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APPELLATE COURT CAUSE NO. 06-15-00167-CR

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IN THE COURT OF CRIMINAL APPEALS

TEODORO HERNANDEZ,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

STATE'S BRIEF ON THE MERITS

FROM THE COURT OF APPEALS FOR THE SIXTH DISTRICT AT TEXARKANA ORIGINAL APPEAL FROM THE 428TH JUDICIAL DISTRICT COURT, HAYS COUNTY, TEXAS, TRIAL COURT CAUSE NO. CR-14-0339

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TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS JUDGES:

COMES NOW the State of Texas, by and through her Assistant District Attorney, Brian Clarke Erskine, and files this brief on the merits pursuant to TEX.R.APP.PROC. Rule 71.3 and would show the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

The Court has indicated that no oral argument would be permitted for the petition. However, the State re-urges its request for oral argument to aid the Court in the decisional process related to the Sixth Court of Appeals' ("Sixth Court") misunderstanding or misapplication of binding precedent.

STATEMENT OF THE CASE

A Hays County Grand Jury indicted Teodoro Hernandez ("Appellant") on May 7, 2014.[1] Hernandez was indicted for Aggravated Assault and the jury found him guilty.[2] The jury sentenced him to seven years in the Texas Department of Criminal Justice's Institutional Division.[3] On appeal, the Sixth Court held the evidence was insufficient to support Appellant's conviction for aggravated assault with a deadly weapon, as alleged, and reversed the trial court's judgment, rendered a judgment for the lesser-included assault and remanded the case back to the trial court

[1] CR 5-6.
[2] CR 131-135.
[3] CR 127-130.

for a new punishment hearing. The Sixth Court overruled Appellant's other error claims and otherwise affirmed the Appellant's conviction and sentence for sexual assault.

STATEMENT OF PROCEDURAL HISTORY

On August 5, 2016, the Sixth Court reversed the conviction, holding that the evidence was insufficient. On February 1, 2017, the Court of Criminal Appeals ("CCA") granted the State's petition for discretionary review.

STATE'S SIXTH COURT OPINION OPPOSITION BRIEF

ISSUE NUMBER ONE

IS THE EVIDENCE SUFFICIENT TO PROVE AGGRAVATED ASSAULT WITH A DEADLY WEAPON WHEN THE STATE PROVES THE OFFENSE ALLEGED IN THE INDICTMENT, BUT THERE IS A VARIANCE BETWEEN THE PLEADING AND PROOF AS TO THE SPECIFIC DEADLY WEAPON?

ISSUE NUMBER TWO

IF, IN THE COURSE OF A SINGLE CRIMINAL EPISODE, APPELLANT ASSAULTS VICTIM, IMMEDIATELY LEAVES THE ROOM TO RETRIEVE A DEADLY WEAPON AND THEN CONTINUES ASSAULTIVE CONDUCT, DOES A COURT OF APPEALS ERR IN FINDING THE EVIDENCE INSUFFICIENT TO PROVE THAT THE DEADLY WEAPON WAS USED "DURING THE COMMISSION" OF THE ASSAULT?

ARGUMENT

In this case, the defendant (hereafter "Appellant") was convicted of sexual assault and aggravated assault with a deadly weapon.

As recited by the court below, the essential facts are that Appellant and the victim began to argue about whether she was unfaithful to him.

> Responding to [Appellant's] repeated accusations and questions with denials, [the victim] was repeatedly struck in the face, temple, and ear by [Appellant] and fell off the bed to the floor. [Appellant] continued questioning [the victim], striking her repeatedly.
>
> In an attempt to divert [Appellant] and to have an opportunity to close the bedroom door, [the victim] asked [Appellant] to get her a glass of water. He complied with her request and left the bedroom, at which time [the victim] attempted to close the door. [Appellant], detecting her efforts, screamed at her, "Neither one of us are [sic] going to make it out alive," and returned to the bedroom, throwing the water in her mouth while simultaneously choking her. She stated, "He was using one hand to choke me while he was pouring water down my throat."[4]

The aggravated assault count of the indictment alleged that Appellant "[d]id then and there intentionally, knowingly, or recklessly cause bodily injury to [the victim] by striking the victim's head or body with the defendant's hands, and the defendant did then and there use or exhibit a deadly weapon, to-wit, water, during the

[4] *Hernandez v. State*, 06-15-00167-CR, 2016 WL 4256938, at *3 (Tex. App.—Texarkana Aug. 5, 2016).

commission of said assault." The jury convicted the Appellant on this count (Count II).[5]

However, the Sixth Court held that the "evidence was insufficient to support the trial court's judgment of conviction as to the charge of aggravated assault with a deadly weapon, as alleged." In doing so, the Sixth Court found that the jury was not authorized to convict Appellant as alleged in Count II, holding that the State was bound by the indictment to prove that 1) the alleged deadly weapon, water, was used or exhibited "either before he struck [the victim] or simultaneously with having struck her;"[6] and 2) that the deadly weapon used was water, and proof of any other weapon would be a material variance.[7]

The Sixth Court's decision is in conflict with the CCA's line of cases involving material variances, including *Johnson v. State,*[8] which stands for the proposition that current evidentiary sufficiency standards lead to the conclusion that a variance between the specific deadly weapon alleged and proven at trial does not render the evidence legally insufficient. In addition, the Sixth Court erred in holding that a deadly weapon's use or exhibition during a continuous episode of assaultive

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[5] The Sixth Court affirmed the conviction for sexual assault, and Appellant was acquitted on a third count of felony family violence assault. We have therefore limited our discussion of the facts to only those directly relevant to the aggravated assault charge.
[6] *Id.*, *6.
[7] *Id.*, at *8.
[8] *Johnson v. State*, 364 S.W.3d 292 (Tex. Crim. App. 2012).

behavior does not support a conviction for aggravated assault if the weapon was used during the episode, but not until after the specific manner and means of injury alleged had occurred.

ISSUE ONE

THE SIXTH COURT ERRED IN HOLDING THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT AN AGGRAVATED ASSAULT CONVICTION IF THE TRIAL PROOF VARIES FROM THE INDICTMENT ALLEGATIONS ONLY IN THE SPECIFIC DEADLY WEAPON THAT WAS USED OR EXHIBITED

The CCA has directed that "sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case:"

> Such a charge would be 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 particular offense for which the defendant was tried.... The standard we formulate today ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime rather than a mere error in the jury charge submitted.[9]

The CCA did not state that the hypothetically correct charge was required to track exactly all of the allegations in the indictment, but only that the charge needed to be "authorized by the indictment."[10] The CCA went on to say, "In light of the principles

[9] *Malik v. State*, 953 S.W.2d 953 S.W.2d 234 at 240 (Tex. Crim. App. 1997).
[10] *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001).

underlying *Malik* and [subsequent cases], we hold that a hypothetically correct charge need not incorporate allegations that give rise to immaterial variances."[11]

In *Johnson v. State*, the CCA held that

> [v]ariances can be classified into three categories, depending upon the type of allegation that the State has pled in its charging instrument but failed to prove at trial. First, a variance involving statutory language that defines the offense always renders the evidence legally insufficient to support the conviction (*i.e.* such variances are always material). Second, a variance involving a non-statutory allegation that describes an "allowable unit of prosecution" element of the offense may or may not render the evidence legally insufficient, depending upon whether the variance is material (*i.e.* such variances are sometimes material). Finally, other types of variances involving immaterial non-statutory allegations do not render the evidence legally insufficient.[12]

The CCA then found that a variance between the charging instrument, which alleged that the defendant hit the victim with a hand, and the act proved at trial, *i.e.,* that the defendant threw the victim against a wall, was an immaterial non-statutory variance that did not render the evidence legally insufficient to support the conviction.[13] The CCA explained,

> What caused the victim's injury is not the focus or gravamen of this offense. The aggravated assault offense at issue is a result-of-conduct crime with the focus or gravamen being the victim and the bodily injury that was inflicted.[14]

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[11] *Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001); *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011), *citing Gollihar*, at 257.
[12] *See Johnson v. State,* 364 S.W.3d 292, 298 (Tex. Crim. App. 2012) (noting that a variance such as that between "stabbing with a knife" and "bludgeoning with a baseball bat" "can never be material.").
[13] *Id.*
[14] *Id.*, at 298.

The CCA provided the following example of this analysis: "an indictment might allege that Dangerous Dan was murdered by being stabbed with a knife, but the proof at trial might showed that he was, instead, bludgeoned with a baseball bat."[15] The variance in such a case would be immaterial because

> murder is a result-of-conduct crime. What caused the victim's death is not the focus or gravamen of the offense; the focus or gravamen of the offense is that the victim was killed. Variances such as this can never be material because such a variance can never show an "entirely different offense" than what was alleged.[16]

The jury's conviction here is supported by proof that deadly weapon was used, whether "water," as alleged, or "hands" as Sixth Court acknowledged was shown by the trial evidence.[17]

The Sixth Court held that that the variance between the charging instrument alleging that defendant struck victim and used or exhibited water as a deadly weapon, and act proved at trial, namely that defendant "choked Molien with his hands or struck Molien by using or exhibiting his hands as a deadly weapon," was a material variation that rendered the evidence legally insufficient to support the conviction.[18] The Sixth Court explained:

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[15] *Id., at* 296.
[16] *Id., at* 298.
[17] *Hernandez*, at *8. See also 8 RR 86-93, wherein Appellant's expert describes death potential from use of hands in manners consistent with strangulation: "from the time I put my hand on your neck until I completely block your arteries or block your airway would be three to four minutes. And will brain death occur within that time? Yes."
[18] *Hernandez*, at *8.

> When the State charged Hernandez with aggravated assault, it was required to allege in its indictment the aggravating factor, something that it duly did. Although the State was within its discretion to allege that Hernandez choked Molien with his hands or struck Molien by using or exhibiting his hands as a deadly weapon, it apparently chose not to do so.[19]

The Sixth Court held that "[t]he State was bound by its choice of the deadly-weapon allegation."[20] The Sixth Court's holding is in conflict with *Johnson*, a case which the Sixth Court's opinion does not even mention.[21]

Johnson counsels tolerance for non-statutory variations between pleadings and proof so long as the proof at trial does not show an entirely different offense than what was alleged in the charging instrument.[22] Whether an offense is "entirely different" relates to the "allowable unit of prosecution" for the offense.[23] As the *Johnson* court explained:

> any issue involving a non-statutory variance can be converted into a jury unanimity question. If the non-statutory allegations that were pled and proved had both been pled, could both have been submitted in the jury charge in support of a single offense without violating principles of jury unanimity? For example, an indictment might allege that Dangerous Dan was murdered by being stabbed with a knife, but the proof at trial might showed that he was, instead, bludgeoned with a baseball bat. The issue could be re-framed as whether the principles of jury unanimity would be violated if "stabbed with a knife" and "bludgeoned with a baseball bat" were both submitted in support

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[19] *Id.*
[20] *Id.*
[21] We note that the Court of Appeals did discuss, at length, *Johnson v. State*, 271 S.W.3d 756 (Tex. App.–Waco 2008, pet. ref'd), a separate precedent from the *Johnson v. State* cited above.
[22] *Johnson*, at 295.
[23] *Id.*

> of the single murder offense to the jury. The answer is no, because the two methods of committing murder do not result in two offenses.[24]

On the other hand, if the State alleged that "Dangerous Dan" was murdered but proved, instead, the murder of "Little Nell," that would be material because causing Nell's death is a separate and distinct murder from killing Dan.[25]

Aggravated assault as alleged here is a result-oriented crime with the focus or gravamen being the victim[26] and the bodily injury that was inflicted.[27] The precise act or nature of the conduct is inconsequential.[28] The use of a deadly weapon may act as an aggravating factor,[29] but that does not change the gravamen of the offense or its unit of prosecution. A variance between the manner and means alleged in an assault case and the actual manner and means used does not preclude a conviction.[30] While there may be circumstances under which a defendant could be convicted twice for causing two separate injuries to a single person, causing a single injury could

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[24] *Id.*, at 296–97.
[25] *Id.*, at 295.
[26] *Ex parte Hawkins*, 6 S.W.3d 554, 560 (Tex. Crim. App. 1999).
[27] *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)..
[28] *Id.*
[29] *Id.*
[30] *Karl v. State*, 02-16-00001-CR, 2016 WL 5443116, at *2 (Tex. App.—Fort Worth Sept. 29, 2016, no. pet. h.); *Thomas v. State*, 303 S.W.3d 331, 333 (Tex. App.—El Paso 2009, no pet.); *Rodriguez v. State*, 274 S.W.3d 760, 767 (Tex. App.—San Antonio 2008, no pet.); *Phelps v. State*, 999 S.W.2d 512, 516 (Tex. App.—Eastland 1999, pet. ref'd); *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012); *Botello v. State*, No. 08-04-00127-CR, 2005 WL 2044667, at *2–3 (Tex. App.—El Paso Aug. 25, 2005, pet. ref'd) (not designated for publication); *see also Dawson v. State*, No. 08-11-00203-CR, 2013 WL 4017433, at *4 (Tex. App.—El Paso Aug. 7, 2013, no pet.) (not designated for publication) ("Several courts including this one have held that the manner and means of an assault offense is not an essential element of the offense and as a result, need not be included in the hypothetically correct jury charge."); *Dunn v. State*, No. 05-10-00196-CR, 2011 WL 227715, at *2 (Tex. App.—Dallas Jan. 26, 2011, pet. ref'd) (not designated for publication).

never result in two convictions regardless of the proof *vis-a-vis* the deadly weapon used or exhibited.

The *Johnson* court explained that only those descriptive averments of statutory elements "that define[] or help[] define the allowable unit of prosecution" can give rise to material variances, and that any other deviation of the proof from a descriptive averment of an element in the indictment will be regarded as "immaterial" and will "not render the evidence legally insufficient."[31] The deadly weapon aggravating factor is simply the way in which a simple assault becomes a more serious offense.[32] Different deadly weapons can be alleged, even weapons unknown to the grand jury, and subsequently proved or not proved at trial.[33] A variance as to which deadly weapon was used or exhibited does not change the fact that a deadly weapon was used or exhibited.[34] Even if Appellant used or exhibited his hands *and* water during an assault that caused a single injury, only one aggravated assault with a deadly weapon conviction could result. Therefore, this immaterial variance could never prove an "entirely different offense" than what was alleged.[35] After all, no matter how many deadly weapons are used to commit a singular assault, only one deadly weapon finding can be imposed.

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[31] *Cornwell v. State*, 471 S.W.3d 458, 467 (Tex. Crim. App. 2015).
[32] *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008).
[33] *Sanchez v. State*, 376 S.W.3d 767, 771 (Tex. Crim. App. 2012).
[34] *Johnson* at 298. See example of knife or baseball bat.
[35] *Id.* at 298.

Consistent with the *Johnson* court's analysis, the CCA has also noted that the State's failure to prove the precise deadly weapon alleged in the indictment is an "immaterial variance." In *Flenteroy v. State*,[36] the evidence supported the jury's finding that appellant used a "hard metal-like object" as a deadly weapon but the State did not prove exactly what it alleged (*i.e.*, a "screwdriver"). The CCA held that the variance was immaterial.[37]

Rather than following the "hypothetically correct jury charge" sufficiency standard outlined in *Johnson*, where the evidence "does not necessarily have to track exactly all of the charging instrument's allegations,"[38] the Sixth Court compared the evidence to the *actual* jury charge, and held that the State was bound to prove precisely what was alleged without this Court's advised tolerance for immaterial variances.[39]

The CCA should reverse the Sixth Court's finding that the evidence was insufficient, as that finding is contrary to the Court's precedent.

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[36] 187 S.W.3d 406, 411 (Tex. Crim. App. 2005).
[37] *Id.*
[38] *Id.*, at 294.
[39] *Hernandez,* at *8 (Tex. App.—Texarkana Aug. 5, 2016, no. pet. h.).

ISSUE TWO

THE SIXTH COURT ERRED IN FINDING THE EVIDENCE INSUFFICIENT TO PROVE USE OR EXHIBITION OF A DEADLY WEAPON WHEN THE WEAPON WAS USED OR EXHIBITED DURING THE COURSE OF AN ASSAULTIVE EPISODE BUT NOT SIMULTANEOUS WITH THE ALLEGED INJURY.

The evidence makes clear that during his ongoing assault of the victim, Appellant struck the victim repeatedly, then retrieved some water, returned and straddled the victim with one hand on her throat while using or displaying water as a deadly weapon.[40] The evidence also supports the jury finding hands as a deadly weapon, though the State "apparently chose not to" allege hands, as noted by the Sixth Court.[41]

The Sixth Court held the evidence insufficient to support that the alleged deadly weapon, water, was used or exhibited "either before he struck [the victim] or simultaneously with having struck her."[42] The Sixth Court took no issue with the evidence's sufficiency to show that the water was a deadly weapon,[43] but instead

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[40] 5 RR 81.

[41] *Hernandez*, at *8. See also 8 RR 86-93, wherein Appellant's expert describes death potential from use of hands in manners consistent with strangulation: "from the time I put my hand on your neck until I completely block your arteries or block your airway would be three to four minutes. And will brain death occur within that time? Yes."

[42] *Hernandez*, at *6 (Tex. App.—Texarkana Aug. 5, 2016, no. pet. h.).

[43] The court noted Appellant's statement to the victim, "Neither one of us are [sic] going to make it out alive," as he returned to the bedroom, throwing the water in her mouth while simultaneously choking her. The victim stated, "He was using one hand to choke me while he was pouring water down my throat." The victim was thinking, "he's going to kill me, he's going to kill me, he's going to kill me." *Hernandez*, at *3 (Tex. App.—Texarkana Aug. 5, 2016, no. pet. h.).

determined that the time between punches in the bedroom and the retrieval of water negated the Appellant's use or exhibition of water.

In so finding, the Sixth Court relied heavily on *Johnson v. State*.[44] In that case, the defendant, a prison inmate, had punched a guard, then dragged her into a dayroom, where he was observed holding a broken piece of glass to the guard's throat. The Waco Court of Appeals found that the evidence viewed in the light most favorable to the verdict would support a finding that the defendant had punched the guard twice, once before and once after he was observed to be threatening her with the piece of glass. The Court held "it would be mere speculation, unsupported by any direct or circumstantial evidence, for a juror to conclude that Johnson used or exhibited the piece of glass during the commission of [the first] assault." However, while the Waco Court did not recite any evidence that the glass was the instrument with which the victim was struck, nor any witness who observed Johnson weilding glass and the victim's being punched simultaneously, the Court held that "the jurors could reasonably infer that Johnson was holding the glass against [the victim]'s neck when he hit her the second time."[45] The Court therefore found the evidence to be sufficient for a conviction for aggravated assault with a deadly weapon. The Sixth

[44] 271 S.W.3d 756 (Tex. App.–Waco 2008, pet. ref'd). Note again that this is a separate case from *Johnson v. State*, 364 S.W.3d 292 (Tex. Crim. App. 2012), which the State asserts would dictate a different outcome in this case.
[45] *Id.* at 763.

Court, inverting the Waco Court's holding, inferred that, in the absence of evidence that the glass had been exhibited or used "at the same time as" the defendant struck the victim with his hand, a conviction would not be warranted.

The indictment alleges that Appellant "cause[d] bodily injury to [the victim] by striking the victim's head or body with defendant's hands."[46] The victim testified that Hernandez reentered the room, straddled her, placed one hand on her throat and used his other hand to pour water on her face.[47] She was unable to control how much water he poured upon her.[48] The only time he stopped was when "[she] felt like [she] was dying," and she did everything she could do to get him off of her."[49]

There was sufficient evidence that Appellant's acts during the use or exhibition of water constituted the infliction of bodily injury. Appellant continued to inflict bodily injury by straddling the victim, pouring water upon her face, and grasping her throat.[50] During the altercation and while the parties were out on the patio, Appellant continued by grabbing [the victim] and trying to force her inside, stating "[y]ou're going to come in this house and suck my cock, bitch."[51] The victim

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[46] CR 66. "Bodily injury" means physical pain, illness, or any impairment of physical condition. CR 81. TEX. PEN. CODE ANN. § 1.07 (West).
[47] 5 RR 81.
[48] 5 RR 86.
[49] 5 RR 86.
[50] This could be construed as "bodily injury" even if not impeding her breath or circulation.
[51] 5 RR 92.

prevented Appellant from forcing her inside, by grabbing a patio fixture.[52] These are all actions a rational jury could have found to establish physical pain, illness, or any impairment of physical condition during a continuing assaultive incident, *i.e.*, "during the commission of the assault."

It bears pointing out that, as discussed in Issue One, sufficiency analysis has evolved with *Johnson* and other cases holding that a jury verdict should not be overturned, even when the State's proof at trial does not strictly coincide with the allegations in the indictment, when the proof established the offense alleged with only immaterial variances. For example, *Johnson* makes clear that proof of an assault by "throwing the victim against the wall" was an immaterial variance when alleged as "hitting the victim with his hand" and "twisting the victim's arm with his hand."[53] The Sixth Court's conclusion here disregards that line of cases, and would instead hold that "[T]he evidence [in this case] does not reflect that [Appellant] either exhibited the water or used it during the time he was striking [the victim]"[54] without regard to whether the State's proof was nevertheless sufficient to satisfy a hypothetically correct jury charge, *i.e.* that the infliction of bodily injury noted above

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[52] 5 RR 93.
[53] *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012).
[54] *Hernandez*, at 6.

was caused while the deadly weapon, water, was exhibited and used, the manner and means of inflicting injury being immaterial.[55]

The Sixth Court's analysis ignores the reality that assault, particularly family violence assaults such as the one here, are rarely one-punch affairs. The Sixth Court's insistence on viewing an assault by injury offense as a discrete instance in time beginning and ending with the infliction of the injury would prevent a deadly weapon finding in any instance where the weapon was used or exhibited during the criminal episode, but not at the very moment of the infliction of injury. If the Sixth Court is correct, then a defendant could not be convicted of aggravated assault if he displayed a gun, put the gun in his pocket, punched the victim, and then revealed the gun again.[56] Under their analysis, by concealing the weapon at the moment of causing injury, the defendant could not then be convicted of using or exhibiting the weapon *during* the assault's commission. This narrow view restricts the use of deadly weapon findings in an important and legally unwarranted way.

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[55] The Sixth Court below held that an allegation of "striking" the victim "with his hands" varies materially from proof of "choking" or "grabbing the victim's throat" "with his hands." The Sixth Court does not explain in what way this difference is material, when that outlined in *Johnson* was not, nor does the court discuss *Johnson* at all to clarify how the cases can be distinguished. The variance to which the Sixth Court objects clearly "involve[s] a non-statutory allegation that has nothing to do with the allowable unit of prosecution and, therefore, cannot be a basis for saying that the proved offense is different from the one that was pled." *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012).

[56] The State acknowledges this scenario and the corresponding Sixth Court commentary could also justify a separate aggravated assault-by-threat charge, however, simply because the State's evidence is sufficient for another offense does not mean it is insufficient for the offense alleged.

The Sixth Court's thinking also invites prosecutorial overcharging by requiring the State to allege exhaustive counts for each conceivable act, injury, and deadly weapon that may have been committed, caused, and used during an assaultive episode. Any ongoing assault that lasted even just minutes might justify multiple indicted counts for each punch, slap, shove, hair pull, and thrown object; each resulting black eye, red mark, aching back, torn scalp, and bump; and the hands, feet, chair, lamp, frying pan, and proverbial kitchen sink that was used or exhibited during each discrete act. This exhaustive listing of indicted assaults would justify separate convictions, but it would also unnecessarily create jury unanimity problems, complicate jury charge application paragraphs, and saddle defendants with additional convictions and redundant deadly weapon findings. When taken to its logical extreme, the Sixth Court's flawed reasoning becomes clear. Their reasoning should be ignored, especially since their thinking contravenes this Court's precedent.

This Court should reinstate Appellant's conviction for Aggravated Assault with a Deadly Weapon both because of the Sixth Court's narrowing of the circumstances in which a deadly weapon can be found to have been used during an offense, and because the Sixth Court has failed to correctly apply current principles of sufficiency of the evidence analysis, in contradiction with this Court's holding in *Johnson* and other cases.

PRAYER FOR RELIEF

Wherefore, premises considered, the State prays that this Court overrule the Sixth Court of Appeals determination to reverse Appellant's conviction for Aggravated Assault with a Deadly Weapon, and that the Court reinstate the conviction.

Respectfully submitted,

By: _____

Brian Clarke Erskine
Asst. Criminal District Attorney
State Bar No. 24074182
Attorney for the State of Texas

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P., RULE 9.4

I certify that this brief contains 3,200 words,[57] exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

Brian Clarke Erskine
Asst. Criminal District Attorney

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief has been email-delivered to counsel for Appellant at: karen.oprea@opreaweberlaw.com on this the 3rd day of March, 2017.

Brian Clarke Erskine
Asst. Criminal District Attorney

[57] A brief on the merits in the Court of Criminal Appeals must not exceed 4,500 words if computer-generated, and 15 pages if not. Tex. R. App. P. 9.4