. He observed gouge marks in the roadway and concluded that they were caused by Linzey’s vehicle.

Brant Johnston, a trooper with the Texas Department of Public Safety, spoke with Linzey at the hospital. Linzey told Trooper Johnston that he injected “30 units” of

methamphetamine and smoked marijuana around midnight before the accident. Trooper Johnston, a certified drug recognition expert, administered tests to determine Linzey's level of intoxication. Linzey's eyes failed to converge in response to one test, indicating cannabis impairment. In response to another test, Linzey was unable to recite the alphabet correctly. When asked to estimate the passage of thirty seconds, Linzey stopped at seventeen seconds, indicating an accelerated internal clock consistent with the stimulant effect of methamphetamine. Trooper Johnston noted that Linzey's elevated blood pressure and pulse rate and muscle tenseness were consistent with methamphetamine intoxication.

Linzey told Trooper Johnston that he "might have been crashing" from methamphetamine use at the time of the accident. Linzey said "he would not have driven if he could go back." Linzey told Trooper Johnston that he believed his methamphetamine use caused him to "crash" or feel sleepy. Trooper Johnston concluded that Linzey had lost the normal use of his mental and physical faculties due to the introduction of methamphetamine.

Officer Brandon Bertelson with the Burnet Police Department obtained a blood sample from Linzey pursuant to a search warrant. Laboratory tests indicated that Linzey's blood contained marijuana metabolite; .1 milligrams per liter of amphetamine, a methamphetamine metabolite; and 1.5 milligrams per liter of methamphetamine.

Sarah Martin, a forensic toxicologist with the Texas Department of Public Safety's crime laboratory, testified that the amount of methamphetamine in Linzey's blood was well above "therapeutic level" and was consistent with abuse. Martin stated that she would

expect the level of methamphetamine found in Linzey's blood to cause the loss of the normal use of mental and physical faculties.

Martin explained that methamphetamine has an initial stimulant effect. But a depressive effect, including drowsiness and cognitive impairment, is characteristic of the later stages of methamphetamine intoxication. Martin noted that epidemiological studies indicate that the depressive effect of methamphetamine intoxication tends to cause certain driving behaviors such as failing to maintain a single lane of travel.

Linzey testified that he used methamphetamine regularly for years. He treated the drug "like a cup of coffee . . . just to get [him] going." Linzey stated that he used methamphetamine and marijuana the night before the accident, but he maintained that the methamphetamine "wasn't any good" and "had no effect." He recalled stopping at a gas station to get coffee the morning of the accident because he was feeling sleepy. Linzey acknowledged that he fell asleep while driving, which caused him to veer into oncoming traffic.

Peyton testified that he had known Linzey for seven years. On the morning of the accident, they were travelling in Linzey's truck to Marble Falls for work. While en route, they stopped at a gas station to get coffee. Moments before the collision, Peyton was looking down at his phone. He remembered looking up and seeing cars coming toward the vehicle. Peyton testified that his injuries—which included broken bones in his feet, pelvis, ribs, arm, jaw, and neck—caused him to be out of work for six months.

Linzey called Lucy Wilkening, PharmD, as a witness. She testified that the physiological effects from methamphetamine could not be determined solely from a lab

report and that Linzey's medical records did not indicate that he was treated for methamphetamine intoxication, which Dr. Wilkening likened to a medical definition of poisoning. On cross-examination, she stated that those who use methamphetamine "for an extended period of time at very high doses" can suffer depression and fatigue.

During the charge conference, Linzey's counsel made the following request, which the trial court denied: "On [cause number] 47692, we make a motion for criminally negligent homicide." The jury was instructed to consider whether Linzey was guilty of intoxication manslaughter or manslaughter in relation to the death of Parrish. With respect to the injuries suffered by Peyton, the jury was asked to consider whether Linzey was guilty of intoxication assault or aggravated assault causing serious bodily injury. The jury found Linzey guilty of both intoxication manslaughter and intoxication assault. It further found that Linzey had used a deadly weapon during the commission of both offenses.

Linzey filed a motion for new trial in both trial court causes, which the trial court overruled by operation of law. This appeal followed.

## **II. LEGAL SUFFICIENCY**

Because Linzey's second issue, challenging the legal sufficiency of the evidence, would provide him the greatest relief, i.e., an acquittal, we will address that contention first.

### **A. Standard of Review**

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution requires that a criminal conviction be supported by a rational trier of fact's findings that the accused is guilty of every essential element of a crime beyond a

reasonable doubt. *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)). This due process guarantee is safeguarded when a court reviews the legal sufficiency of the evidence. *Id.* To determine whether the evidence is legally sufficient, we consider all of the evidence in the light most favorable to the verdict and determine whether a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt based on the evidence and reasonable inferences from that evidence. *Jackson*, 443 U.S. at 319; *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014). Because the jury is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony, we resolve any conflicts or inconsistencies in the evidence in favor of the verdict. *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (en banc).

We measure the legal sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Such a charge 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 for which the defendant was tried. *Id.* To establish intoxication manslaughter under a hypothetically correct jury charge, the State was required to prove that (1) Linzey (2) operated a motor vehicle in a public place (3) while intoxicated, and (4) by reason of that intoxication, (5) caused the death of another by accident or mistake. See TEX. PENAL CODE ANN. § 49.08; *Matamoros v. State*, 500 S.W.3d 58, 62 (Tex. App.—

Corpus Christi–Edinburg 2016, no pet.). Under a hypothetically correct jury charge for intoxication assault, the State was required to prove that (1) Linzey (2) operated a motor vehicle in a public place (3) while intoxicated, and (4) by reason of that intoxication, (5) caused serious bodily injury to another by accident or mistake. See TEX. PENAL CODE ANN. § 49.07; *Rodriguez v. State*, 191 S.W.3d 428, 437 (Tex. App.—Corpus Christi–Edinburg 2006, pet. ref'd).

## **B. Analysis**

For both convictions, Linzey argues that “there is legally insufficient evidence to establish [Linzey] was intoxicated.” Specifically, Linzey maintains that the evidence establishes only that he was impacted by the “after-effects” of methamphetamine use, which he argues does not constitute intoxication. The State responds that the evidence establishes that the depressive effects of methamphetamine use are a stage of methamphetamine intoxication.

As relevant to this case, the penal code defines “intoxication” as “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body.” TEX. PENAL CODE ANN. § 49.01(2)(A). The State presented evidence that the depressive effect associated with methamphetamine use is a stage of intoxication and not simply an “after-effect” as suggested by Linzey. In particular, the State’s expert Martin testified that methamphetamine, despite its initial stimulant effect, has a later depressive effect. Martin further testified that the amount of methamphetamine in Linzey’s blood was consistent



with abuse and would cause the loss of the normal use of a person's mental and physical faculties. She explained that the drug's later stage effects included drowsiness and cognitive impairment. Martin cited epidemiological studies indicating that methamphetamine intoxication tends to cause driving behaviors such as failing to maintain a single lane of travel. Linzey's explanation for the accident—that he fell asleep—is consistent with the described intoxicating effects of the drug. Linzey also admitted to law enforcement that he might have been “crashing” from his earlier methamphetamine use at the time of the accident.

Further, Trooper Johnston observed several indicators of methamphetamine intoxication at the hospital, including an accelerated internal clock, elevated blood pressure and pulse rate, and muscle tenseness. As a result, he testified that he was of the opinion that Linzey had lost the normal use of his mental and physical faculties due to the introduction of methamphetamine. Generally, an officer's opinion testimony based upon experience and the observed facts that a defendant was intoxicated is sufficient to establish the element of intoxication. See *Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979); *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st. Dist.] 2002, pet. ref'd).

We conclude that a rational fact finder could have found beyond a reasonable doubt that Linzey was intoxicated at the time of the accident. See *Jackson*, 443 U.S. at 319. Therefore, we hold that there was legally sufficient evidence supporting both convictions. See *Gibson v. State*, 233 S.W.3d 447, 451–52 (Tex. App.—Waco 2007, no pet.) (holding that the evidence was legally sufficient to establish that the defendant

was intoxicated where his vehicle left the road and struck a tree; a sample of the defendant's blood revealed the recent ingestion of methamphetamine, cocaine, and two other drugs; forensic scientists testified how those drugs impaired motor skills and judgment; and circumstances of the accident itself were indicative of a loss of normal mental faculties).

We overrule Linzey's second issue.

### III. LESSER-INCLUDED INSTRUCTION

By his first issue, Linzey argues that the trial court erred in denying his request for a criminally negligent homicide instruction as a lesser-included offense of manslaughter. Assuming, without deciding, that the trial court erred in denying the requested instruction, we conclude that such error did not harm Linzey.

We review an allegation of charge error by considering: (1) whether error existed in the charge; and (2) whether sufficient harm resulted from the error to compel reversal. *Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005). The erroneous refusal to give a requested instruction on a lesser-included offense is subject to a harm analysis pursuant to *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). See *Broughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018); *Grey v. State*, 298 S.W.3d 644, 648 (Tex. Crim. App. 2009). Where, as here, the defendant has preserved error by requesting the challenged instruction, we reverse the conviction if the denial of the instruction resulted in some harm to the defendant.<sup>3</sup> *Broughton*, 569 S.W.3d at 613; *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013). "Some harm" means actual

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<sup>3</sup> We disagree with the State's contention that Linzey failed to preserve his claim of jury charge error.

harm and not merely a theoretical complaint. *Rogers v. State*, 550 S.W.3d 190, 191 (Tex. Crim. App. 2018). Reversal is required if the error was calculated to injure the rights of the defendant. *Id.* at 192; *Almanza*, 686 S.W.2d at 171. In evaluating harm, we review the whole record, including the jury charge, the state of the evidence, the arguments of counsel, and other relevant information. *Almanza*, 686 S.W.2d at 171.

The court of criminal appeals has held that a jury's failure to find a defendant guilty of an intervening lesser-included offense can render the trial court's failure to give the requested charge harmless. See *Broughton*, 569 S.W.3d at 617; *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005); *Saunders v. State*, 913 S.W.2d 564, 573–74 (Tex. Crim. App. 1995). The harm from denying a lesser offense instruction stems from the potential to “place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer.” *Masterson*, 155 S.W.3d at 171. Such a concern is not present in situations where another charged offense presents the jury with an available compromise, giving the jury the ability to hold the wrongdoer accountable without having to find him guilty of the greater offense. *Id.*

In *Broughton*, the jury was given a manslaughter instruction as a lesser-included offense to murder, but the trial court denied the defendant's request for an instruction on felony deadly conduct. 569 S.W.3d at 613. The court held that the error, if any, was harmless:

By its rejection of manslaughter, the jury signaled its legitimate belief that appellant was not merely reckless in bringing about Dominguez's death and that he did in fact harbor the requisite culpable mental state required for murder—that is, that he either intentionally or knowingly caused

Dominguez's death, or intended to cause Dominguez serious bodily injury and intentionally or knowingly shot him.

*Id.* at 615.

We believe the reasoning set out in the above cases applies equally in this case. The jury was charged under two theories—intoxication manslaughter and manslaughter.<sup>4</sup> Both manslaughter and criminally negligent homicide require proof of a culpable mental state, while intoxication manslaughter does not. See *Wooten v. State*, 267 S.W.3d 289, 305 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). “Because intoxication manslaughter does not require proof of a mental state, it is, by statute, a strict liability crime.” *Reidweg v. State*, 981 S.W.2d 399, 406 (Tex. App.—San Antonio 1998, no pet.). By receiving instructions on two charges—one requiring a culpable mental state, the other a strict liability offense—the jury was not faced with an all-or-nothing dilemma under which it was forced to consider convicting Linzey of an offense for which it had reasonable doubt. Further, the jury's decision to convict Linzey of intoxication manslaughter despite the availability of manslaughter shows that it believed that Linzey was intoxicated at the time of the accident. In reaching this conclusion, the jury was not required to consider whether Linzey's possessed a lesser culpable mental state. Accordingly, even if the jury believed that Linzey was merely negligent in causing Parrish's death as opposed to reckless, it would have still found Linzey guilty of intoxication manslaughter. In other words, there is no realistic possibility that the jury would have opted to convict Linzey of criminally

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<sup>4</sup> Manslaughter and intoxication manslaughter are the same offense for purposes of double jeopardy. *Ervin v. State*, 991 S.W.2d 804, 817 (Tex. Crim. App. 1999). Therefore, Linzey could not have been convicted for both intoxication manslaughter and manslaughter arising from the death of Parrish. See *Jackson v. State*, 50 S.W.3d 579, 596 (Tex. App.—Fort Worth 2001, pet. ref'd). The verdict form provided the jury with three alternatives presented in the disjunctive: (1) to find Linzey guilty of intoxication manslaughter; or (2) to find Linzey guilty of manslaughter; or (3) to find Linzey not guilty.

negligent homicide had it received an instruction on that offense. See *Broughton*, 569 S.W.3d at 617. Therefore, any error by the trial court was harmless. See *id.*

We overrule Linzey's first issue.

#### **IV. CONCLUSION**

We affirm the trial court's judgments in both appellate causes.

LETICIA HINOJOSA  
Justice

Do not publish.  
TEX. R. APP. P. 47.2(b).

Delivered and filed the  
26th day of March, 2020.