



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. PD-0509-14 & PD-0510-14

PATRICK MARSHALL, Appellant

v.

THE STATE OF TEXAS

**ON STATE'S AND APPELLANT'S PETITIONS
FOR DISCRETIONARY REVIEW
FROM THE THIRD COURT OF APPEALS
HAYS COUNTY**

KEASLER, J., delivered the opinion of the Court in which JOHNSON, HERVEY, ALCALA, RICHARDSON, and NEWELL, JJ., joined. YEARY, J., filed a concurring and dissenting opinion in which MEYERS, J., joined and in which KELLER, P.J., joined as to Part I only. KELLER, P.J., dissented.

OPINION

A jury convicted Patrick Marshall of felony assault against a family member. On appeal, the court of appeals held the evidence legally sufficient but the omission of the words “bodily injury” from the jury charge’s application paragraph egregiously harmed Marshall.¹

¹ *Marshall v. State*, Nos. 03-11-00475-CR & 03-11-0476-CR, 2014 WL 1365659, at *3–4 (Tex. App.—Austin Apr. 3, 2014) (mem. op., not designated for publication).

We agree that the evidence was sufficient, but disagree that the jury charge egregiously harmed Marshall because the jury charge sufficiently required the jury to find bodily injury by impeding normal breathing—a bodily injury *per se*. We therefore reverse the judgment below.

I. Facts and Procedural History

While the parties do not dispute the facts, a brief background is necessary. On September 5, 2005, Marshall and his wife, Shawne Marshall physically fought. The fight moved into the bedroom where Marshall pushed Shawne onto the bed. He straddled her and put a pillow over her face, holding down each side of the pillow. Shawne testified that his body weight pinned her to the bed and the pillow affected her breathing. She further testified that she never passed out and never lost the complete ability to breathe. Nevertheless, she testified that she could not take deep breaths. The jury charge instructed the jury to return a guilty verdict if they found

that the defendant, Patrick James Marshall, . . . did then and there intentionally, knowingly, or recklessly impede the normal breathing or circulation of the blood of Shawne Marshall by blocking the nose or mouth of Shawne Marshall with a pillow, and the said Shawne Marshall was then and there a member of the defendant’s family or household.

Marshall’s trial counsel did not object to the omission of “bodily injury.” The jury convicted Marshall under Penal Code § 22.01, felony assault against a family member. Penal Code § 22.01 provides in relevant part:

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse;

...

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

...

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

...

(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person’s throat or neck or by blocking the person’s nose or mouth²

On appeal, Marshall claimed that the trial judge erred because the jury could return a guilty verdict without finding that Marshall caused a bodily injury. Essentially, Marshall argued that omitting “bodily injury” from the application paragraph relieved the state of its burden to prove an essential element. Marshall also claimed there was insufficient evidence to support the jury’s verdict.

The court of appeals agreed that the jury charge was erroneous, found the error resulted in egregious harm, vacated the conviction, and remanded for a new trial.³ The court of appeals, however, rejected Marshall’s evidentiary insufficiency claim.⁴ Both parties petitioned for discretionary review and we granted the petitions to determine whether the evidence sufficiently supported the jury’s verdict and whether omitting “bodily injury” from

² TEX. PENAL CODE § 22.01 (West 2011).

³ *Id.* at *17.

⁴ *Id.* at *5, *12–13.

the jury charge's application portion caused egregious harm. We find the jury's verdict was supported by sufficient evidence and that Marshall did not suffer egregious harm because of the jury charge's omission.

II. Analysis

A. Jury Charge Error

Upon a finding of error in the jury charge, there are separate standards of review depending on whether the defendant timely objected to the jury instructions.⁵ If the defendant timely objected to the jury instructions, then reversal is required if there was some harm to the defendant.⁶ If the defendant did not timely object to the jury instructions, then reversal is required only if the error was so egregious and created such harm that the defendant did not have a fair and impartial trial.⁷

Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory.⁸ In examining the record to determine whether charge error is egregious, we have traditionally considered: (1) the entirety of the jury charge itself, (2) the state of the evidence, (3) counsel's arguments, and (4) any other relevant information revealed by the entire trial

⁵ *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

⁶ *Id.*

⁷ *Id.*

⁸ *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007).

record.⁹ Egregious harm is a difficult standard to meet, and such a determination must be made on a case-by-case basis.¹⁰ Neither party bears the burden on appeal to show harm or lack thereof under this standard.¹¹ Instead, courts are required to examine the relevant portions of the *entire* record to determine whether appellant suffered actual harm, as opposed to theoretical harm, as a result of the error.¹²

Here, we find the trial judge erred in omitting “bodily injury” from the jury charge but the error did not egregiously harm Marshall. To reach this result, we begin by reviewing the entire jury charge. The abstract portion defined bodily injury pursuant to § 1.07(a)(8), even though the application portion lacked a reference to “bodily injury.” However, the omission did not cause harm. To reach this conclusion, we need only examine the statute and give effect to its plain meaning if the statutory language is unambiguous.¹³

Ordinarily, assault is a Class A misdemeanor and occurs when one “intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse.”¹⁴ Yet a simple assault may be enhanced to a third-degree felony if committed against a family

⁹ See, e.g., *Gelinas v. State*, 398 S.W.3d 703, 705–06 (Tex. Crim. App. 2013) (citing *Almanza*, 686 S.W.3d at 171).

¹⁰ *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

¹¹ *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

¹² *Arline v. State*, 721 S.W.2d 348, 351–52 (Tex. Crim. App. 1986) (emphasis in original).

¹³ *Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991).

¹⁴ TEX. PENAL CODE § 22.01 (West 2011).

member¹⁵ “by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person’s throat or neck or by blocking the person’s nose or mouth.”¹⁶ Bodily injury “means physical pain, illness, or any impairment of physical condition.”¹⁷

Moreover, “impairment of physical condition” is a term of common usage.¹⁸ Black’s Law Dictionary defines “impairment” as “[t]he quality, state, or condition of being damaged, weakened, or diminished; specif., a condition in which a part of a person’s mind or body is damaged or does not work well, esp. when the condition amounts to a disability.”¹⁹ “[P]hysical impairment’ . . . include[s] the diminished function of a bodily organ.”²⁰ While the statute does not define “impeding the normal breathing of a person,” an impediment is ordinarily understood as “[a] hindrance or obstruction.”²¹ In other words, obstructing or impeding a person’s ability to breath impairs a person’s physical condition—a form of bodily injury.

¹⁵ TEXAS FAMILY CODE §§ 71.0021(b), 71.003, 71.005 (West 2011).

¹⁶ TEX. PENAL CODE § 22.01(b)(2)(B) (West 2011).

¹⁷ *Id.* § 1.07(a)(8).

¹⁸ *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989).

¹⁹ BLACK’S LAW DICTIONARY 869 (10th ed. 2014).

²⁰ *Garcia v. State*, 367 S.W.3d 683, 688 (Tex. Crim. App. 2012) (citing collecting cases).

²¹ BLACK’S LAW DICTIONARY 870 (10th ed. 2014).

Correspondingly, the plain meaning of the statutory language indicates that any impediment to normal breathing is a bodily injury. The Legislature decided that bodily injury is the result to be prevented, making the conduct causing it eligible for punishment. It also decided that causing bodily injury, particularly, impeding normal breathing, is reprehensible and eligible for greater punishment. In short, this plain meaning does not contradict the Legislature’s intended result.

In this case, the application paragraph required the jury to find Marshall guilty if it found he impeded Shawne’s normal breathing when he covered her face with a pillow. A necessary element here is impeding another person’s breathing, which as explained above is a type of bodily injury. The jury did not need to find that Shawne actually stopped breathing or that she was unconscious. Rather, the jury only needed to find that Marshall impeded her breathing, the particular type of bodily injury in this case. By finding that Marshall impeded Shawne’s breathing, the jury found bodily injury *per se*.

To that end, we overrule the court of appeals’ holding that Marshall suffered egregious harm when the jury charge omitted “bodily injury” in the application paragraph. Omitting “bodily injury” in the application paragraph did not cause egregious harm because the application paragraph required the jury to find a specific type of bodily injury. The error neither deprived Marshall of any valuable rights nor vitally affected his defensive theory. Thus the trial court’s error did not egregiously harm Marshall when it omitted “bodily injury” from the jury charge in this case.

B. Legal Sufficiency

We examine legal sufficiency issues under *Jackson v. Virginia*, where we view the evidence in the light most favorable to the verdict.²² We then decide, based on the evidence whether a rational jury could find all the requisite elements beyond a reasonable doubt.²³ We defer to the jury's finding when the record provides a conflict in the evidence.²⁴ Here, we overrule Marshall's claim that the evidence introduced at trial was legally insufficient to support a finding that he impeded Shawne's normal breathing or a finding that he caused bodily injury. Rather, the jury only needed to determine whether the evidence supported a finding that he impeded Shawne's breathing, thereby finding bodily injury *per se*.

In this case, Shawne testified that Marshall tried to smother her when he pressed a pillow hard and tight against her face. Shawne testified and demonstrated with her hands how he held the pillow over her face. She also testified that she was unable to take deep breaths while Marshall held a pillow against her face. Even though Shawne testified that she never lost consciousness and never was completely unable to breath, that is not required under bodily injury, as explained above. An impediment to normal breathing does not necessarily prevent breathing altogether because an impediment is merely a hindrance or obstruction. Shawne's testimony that she was never entirely unable to breathe does not

²² 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

²³ *Jackson*, 443 U.S. at 319.

²⁴ *Id.* at 326.

foreclose the possibility that her normal breathing was hindered. We are unconvinced by Marshall's argument that deep breaths do not amount to normal breathing. A jury could reasonably infer that Marshall impeded her normal breathing and the evidence is legally sufficient to support such a finding. We therefore hold that the jury had sufficient evidence to find Marshall guilty of impeding Shawne's normal breathing, the third-degree felony assault.

III. Conclusion

When the jury found that Marshall impeded Shawne's normal breathing, it necessarily found that he caused a bodily injury. While the jury charge erroneously omitted a distinct "bodily injury element," doing so did not cause Marshall egregious harm because impeding normal breathing is *per se* a bodily injury under § 22.01(b)(2)(B). The court of appeals erred in holding otherwise.

We overrule Marshall's legal-sufficiency challenge, reverse the court of appeals' holding that the erroneous jury charge caused egregious harm, and reinstate the jury's verdict. Further, we dismiss as improvidently granted cause number PD-0509-14 because the parties' legal arguments pertaining to Marshall's conviction for felony assault against a family member by suffocation arises from cause number PD-0510-14, not PD-0509-14.

Delivered: January 13, 2016
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