

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00693-CR

Carlos Baca, Jr., Appellant

v.

The State of Texas, Appellee

**FROM THE 207TH DISTRICT COURT OF HAYS COUNTY
NO. CR-18-0188, THE HONORABLE DANIEL H. MILLS, JUDGE PRESIDING**

MEMORANDUM OPINION

A jury convicted appellant Carlos Baca, Jr. of the second-degree felony offense of aggravated assault, *see* Tex. Penal Code § 22.02(a), and assessed his punishment, enhanced under the habitual offender provision of the Texas Penal Code, at confinement for thirty years in the Texas Department of Criminal Justice, *see id.* § 12.42(d). In one point of error, appellant challenges the sufficiency of the evidence to prove the aggravating element of the charged offense. Because we conclude that the evidence was sufficient, we affirm the trial court's judgment of conviction.

Background

The jury heard evidence that, on the night of December 22, 2017, appellant followed Terrence Bethel into a smoke shop, where appellant began punching Bethel in the face. After Bethel fell to the ground, appellant continued to punch him repeatedly and then dragged

him through the shop's front door. Outside the shop, appellant continued to punch and kick Bethel multiple times in the face. Bethel "didn't fight back" and was unconscious "very early on." Witnesses to the incident called 911, and the police and EMS were dispatched to the shop. The police arrested appellant, and Bethel was transported to the hospital by ambulance.

Based on the December 2017 incident, the State indicted appellant for the offense of aggravated assault, alleging that:

On or about the 22nd day of December, 2017, in Hays County, Texas, the Defendant, Carlos Baca, did then and there:

PARAGRAPH A

Intentionally, knowingly, or recklessly cause serious bodily injury to Terrence Bethel, by striking the said Terrence Bethel with the hands of said defendant or kicking the said Terrence Bethel with the legs or feet of said defendant;

PARAGRAPH B

Intentionally, knowingly, or recklessly cause bodily injury to Terrence Bethel, by striking the said Terrence Bethel with the hands of said defendant or kicking the said Terrence Bethel with the legs or feet of said defendant, and the said defendant used or exhibited a deadly weapon during the commission of the assault, to wit: the defendant's hands or feet.

See Tex. Penal Code § 22.02(a).

The jury trial occurred in October 2018. The State's witnesses included responding and investigating officers; surgeons who examined Bethel at the hospital; a responding EMS paramedic; an employee from the shop who witnessed the portion of the incident that happened inside the shop; and two other individuals who witnessed portions of the incident that happened outside the shop. The exhibits included photographs of the scene and Bethel's injuries from the assault; a surveillance video from the shop of appellant punching

Bethel repeatedly in the face and Bethel falling to the floor; the 911 calls reporting the incident; police body camera recordings; and Bethel's medical records.

Eyewitnesses' testimony was consistent that appellant was the aggressor and Bethel, who was intoxicated at the time, did not fight back or defend himself. The shop employee testified that appellant was "irate," "accusing [Bethel] of stealing from him," and "just beat [Bethel] up right in front of [the employee] at the store"; that appellant's "punches knocked [Bethel] out"; and that appellant continued to punch Bethel after he was unconscious. Another witness, who worked at a convenience store next to the shop, testified that, after she arrived, appellant "kicked [Bethel] in the face" multiple times and "stomped on him at one point."

Witnesses who observed Bethel at the scene also testified about Bethel's condition during and following the assault. The shop employee testified that Bethel had "blood all over his face, black eyes" and "was in horrible shape." He described Bethel's injuries as "serious." A responding officer to the incident testified that Bethel had "[a] large contusion on the back of his head," "both his eyes were swollen shut, he had blood in his ears, blood all over his face, blood in his mouth"; he "believed [Bethel] had a broken orbital socket"; the swelling on Bethel's face was "[v]ery serious"; Bethel was "just moaning" "on the ground, kind of almost in a fetal position"; and "[Bethel] was conscious, but he wasn't really responding to any questions, he wasn't able to speak or form words." The convenience store employee testified that Bethel was unconscious when she "walked up," that he was "very unconscious on the ground, bleeding," and that he "wasn't moving" or responsive. She also testified that she saw Bethel "about three weeks later" and, at that time, "[h]e looked pretty bad—badly beat up" and "[h]is left eye was very swollen and purple, like popped blood vessels, along with the trauma onto his head."

The medical records show that Bethel “was inebriated” and that his injuries from the assault included a “[l]eft lower eyelid laceration 4cm,” “left chin laceration 6cm,” “left orbital floor fracture with a retrobulbar hematoma,” “a left maxillary sinus fracture,” “swollen left eye that [was] completely swollen shut,” “swollen lips,” and “significant soft tissue swelling.” During his hospital stay, Bethel’s lacerations were repaired but, because of swelling, his orbital fracture was not.¹ Bethel was discharged from the hospital the day after the incident with instructions not to return to work until cleared to do so by his provider, to keep his head elevated at 30 degrees at all times, to follow up with the plastic surgeon in one week “for repair of his orbital fracture once edema resolves,” and to follow up with the ophthalmologist in five days. Bethel, however, did not follow up as instructed, and the State was unable to locate Bethel after he was released from the hospital. The convenience store employee did see him several weeks after the assault, and the extent of his injuries were visible.

In addition to the medical records, the surgeons testified about Bethel’s injuries, his treatment at the hospital, and risks associated with his types of injuries. As to risks that were associated with Bethel’s types of injuries, the plastic and craniofacial surgeon testified about possible long-lasting effects, including that: (i) lacerations can cause infection, scarring, and “distortion of the facial anatomy”; (ii) an orbital floor fracture can cause “sink[ing]” of the

¹ The trauma surgeon explained the reasons for waiting to repair the orbital fracture:

Just because you have facial fractures don’t mean you need to get them fixed immediately. And it makes perfect sense, if you understand it, because the bones in the face are tiny, tiny, tiny, and thin, and kind of paper thin. So if you got a bunch of swelling around those bones and we go in there and try and push them back together to put a screw on them or plate on them, we’re liable to break them, make it worse. So typically what they’ll do is they’ll have folks sit around for 7 to 10 days, and then they’ll come back and have it fixed at that time.

eyeball, resulting in double vision and affecting vision permanently; and (iii) a retrobulbar hematoma can grow and “hurt the eye itself.”

The defense theories were that appellant was acting in self-defense or in defense of property, *see* Tex. Penal Code §§ 9.31, .41, .42, and that Bethel did not sustain “serious bodily injury,” *see id.* § 1.07(a)(46). Appellant testified on his own behalf. He agreed that the video recording from the shop showed him punching Bethel sixteen times and that he kicked Bethel, but he testified that he was “feeling threatened” and that Bethel had stolen his “stuff.” The defense also focused on the surgeons’ equivocal testimony as to the severity of Bethel’s injuries without follow-up visits. The plastic and craniofacial surgeon testified that it was “hard to weigh in on severity” of the orbital fracture because of swelling and “[t]hat’s why that follow-up appointment is very helpful.” The trauma surgeon agreed that, without further follow-up, “it was impossible to assess whether there was any serious permanent disfigurement” or “protracted loss or impairment of any of [Bethel]’s functions concerning the eye.”

The application paragraph of the jury charge stated the required elements for the charged offense as follows:

1. The defendant, Carlos Baca, in Hays County, Texas, on or about the 22nd day of December, 2017:
 - a. Caused bodily injury to Terrence Bethel, by striking Terrence Bethel with his hands or kicking Terrence Bethel with his legs or feet, and used or exhibited a deadly weapon during the commission of the assault, to wit: the defendant’s hands or feet; or
 - b. Caused serious bodily injury to Terrence Bethel, by striking Terrence Bethel with his hands or kicking Terrence Bethel with his legs or feet; and
2. The defendant did so intentionally, knowingly, or recklessly.

See Tex. Penal Code §§ 22.01(a), .02(a).

The jury found appellant guilty of aggravated assault, and the trial proceeded to the punishment phase. In the punishment phase, appellant pleaded true to two enhancement paragraphs but not true to the State's allegation that he had used or exhibited a deadly weapon during the commission of the offense. The jury assessed punishment at confinement for thirty years and found that the State had not proven beyond a reasonable doubt that appellant used or exhibited a deadly weapon during the commission of the offense. The trial court entered judgment consistent with the jury's verdict. This appeal followed.

Analysis

In his sole point of error, appellant challenges the sufficiency of the evidence to prove the aggravating element of the charged offense. He contends that the evidence was insufficient to prove the element of "serious bodily injury" as alleged in paragraph A of the indictment or that he used or exhibited a deadly weapon as alleged in paragraph B of the indictment.

Standard of Review

Under the legal sufficiency standard of review, we consider the evidence in the light most favorable to the verdict and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018). Under this standard, we defer to the jury's resolution of conflicts in testimony, weighing of the evidence, and drawing of reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010); see *Nisbett*, 552 S.W.3d at 262 (explaining that standard of sufficiency review "gives full play to the responsibility of the factfinder" and that

“court’s role on appeal is restricted to guarding against rare occurrence when the factfinder does not act rationally”); *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015) (“The trier of fact is the exclusive judge of the credibility and weight of the evidence and is permitted to draw any reasonable inference from the evidence so long as it is supported by the record.”). “Furthermore, the trier of fact may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence.” *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

In this case, the two paragraphs of the indictment did not allege different offenses but alternative ways of committing the offense of aggravated assault. *See* Tex. Penal Code § 22.02(a). Thus, we must uphold the verdict if the evidence is sufficient to support a finding of the offense under either theory submitted. *See Guevara v. State*, 152 S.W.3d 45, 52 (Tex. Crim. App. 2004) (“We have consistently held that, when multiple theories are submitted to the jury, the evidence is sufficient to support a conviction so long as the evidence is sufficient to support conviction for one of the theories submitted to the jury.” (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991))); *Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1987) (op. on reh’g) (“Where a general verdict is returned, and the evidence is sufficient to support a finding under any of the counts submitted, the verdict will be applied to the offense finding support in the facts.”). With these standards in mind, we turn to appellant’s challenges to the sufficiency of the evidence.

Serious Bodily Injury

Appellant challenges the sufficiency of the evidence to prove “serious bodily injury” as alleged in Paragraph A of the indictment. “Serious bodily injury” as defined in the

Penal Code is “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 § 1.07(a)(46). “The distinction between ‘bodily injury’ and ‘serious bodily injury’ is often a matter of degree and the distinction must be determined on a case-by-case basis.” *Camarillo v. State*, 82 S.W.3d 529, 537 (Tex. App.—Austin 2002, no pet.) (citing *Moore v. State*, 739 S.W.2d 347, 349, 352 (Tex. Crim. App. 1987)).

When deciding whether the evidence is sufficient to establish serious bodily injury, an appellate court should consider “the disfiguring and impairing quality of the bodily injury as it was inflicted on a complainant by an offender,” and not “the amelioration or exacerbation of an injury by actions not attributable to the offender, such as medical treatment.” *Blea v. State*, 483 S.W.3d 29, 35 (Tex. Crim. App. 2016); see *Cranfill v. State*, Nos. 03-16-00649-CR, 03-16-00650-CR, 2017 Tex. App. LEXIS 6522, at *5 (Tex. App.—Austin July 14, 2017, no pet.) (mem. op., not designated for publication) (describing inquiry for determining sufficiency of evidence to establish serious bodily injury). “For injuries that cause ‘protracted’ loss or impairment of bodily function, the evidence must show only that the loss or impairment was ‘extended, lengthened, prolonged, or continued.’” *Cranfill*, 2017 Tex. App. LEXIS 6522, at *5 (quoting *Nash v. State*, 123 S.W.3d 534, 538 (Tex. App.—Fort Worth 2003, pet. ref’d)). “Moreover, ‘serious bodily injury may be established without a physician’s testimony when the injury and its effects are obvious.’” *Id.* (quoting *Blea*, 483 S.W.3d at 35).

Appellant argues that the surgeons’ testimony was not sufficient to prove that he caused Bethel serious bodily injury because they did not reassess Bethel after he was discharged from the hospital. Appellant argues: “No physician or medical expert testified that Bethel

actually sustained serious bodily injury, only that there was the potential for serious injury” and that “[t]he State’s entire case focused on the premise that the injuries caused by appellant put Bethel at *risk* of serious bodily injury, not that appellant’s actions actually *caused* serious bodily injury.” However, although the surgeons were unable to testify about the ultimate prognosis of Bethel’s injuries because Bethel did not return for follow-up visits, they described his facial injuries as “serious,” “severe,” “significant,” and would cause scarring. For example, when asked why he considered Bethel’s injuries to be “significant,” the plastic and craniofacial surgeon testified that “there [were] large lacerations on the face on that side” and “any injury that fractures a bone of the face that has some functional—or can have a functional impact, that, you know, that—that counts . . . as severe in my book.” The trauma surgeon similarly answered, “Yes,” when asked if he considered Bethel’s type of head injuries to be “serious injuries.”

We further observe that, in addition to the surgeons’ testimony, other evidence supported a finding that appellant caused serious bodily injury to Bethel. *See Blea*, 483 S.W.3d at 35; *Cranfill*, 2017 Tex. App. LEXIS 6522, at *5. The evidence was undisputed that Bethel lost consciousness and was unresponsive after appellant punched him in the face multiple times and that appellant continued to punch and kick him in the face after he lost consciousness. The exhibits included the photographs showing Bethel’s injuries from the assault, his medical records documenting the injuries as including a “left orbital floor fracture with a retrobulbar hematoma,” and the video of appellant repeatedly punching appellant in the face. Consistent with this evidence, a responding officer testified that Bethel had “[a] large contusion on the back of his head,” “both his eyes were swollen shut, he had blood in his ears, blood all over his face, blood in his mouth”; that the swelling on his face was “[v]ery serious”; that he was “just moaning” “on the ground, kind of almost in a fetal position”; and that he was not able to speak or form words.

The store employee similarly testified that Bethel was “very unconscious on the ground, bleeding” and that he “wasn’t moving.” She also testified about her observations of Bethel a few weeks after the incident. She testified that—at that later time—he looked “badly beat up” and that his “left eye was very swollen and purple, like popped blood vessels, along with the trauma onto his head.”

Viewing the evidence and all reasonable inferences therefrom in the light most favorable to the verdict, we conclude that it was sufficient to prove that appellant caused serious bodily injury to Bethel as alleged in Paragraph A of the indictment. *See Jackson*, 443 U.S. at 319; *Ramsey*, 473 S.W.3d at 809; *Acosta*, 429 S.W.3d at 625; *see also Cranfill*, 2017 Tex. App. LEXIS 6522, at *8 (concluding that evidence was sufficient to prove that defendant “caused [the victim] serious bodily injury” and citing evidence that victim “suffered a fractured foot that adversely affected her ability to walk for approximately six weeks to two months,” testimony from officers “summarizing their observations of [the victim]’s injuries following the assault,” and photos “showing the extent and severity of the bruising to [the victim]’s body”). The jury could have found that Bethel suffered a “protracted loss or impairment of the function of [a] bodily member or organ”—his left eye—as a result of the assault. *See Tex. Penal Code* § 1.07(a)(46); *Cranfill*, 2017 Tex. App. LEXIS 6522, at *8; *see also Camarillo*, 82 S.W.3d at 537–38 (concluding that evidence was sufficient to support jury’s “serious bodily injury” finding when evidence showed that victim had broken nose and nurse testified about “broken nose” and “‘lots of nose trauma,’ which could cause serious impairment of a person’s ability to breathe,” and “expressed the opinion that when a person sustains a fractured nose there is a likelihood that the person will suffer some protracted loss of the function or an impairment of the use of the organ”).

Because we have concluded that the evidence was sufficient to prove the aggravating element of serious bodily injury in Paragraph A of the indictment, we do not address the sufficiency of the evidence to support that appellant used or exhibited a deadly weapon as alleged in paragraph B of the indictment. *See Guevara*, 152 S.W.3d at 52 (explaining that “when multiple theories are submitted to the jury, the evidence is sufficient to support a conviction so long as the evidence is sufficient to support conviction for one of the theories submitted to the jury”); *see also* Tex. R. App. P. 47.1, 47.4.

Conclusion

Having concluded that the evidence was sufficient to prove the aggravating element of serious bodily injury in Paragraph A of the indictment, we overrule appellant’s point of error and affirm the trial court’s judgment of conviction.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Kelly

Affirmed

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