PD-0408-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/22/2021 3:18 PM
Accepted 11/23/2021 10:51 AM
DEANA WILLIAMSON
CLERK

No. PD-0408-21

FILED
COURT OF CRIMINAL APPEALS
11/23/2021
DEANA WILLIAMSON, CLERK

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

SYED SARTAJ NAWAZ,
Appellant/Respondent

v.

THE STATE OF TEXAS,
Appellee/Petitioner

On Discretionary Review From
The Fifth Court of Appeals, Dallas, Texas
No. 05-19-00092-CR

and

The 199th Judicial District Court of Collin County, Texas
No. 199-81120-2017

STATE'S BRIEF

GREG WILLIS
Criminal District Attorney
Collin County, Texas

ABIGAIL POLICASTRO
Asst. Criminal District Attorney

JOHN R. ROLATER, JR.
Asst. Criminal District Attorney
Chief of the Appellate Division

SARAH R. PRESTON
Asst. Criminal District Attorney
2100 Bloomdale Rd., Ste. 200
McKinney, Texas 75071
State Bar No. 24060979
(972) 548-4323
FAX (214) 491-4860
spreston@co.collin.tx.us

IDENTIFICATION OF PARTIES

Pursuant to Rule of Appellate Procedure 38.1(a), a complete list of the names of all interested parties is provided below.

Parties:	**Counsel:**
The State of Texas (Appellee/Petitioner)	**Greg Willis** Collin Co. Criminal District Attorney **Abigail Policastro** Assistant Criminal District Attorney (Trial) **John R. Rolater, Jr.** Assistant Criminal District Attorney Chief of the Appellate Division **Sarah R. Preston** Assistant Criminal District Attorney 2100 Bloomdale Road, Ste. 200 McKinney, Texas 75071 spreston@co.collin.tx.us (Appeal)
Syed Sartaj Nawaz (Appellant/Respondent)	**John Hunter Smith & Scott Edgett** (Trial) **Jeremy Rosenthal** 4500 Eldorado Parkway, Ste. 3000 McKinney, Texas 75070 jeremy@texasdefensefirm.com (Appeal)
Judge: **The Hon. John R. Roach Jr.,** Presiding Judge, 296th Judicial District Court	**Court** **199th Judicial District Court** Collin County, Texas

TABLE OF CONTENTS

IDENTIFICATION OF PARTIES 2

TABLE OF CONTENTS 3

INDEX OF AUTHORITIES 5

STATEMENT REGARDING ORAL ARGUMENT 8

STATEMENT OF THE CASE 8

ISSUE PRESENTED 9

In concluding that Appellant's convictions for injury to a child causing serious bodily injury and injury to a child causing serious mental deficiency, impairment, or injury violated double jeopardy, did the court of appeals erroneously focus on the transaction rather than the result?

STATEMENT OF FACTS 10

I. The Evidence at Trial 10

II. Arguments in the Court of Appeals 17

ARGUMENT AND AUTHORITIES 20

I. Injury to a child is a result-oriented offense 20

II. The court of appeals misinterpreted the evidence as showing only one injury 24

III. The court of appeals improperly focused on the transactions rather than injuries 27

IV. The unit of prosecution determines the number of prosecutable offenses 29

V. Upholding both convictions is consistent with this Court's precedent and legislative intent of Section 22.04 31

VI. There was no double jeopardy violation 37

PRAYER FOR RELIEF.....38

CERTIFICATE OF SERVICE 39

CERTIFICATE OF COMPLIANCE.....39

INDEX OF AUTHORITIES

Cases

Alvarado v. State,
704 S.W.2d 36 (Tex. Crim. App. 1985)..... 20, 21

Beggs v. State,
597 S.W.2d 375 (Tex. Crim. App. 1980)..... 20, 21

Crocker v. State,
573 S.W.2d 190, (Tex. Crim. App. 1978).....28

Dixon v. State,
201 S.W.3d 731 (Tex. Crim. App. 2006).....32

Ex parte Ervin,
991 S.W.2d 804 (Tex. Crim. App. 1999).....30

Gamboa v. State,
296 S.W.3d 574 (Tex. Crim. App. 2009).....21

Garfias v. State,
424 S.W.3d 54 (Tex. Crim. App. 2014).....30

Gonzales v. State,
304 S.W.3d 838 (Tex. Crim. App. 2010)..... 21, 30

Huffman v. State,
267 S.W.3d 902 (Tex. Crim. App. 2008).....21

Jefferson v. State,
189 S.W.3d 305 (Tex. Crim. App. 2006)..... 21, 22, 23, 31, 33, 35, 36

Loving v. State,
401 S.W.3d 642 (Tex. Crim. App. 2013).....30

Nawaz v. State,
No. 05-19-00092-CR, 2021 WL 1884551
(Tex. App.—Dallas May 11, 2021, pet. granted)
(mem. op., not designated for publication) 8, 17, 23, 25, 27, 28

Ortiz v. State,
623 S.W.3d 804 (Tex. Crim. App. 2021) 20, 34

Price v. State,
434 S.W.3d 601 (Tex. Crim. App. 2014) 32, 35

Stuhler v. State,
218 S.W.3d 706 (Tex. Crim. App. 2007) 21, 23, 28, 29, 31, 33, 36

Vick v. State,
991 S.W.2d 830 (Tex. Crim. App. 1999) 30

Villanueva v. State,
227 S.W.3d 744 (Tex. Crim. App. 2007) 23, 28, 29, 31, 33

Weinn v. State,
326 S.W.3d 189 (Tex. Crim. App. 2010) 30

Wolfe v. State,
459 S.W.3d 201 (Tex. App.—Fort Worth 2015) 33

Statutes, Codes, and Rules

Tex. Code Crim. Proc. art. 38.072 ..... 32, 33

Tex. Code Crim. Proc. art 38.37 ..... 32, 33

Tex. Penal Code § 22.04 ..... 31, 36

U.S. Const. amend. V 29

Tex. R. App. P. 9.4(i) 39

Other

Senate Comm. on Crim. Proc. Reform, Bill Analysis,
Tex. S.B. 12, 83rd Leg., R.S. (2013) 32

House Comm. on Crim. Jurisprudence, Bill Analysis,
Tex. H.B. 8, 80th Leg., R.S. (2007) 33

STATEMENT REGARDING ORAL ARGUMENT

This Court granted review without permitting oral argument.

STATEMENT OF THE CASE

In a single proceeding, a jury convicted Appellant of both of injury to a child causing serious bodily injury and injury to a child causing serious mental deficiency, impairment, or injury based on the same alleged manners and means. CR 19, 159-69. The Fifth District Court of Appeals found that Appellant's conviction for both offenses violated double jeopardy and vacated his injury to a child causing serious mental deficiency, impairment, or injury conviction in an unpublished opinion. *Nawaz v. State*, No. 05-19-00092-CR, 2021 WL 1884551 (Tex. App.—Dallas May 11, 2021, pet. granted) (mem. op., not designated for publication).

ISSUE PRESENTED

In concluding that Appellant's convictions for injury to a child causing serious bodily injury and injury to a child causing serious mental deficiency, impairment, or injury violated double jeopardy, did the court of appeals erroneously focus on the transaction rather than the result?

STATEMENT OF FACTS

I. The Evidence at Trial

On September 19, 2016, around 11:00 a.m., nine-week-old A.R. was seen by her pediatrician for her two-month check-up. 3 RR 9, 16, 36. Other than some discoloration on her face from iodine that her mom, Natalie, had put on her cheek and forehead and a diaper rash, A.R. was a normal, healthy baby. 3 RR 18-21. Appellant, her father, had taken her to the appointment while Natalie worked. 3 RR 18.

However, at about 9:50 p.m., A.R. arrived at Children's Medical Center in Plano in critical condition. 3 RR 83, 112. A.R.'s breathing was abnormal: she had periods where she was breathing rapidly followed by long pauses in her breathing. 3 RR 83-84. A.R.'s vital signs were abnormal, her heart rate fluctuated from very slow to very fast, she was pale, and she had periods where she was hypoxic—her oxygen levels in her blood had fallen—which required medical professionals to breathe for her with a bag and mask. 3 RR 84.

Triage nurses rushed A.R. to the critical care room. 3 RR 84-85. The ER team immediately provided stabilization measures and attempted to assess what had caused A.R.'s condition. 3 RR 85. A.R. did not have any external injuries. 3 RR 92, 96. However, a CT scan revealed multiple areas of bleeding in A.R.'s brain, specifically subdural hematomas, intraparenchymal hematoma, and bleeding around

the clivus—where the skull meets the spinal cord. 3 RR 93. Medical professionals were concerned that A.R.'s injuries were the result of abusive head trauma. 3 RR 95.

A.R. was transferred to Children's Medical Center in Dallas so that she could be seen by a neurosurgeon. 3 RR 93. When A.R. arrived she was medically sedated but still in critical condition. 3 RR 98. There were still ongoing stabilization measures in place. 3 RR 99. Additionally, due to the bleeding at the clivus, A.R. underwent a CT scan of her cervical spine out of concern for injury to her neck. 3 RR 99. The CT scan did not reveal any fractures, but were concerning for injury to the ligaments in her neck—stretching and pulling of the ligaments similar to a sprain—warranting an MRI when A.R. was more stable. 3 RR 100. A.R. had no broken or fractured bones on her body, including her skull. 3 RR 127-28.

The combination of A.R.'s injuries and what the medical professionals were able to eliminate led to diagnoses of subdural hematoma, epidural hemorrhage with loss of consciousness, acute respiratory failure, and hypothermia due to non-accidental trauma. 3 RR 101, 141.

Dr. Kristen Reeder, a child abuse pediatrician with the REACH team at Children's Medical Center, examined A.R. at about 9:00 a.m. the following morning. 3 RR 234. She performed an evaluation for abuse or neglect. 3 RR 235. Prior to examining A.R., Dr. Reeder reviewed A.R.'s chart for records and notes about what tests had already been performed and what had already been told to the

ER doctors when she arrived at the hospital. 3 RR 237. She also spoke to Appellant and Natalie to gather information.[1] 3 RR 239, 241.

They told Dr. Reeder that A.R. had woken up around 6:30 a.m. that morning, drank two bottles, and was fine when Appellant dropped Natalie off at the train station at 7:00 a.m. to go to work. 3 RR 242. After dropping Natalie off, A.R. had another bottle and a bath, and then went to her pediatrician appointment around 10:30-11:00 a.m. 3 RR 163, 243. After being seen by her pediatrician, A.R. slept in the car on the way home, and around 3:00 p.m., Appellant had to wake her so that he could feed her another bottle, which was unusual. 3 RR 243. After he woke her, A.R. appeared to be very drowsy and was not eating normally. 3 RR 243. So, he let her rest and then tried to feed her again, but she was still very drowsy and lethargic and was not eating normally. 3 RR 243. To try to get some formula into her, he took a syringe and attempted to force feed A.R., but it came out of her nose. 3 RR 243. He put her back down to sleep. 3 RR 243. Around 6:30 p.m., Appellant and A.R. picked Natalie up from the train station, and Natalie immediately noticed something was wrong. 3 RR 167. A.R. was pale, lethargic, and cool to the touch. 3 RR 243. Additionally, A.R. was not breathing normally—it sounded like she had water in her lungs. 3 RR 244. Natalie tried to warm A.R. with skin-to-skin contact and stimulate

[1] In addition to Dr. Reeder, multiple medical professionals, a social worker, CPS, and law enforcement spoke to Appellant and Natalie in an attempt to determine how A.R. was injured. 2 RR 240, 244-45, 48; 3 RR 91, 96-97, 160-69, 204, 214, 239, 241-44.

her with lights and music. 3 RR 243-44. However, when A.R. did not respond, they were advised to take A.R. to the hospital. 3 RR 244.

Appellant and Natalie were not able to provide any explanation for A.R.'s injuries. 2 RR 249; 3 RR 91, 96-97, 276, 314. Indeed, when asked directly, Appellant and Natalie denied that A.R. fell or was dropped.[2] 2 RR 248; 3 RR 168-69.

Dr. Reeder agreed with the ER doctors that there were no external injuries. 3 RR 264. However, A.R.'s CT scan showed subdural hemorrhaging—a collection of blood or bleeding around the brain—in several areas of A.R.'s brain. 3 RR 252, 255. Additionally, an MRI performed on September 21, 2016, showed several contusions—bruising to the brain tissue itself—on different places of A.R.'s brain. 3 RR 252-56. This bruising on the brain indicated that the brain had impacted the skull. 3 RR 265, 269. The MRI also showed that A.R. had ligament damage and swelling in her neck. 3 RR 258. This kind of ligamentous injury indicated some type of whiplash-type motion where A.R.'s head had been swung back and forth causing extreme bending and stretching of those ligaments and muscles. 3 RR 259.

[2] Appellant had told the pediatrician at the appointment earlier in the day that A.R. had accidentally rolled off of the bed the night before and sustained a few bruises on her cheeks. 3 RR 18-19. However, Dr. Reeder testified that "[e]specially with injuries to this extent and this severe, the child would not have been normal in any way, shape or form with these injuries," and even having reviewed the pediatrician records, believed A.R. had not yet sustained her injures by the time she was at the pediatrician's office because she would have immediately been symptomatic. 3 RR 270-71.

Dr. Ye-Guang He, a pediatric ophthalmologist with a subspecialty in retinas, performed an ophthalmology consult on September 22, 2016, and later surgery, which revealed that A.R. suffered from extensive retinal hemorrhaging.[3] 4 RR 40, 44-45; SX 2.1 (6 RR (Part 1) 320-24). A.R. had multi-layer hemorrhaging in her retina: preretina, intraretina, and subretina. 4 RR 45. Indeed, the hemorrhaging was so severe it went beyond the retina into the vitreous cavity—the gel inside the eyeball. [4] 4 RR 37, 45.

On October 5, Dr. He performed surgery on A.R.'s eyes. SX 2.4 (6 RR (Part 2) 1329-30). During the surgery, Dr. He was only able to clean the vitreous hemorrhaging and the preretina hemorrhage. 4 RR 45. He was unable to clean the hemorrhaging in the intraretina and the subretina because it would have caused damage to the retina. 4 RR 45. Also during the surgery, Dr. He was able to get a good view to the back and realized A.R.'s prognosis was very poor. 4 RR 46. He determined that A.R. was blind and was unlikely to regain useful vision. 4 RR 46. This was one of the most severe cases that Dr. He had seen. 4 RR 41.

---

[3] The retina is a part of the brain. 4 RR 32.

[4] Although retinal hemorrhaging is non-specific for abusive head trauma and insufficient on its own to diagnose abusive head trauma, Dr. Reeder considered Dr. He's findings and opinions when reaching her diagnoses in her overall evaluation. 3 RR 280-81.

Dr. Reeder examined A.R. again on January 26, 2017.[5] 3 RR 283. Her observations corroborated Dr. He's prognosis. A.R. was unable to track objects and never focused on anything. 3 RR 284. Additionally, at that time, A.R. was developmentally delayed. 3 RR 284. Indeed, she had been receiving therapy multiple times a week in her home to help her get to a level that would be more appropriate for her age. 3 RR 284. However, Dr. Reeder opined that while it was too soon to say what the extent of A.R.'s mental injury or deficiency would be, but because of the holes in her brain, A.R. would never be completely normal and would always be at risk for different developmental delays.[6] 3 RR 286-87.

Ultimately, Dr. Reeder concluded that A.R.'s injuries were the result of abusive head trauma—head injuries inflicted on A.R. and not the result of accident. 3 RR 265-66. The type of motion or mechanism that would cause these injuries was a shaking-type mechanism. 3 RR 266. A shaking-type mechanism could include violent shaking, slamming onto or throwing against a soft surface such as a bed or couch, dropping with enough force onto something soft, swinging around, shaking the head side to side, or any combination of those things. 3 RR 268, 282. This

[5] A.R. also had two additional MRIs performed between her release on September 30 and her exam on January 26 that Dr. Reeder reviewed and considered in her January 26 examination. 3 RR 300.

[6] Dr. Joseph Scheller, Appellant's expert, corroborated that Dr. Reeder was discussing literal holes in A.R.'s brain. Although he disagreed with Dr. Reeder that there were any holes in A.R.'s brain in the follow-up MRIs, he testified that he would expect to see scars or holes in A.R.'s brain if she had suffered from contusions as Dr. Reeder had diagnosed. 4 RR 250, 253, 255-56.

shaking-type motion will cause blood vessels that run from the dura (covering outside of the brain) to the brain to tear, causing a collection of blood underneath the dura—subdural hemorrhaging. 3 RR 268. It will also cause the brain to slam into different parts of the skull, resulting in contusions where impact occurred. 3 RR 269. This shaking-type motion will also cause injury to the neck muscles and ligaments because a two-month old does not have enough control in their neck to steady their head. 3 RR 269. Finally, it can cause the eyeball and the vitreous gel inside of the eyeball to move and twist, causing tearing and bleeding. 3 RR 281. The injuries A.R. suffered from required significant forces. 3 RR 278-79.

Sometime later, A.R.'s court appointed special advocate ("CASA") viewed a video that showed Appellant with his hand around A.R.'s neck violently shaking her throughout the majority of the minute-long video. 4 RR 124, 129. Although she did not know when the video was filmed, she observed in the video the same marks on A.R. that she observed on A.R. in the hospital, and that A.R. was about the same size. 4 RR 124-25, 132. In the video, A.R. was screaming, her eyes were wide open, and she appeared to be afraid and scared.[7] 4 RR 128.

[7] In a hearing outside of the presence of the jury, the CASA testified that she had seen the video before a hearing in the CPS case. 4 RR 83. Before a copy of the video could be obtained, the video was lost. 4 RR 83-84. She later learned that there were two screenshots of the video, and those two screenshots were admitted into evidence as State's Exhibit 12. 4 RR 84-85, 126.

II. Arguments in the Court of Appeals

In the court of appeals, Appellant complained that his convictions for injury to a child causing serious bodily injury (Count I) and injury to a child causing serious mental deficiency, impairment, or injury (Count II) violated double jeopardy because, according to him, A.R.'s injuries were legally and factually indistinguishable. Appellant's COA Brief at 40-41. He also claimed the evidence supporting his conviction for Count II actually proved serious bodily injury because A.R.'s developmental and cognitive delays were the result of organic brain damage, not pure psychological damage.[8] Appellant's COA Brief at 41. Notably, Appellant did not contest that injury to a child causing serious bodily injury and injury to a child causing serious mental deficiency, impairment, or injury are two separate offenses. Appellant's COA Brief at 41. Instead, he complained that Section 22.04(a)(2) was poorly written and allows for factual overlap. Appellant's COA Brief at 41.

[8] Appellant simultaneously attempted to challenge the sufficiency of the evidence for Count II. Although he labeled his sufficiency challenge as a separate issue, the entirety of his sufficiency issue was a single page of his brief. Appellant's COA Brief at 42. Further, he attempted to incorporate his arguments from his double jeopardy challenge by arguing, "[a] different way to analyze the issue in Appellant's argument 1 is that the State – by proffering evidence A.R. suffered developmental delays due to a traumatic brain injury proved SBI yet a different way – while not proving the SDMII count at all." Appellant's COA Brief at 42. Because the court of appeals resolved Appellant's double jeopardy challenge against the State, it did not address Appellant's sufficiency challenge. *Nawaz*, 2021 WL 1884551, at *5.

The State responded that double jeopardy was not violated because the legislature intended to create two separate offenses in Section 22.04. State's COA Brief at 13-16. It argued that legislative intent is the determinative factor when analyzing double jeopardy claims. State's COA Brief at 13-14. When determining legislative intent, the key focus is the gravamen of the offense. State's COA Brief at 13-14. The result is the gravamen of the offense in injury to a child cases, and therefore, the legislature clearly intended two separate offenses when it drafted Penal Code Section 22.04. State's COA Brief at 14-16. Thus, Appellant could be convicted for causing both results. State's COA Brief at 16.

It further responded that the legislature chose not to define "serious mental deficiency, impairment, or injury" and that a fair import of the term includes developmental and cognitive disabilities, even if caused by organic brain damage. State's COA Brief at 17-18. When serious mental deficiency, injury, or impairment is caused by organic brain damage, the State retains discretion on whether to prosecute it as serious bodily injury or serious mental deficiency, injury, or impairment. State's COA Brief at 18-19. Moreover, under the facts of this case, the underlying physical injury which led to the cognitive and developmental deficiencies—holes in A.R.'s brain from the contusions—was separate from the injury which caused A.R. to be blind—retinal hemorrhaging. State's COA Brief at

16-17, 19. Therefore, there were two separate injuries to support both counts. State's COA Brief at 19.

ARGUMENT AND AUTHORITIES

The court of appeals held that Appellant's two convictions violated double jeopardy because the State failed to prove that A.R.'s differing "medical issues" (*i.e.*, injuries) occurred during separate and distinct incidents. But injury to a child is a result-oriented offense, meaning that the court of appeals should have focused on the results instead of the transaction. This Court has not yet addressed the question about how many prosecutable injury offenses arise when a child suffers multiple injuries from an unknown number of incidents. And, this Court has acknowledged the need for guidance in closely-related assault cases without resolving the issue. *See Ortiz v. State*, 623 S.W.3d 804 (Tex. Crim. App. 2021).[9] This Court should find that each separate injury, or each separate kind of injury, is the appropriate unit of prosecution and that double jeopardy was not violated.

I. Injury to a child is a result-oriented offense

This Court has long held that injury to a child is a result-oriented offense. *Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985); *Beggs v. State*, 597 S.W.2d 375, 377 (Tex. Crim. App. 1980). It has consistently focused on the result when analyzing Section 22.04. In 2006 and 2007, it decided *Jefferson*, *Stuhler*, and *Villanueva*, a series of injury to a child cases dealing with double jeopardy and jury

[9] This Court granted review to decide whether simple assault is a lesser-included offense of assault by occlusion in *Ortiz*, No. PD-1661-19 and *Barrett*, No. PD-1362-18, and consolidated the appeals. In *Barrett* only, it also granted review on whether injuries from a single attack are separate prosecutable assaults.

unanimity, which are related and intertwined concepts. *See Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010) (citing *Huffman v. State*, 267 S.W.3d 902, 905 (Tex. Crim. App. 2008) (jury unanimity and double jeopardy are "closely intertwined"); *Gamboa v. State*, 296 S.W.3d 574, 583 (Tex. Crim. App. 2009) (jury unanimity and double jeopardy "address the same basic question")).

In *Jefferson*, this Court examined whether the jury was required to be unanimous on whether Jefferson caused the victim's injury—death—by act or omission. *Jefferson v. State*, 189 S.W.3d 305, 309-13 (Tex. Crim. App. 2006). Looking at the plain language of the statute and its prior decisions interpreting Section 22.04, it found that a jury need not be unanimous on whether Jefferson caused the child's death by act or by omission because "act or omission" are not elements of the offense. *Id*. at 312-14 (citing *Alvarado*, 704 S.W.2d at 39; *Beggs*, 597 S.W.2d at 377).

In *Stuhler*, this Court again considered jury unanimity in Section 22.04; however, there it specifically analyzed the interplay of subsections (a)(1) and (a)(2). *Stuhler v. State*, 218 S.W.3d 706, 716-19 (Tex. Crim. App. 2007). Jury unanimity was at issue because the State had charged Stuhler with injury to a child in the alternative, alleging that she caused either serious bodily injury or serious mental deficiency, impairment, or injury by her conduct. *Id*. at 709. The State's theory at trial was that the child suffered both physical and psychological damage from

Stuhler's abuse. Applying Judge Cochran's Eighth-Grade Grammar Test, this Court determined that the separate results outlined in the differing subsections are elemental, and thus require the jury to be unanimous. *Id*. at 718-19 (citing *Jefferson*, 189 S.W.3d at 315-16 (Cochran, J., concurring)).

Further, this Court noted that the evidence was not clear whether the State relied on a single act or whether it relied on a series of acts to support both injuries. *Id*. at 717. It found that even if the State relied upon a series of acts to support its convictions, the jury need not be unanimous about which specific act caused the injury. *Id*. This holding is consistent with *Jefferson*. If the jury need not be unanimous on whether the actor caused the injury by act or omission, it reasonably follows that the jury need not be unanimous about what specific act occurred. Like Judge Cochran said,

> [T]he unanimity requirement is directed toward the act which makes the conduct criminal… But the specifics of how the defendant caused serious bodily injury are not the gravamen of the offense and not the statutorily prohibited conduct. In this statute, the legislature was concerned about the result of the defendant's conduct; he caused serious bodily injury. It really doesn't matter, for purposes of criminal liability *how* he did it… It would be nice to know *exactly* what the defendant did—precisely what act he performed or failed to perform that caused serious bodily injury—but the legislature did not predicate criminal liability for injury to [a] child on the specific act the defendant performed. It is enough, for purposes of criminal liability, that the defendant did 'something' or failed to do 'something' and that act, what'er it may be, caused serious bodily injury.

Jefferson, 189 S.W.3d at 314-15 (Cochran, J., concurring) (emphasis in original). Moreover, it is important here because it suggests that a single act can support convictions for both injuries. After all, the result is the gravamen of the offense, regardless of the nature or number of acts, and serious bodily injury and serious mental deficiency, impairment, and injury are separate results. *Stuhler*, 218 S.W.3d at 719.

Again noting that the result is the gravamen of the offense, this Court examined a double jeopardy challenge in *Villanueva*. *Villanueva v. State*, 227 S.W.3d 744, 748 (Tex. Crim. App. 2007). Villanueva was convicted in one count of injury to a child for causing the child's injury—death—by an affirmative act and in a second count for his omission for failing to seek medical care. *Villanueva*, 227 S.W.3d at 745. In reversing on double jeopardy grounds, this Court looked to the number of injuries, finding only one death. *Id*. As Judge Cochran said in her concurring opinion, "[l]ittle Greg could die but once." *Id*. at 751 (Cochran, J., concurring).

This Court has a long history of recognizing the result as the gravamen of injury to a child. Although the Fifth Court of Appeals acknowledged the relevant gravamen, its double jeopardy analysis suffers two critical flaws. *Nawaz*, 2021 WL 1884551, at *4. First, it misinterpreted the evidence as showing only one injury.

Second, it focused on the transaction that caused A.R.'s injuries rather than the injuries themselves.

II. The court of appeals misinterpreted the evidence as showing only one injury

The evidence showed A.R. suffered two separate and distinct injuries. First, A.R. suffered retinal hemorrhaging that resulted in blindness. 4 RR 32, 38-46. Shaking-type forces can cause an infant's eyeball, and vitreous gel inside the eyeball, to move and twist, which causes the blood vessels in the retina to tear and bleed. 3 RR 280-81; 4 RR 32. A.R.'s retinal hemorrhaging was severe and extended to several layers: preretina, intraretina, and subretina, as well as in in the vitreous cavity. 4 RR 41, 45. Although Dr. He performed surgery to alleviate or mitigate the damage, he could only clean the vitreous cavity and intraretina hemorrhaging because cleaning behind the retina would only cause further damage. 4 RR 45. Dr. He testified it is unlikely that A.R. will regain useful vision and will instead be blind. 4 RR 46. This evidence proved serious bodily injury, as alleged in Count I.

Second, A.R. suffered cognitive and developmental delays caused by the holes in her brain from the contusions. The offense occurred sometime on September 19, 2016. 3 RR 16, 36, 83, 112. When Dr. Reeder examined A.R. again on January 26, 2017—four months after the offense—A.R. was developmentally behind where a six-month-old should have been. 3 RR 284, 286. A.R. was receiving in-home therapy several times a week to get her to a more age-appropriate developmental

level. 3 RR 284. Dr. Reeder opined that A.R. would never be normal. 3 RR 286. At the time of trial, Dr. Reeder could not determine to what extent A.R. would be delayed or in what ways, but she was certain that A.R. "will never be completely normal." 3 RR 286. This evidence proved serious mental deficiency, impairment, or injury, as alleged in Count II.

Contrary to the preceding evidence, the court of appeals found only one injury—abusive head trauma. *Nawaz*, 2021 WL 1884551, at *4-5. In doing so, the court misinterpreted the evidence, confusing the mechanism of injury with the injury itself.

Medical professionals at trial consistently testified that abusive head trauma is an all-encompassing term that relates to the mechanism of injury—*i.e.*, non-accidental trauma—and does not define any particular injury or group of injuries. 3 RR 103, 235-36, 265-66. Indeed, the following exchange occurred between the prosecutor and Dr. Reeder on direct examination:

> [STATE]: Were you able to come to a conclusion, essentially, that her injuries were the result of something?
>
> [DR. REEDER]: Yes, ma'am.
>
> [STATE]: And, ultimately, what was your opinion in that?
>
> [DR. REEDER]: Ultimately, my diagnosis or my assessment is that her injuries were caused by abusive head trauma.
>
> [STATE]: And what is abusive head trauma?

> [DR. REEDER]: Abusive head trauma is a term that is used to describe injuries in the head that are not caused by accident. So again, it is not a specific injury or one, you know, group of injuries, or anything like that. It can be different in different situations; but ultimately, it is injuries to the head that are not explained by the history that is given.

3 RR 265-66.

Similarly, the court re-categorized A.R.'s injuries as "medical issues." Throughout the testimony, medical professionals consistently referred to A.R.'s "injuries" (plural); none referred to her "medical issues." *See, e.g.*, 3 RR 81-82, 96-97, 265. Notably, in a Rule 702 hearing outside of the presence of the jury, Dr. Reeder was specifically asked what injuries (plural) she observed to support her diagnosis of abusive head trauma, and she listed the following: "[t]he presence of subdural hemorrhages, contusions to the brain, retinal hemorrhages, and neck injury." 3 RR 225. The medical professionals clearly considered A.R.'s injuries as separate injuries. By concluding otherwise, the court of appeals substituted its own opinion for that of the experts.

That opinion is flawed. The court of appeals's logic and reading of the evidence breaks down as follows: whip-lash type movement (conduct) *caused* abusive head trauma (injury) with retinal hemorrhaging and developmental and cognitive delays (multiple underlying "medical issues"). But the testimony showed the following: whip-lash type movement (conduct) *was* abusive head trauma which caused retinal hemorrhaging and resulting blindness (injury) and holes in A.R.'s

brain resulting in developmental and cognitive delays (injury). The evidence showed there were separate and distinct injuries supporting multiple convictions.

III. The court of appeals improperly focused on the transactions rather than injuries

The court of appeals's opinion is also based on the faulty premise that the number of transactions has some bearing on the number of offenses committed. The crux of the court's opinion was that the State failed to prove two separate and distinct "incidents" of injury. *Nawaz*, 2021 WL 1884551, at *4-5. If the critical factor was that only one specific injury was shown, the number of incidents would be irrelevant and the court's opinion would have, and should have, ended there. Nonetheless, the court proceeded to find that, "the State did not prove two separate and distinct incidents of injury. A.R.'s injury was non-accidental abusive head trauma caused by a whip-lash type movement of her head. This single injury caused both the hemorrhaging in A.R.'s retinas and the holes in A.R.'s brain. Accordingly, on the particular facts of this case, appellant cannot be punished twice for medical conditions caused by one incident of injury to A.R." *Nawaz*, 2021 WL 1884551, at *5. Notably, the court of appeals only assumed a single incident of injury. Whether Appellant acted once or more than once between 11:00 a.m. and 9:50 p.m. is unknown. 3 RR 36, 112. Nevertheless, this finding placed undue focus on the incident or transaction which caused A.R.'s injuries rather than the resulting injuries.

In double-jeopardy-related concepts—jury unanimity and election—the number of incidents is irrelevant. *See Stuhler*, 218 S.W.3d at 717 (if a series of incidents led to the victim's injuries rather than a single discrete incident, the jury need not agree on a particular incident, and the State would not be required to elect a particular incident); *see also Crocker v. State*, 573 S.W.2d 190, (Tex. Crim. App. 1978) (trial court did not err in refusing to require State to elect a single incident of radiation poisoning to support conviction). No rational reason exists to use a different analysis for double jeopardy.

Moreover, the court of appeals does not appear to be intentionally applying a different analysis. To reach its decision, the court of appeals relied on this Court's holding in *Villanueva. Nawaz*, 2021 WL 1884551, at *4-5. But, it misapplied this Court's analysis. The question before this Court was whether Villanueva could be convicted for his act and his omission, which are not elements. *Villanueva*, 227 S.W.3d at 747. This Court had to determine whether Villanueva's act and his omission, which occurred in rapid succession, that led to the child's death was a single offense. *Id*. at 748. Moreover, the serious bodily injury at issue was a single injury—the child's death. *Id*. at 751 (Cochran, J., concurring) ("[l]ittle Greg could die but once.").

The court of appeals placed too much emphasis on the fact that this Court discussed the timing of Villanueva's act and omission. *Nawaz*, 2021 WL 1884551,

at *4-5. The whole point was that two separate and discrete injuries could not be shown. *Villanueva*, 227 S.W.3d at 749. Notably, this Court hypothesized in its opinion that a second conviction for omission could be warranted if the evidence showed a "separate and discrete, or at least incrementally greater injury." *Id*. at 749. Judges Cochran and Keller acknowledged this finding in their concurring and dissenting opinions. Judge Cochran went so far as to identify hypothetical situations where a parent's omission could lead to a second conviction when a distinct separate injury could be shown. *Id*. at 751-52 (Cochran, J., concurring). Judge Keller dissented because she believed the evidence did show a separate and distinct injury from Villanueva's omission. *Id*. at 752-53 (Keller, J., dissenting). Although the timing of Villanueva's act and omission was a consideration for this Court, it was not the basis for its holding. The point was that only a single injury was shown. Here, the facts showed two separate and discrete injuries.

By determining the number of convictions from the number of incidents rather than the injuries, the court of appeals effectively re-categorized injury to a child as a nature-of-the-conduct offense.

IV. The unit of prosecution determines the number of prosecutable offenses

The Double Jeopardy clause of the Fifth Amendment prohibits a person from being twice prosecuted for the same offense. U.S. Const. amend. V. This means that a person shall not be prosecuted for the same offense after an acquittal; be prosecuted

for the same offense after conviction; or receive multiple punishments for the same offense. *Weinn v. State*, 326 S.W.3d 189, 192 (Tex. Crim. App. 2010). When, as here, the question before the court is whether there have been multiple punishments for the same offense, the key inquiry is whether the legislature intended to permit multiple punishments. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014); *Ex parte Ervin*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999).

There are two ways to ascertain legislative intent: (1) by analyzing the elements of the offenses in question, or (2) by identifying the unit of prosecution for the offenses. *Garfias*, 424 S.W.3d at 58. The instant double jeopardy complaint concerns two convictions of the same statutory offense; thus, a units analysis should be employed.[10] *Id.*; *Loving v. State*, 401 S.W.3d 642, 645-46 (Tex. Crim. App. 2013). In a units analysis, courts rely on the plain language of the statute and prior cases discussing the plain language to determine the allowable unit of prosecution. *Loving*, 401 S.W.3d 646-47. "Absent an express statement defining the allowable unit of prosecution, the gravamen of an offense best describes the allowable unit of prosecution." *Id*. at 647 (citing *Gonzales v. State*, 304 S.W.3d 838, 847-48 (Tex. Crim. App. 2010); *Vick v. State*, 991 S.W.2d 830, 830 (Tex. Crim. App. 1999)).

[10] When arguing legislative intent in the court below, the State cited to the *Blockburger* line of cases employing elements analyses. See State's COA Brief at 12-14. Nonetheless, a units analysis should be employed because the instant case deals with convictions arising from the same statutory section.

The plain language of Section 22.04 does not specifically define the allowable unit of prosecution. *See* Tex. Penal Code § 22.04. As discussed in detail above, the gravamen of the offense is the result. Therefore, the gravamen—the result—establishes the appropriate unit of prosecution.

V. Upholding both convictions is consistent with this Court's precedent and legislative intent of Section 22.04

Upholding both convictions here is consistent with this Court's precedent in the *Jefferson*, *Stuhler*, and *Villanueva* line of cases in which double jeopardy/jury unanimity and act/omission/injury intertwine. *Jefferson* dealt with jury unanimity for an act or omission. *Jefferson*, 189 S.W.3d at 306. *Villanueva* dealt with double jeopardy for an act or omission. *Villanueva*, 227 S.W.3d at 745. And, *Stuhler* dealt with jury unanimity for differing injuries. *Stuhler*, 218 S.W.3d at 718-19. The instant case, which deals with double jeopardy for differing injuries, is the final piece of the precedential puzzle.

Moreover, upholding both convictions here is consistent with the legislature's treatment of child abuse generally. Specifically, the legislature has a long history of recognizing the realities prosecutors face in prosecuting offenses committed against children, providing prosecutors tools so that offenders can be effectively held accountable for their crimes, and enacting harsh punishments for those convicted. For example, when examining the continuous sexual abuse of a child statute, this Court looked to the circumstances under which the statute was enacted and the

legislative history. *Price v. State*, 434 S.W.3d 601, 607-08 (Tex. Crim. App. 2014). It recognized that "[l]awmakers responded to [Judge Cochran's] call for legislation" after she noted in an earlier opinion that "current Texas law does not easily accommodate the prosecution of generic, undifferentiated, ongoing acts of sexual abuse of young children," predicted a "train wreck" under the then-existing framework, and proposed that the legislature consider enacting a new penal statute. *Id*. at 608 (quoting *Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring)). As such, the legislature created a statute to accommodate for the "common factual scenario" of ongoing sexual abuse of a child. *Id*. at 607.

Similarly, the legislature has recognized the harsh reality that most sex offenses committed against children go to trial with little more than the testimony of a traumatized child due to delayed outcries and deteriorated and depleted evidence. *See* Senate Comm. on Crim. Proc. Reform, Bill Analysis, Tex. S.B. 12, 83rd Leg., R.S. (2013). To help prosecutors effectively prosecute sexual offenders, the legislature provided prosecutors "a necessary tool" to present propensity evidence, not normally admissible in other types of trials. *Id*.; Tex. Code Crim. Proc. art 38.37; *see also* Tex. Code Crim. Proc. art. 38.072 (allowing hearsay testimony from the first adult a child victim disclosed an offense to under certain circumstances). Further, the legislature has enacted stricter penalties for those convicted of sexual offenses committed against children by increasing punishment ranges and removing

eligibility for parole, good-time credit, and mandatory-release eligibility. *See* House Comm. on Crim. Jurisprudence, Bill Analysis, Tex. H.B. 8, 80th Leg., R.S. (2007). Moreover, the legislature has evinced its intent to provide similar necessary tools in violent assaultive offenses committed against children. *See* Tex. Code Crim. Proc. arts. 38.37, 38.072 (specifically applying some of the same protections to assaultive offenses committed against children).

Like child sexual abuse, the prosecution of physical child abuse poses unique challenges. Children are unable to care for themselves and often the abuse occurs at the hands of those responsible for their care. *See e.g., Villanueva*, 227 S.W.3d at 745 (victim's biological father); *Stuhler*, 218 S.W.3d at 709 (victim's step-mother). As a result, the amount of information known about how and when a child is injured varies drastically. The number of incidents or transactions, or what specifically caused a child's injuries, is often unknown. Sometimes the abuse occurs over an extended period of time. *See e.g., Jefferson*, 189 S.W.3d at 306-07 (defendant and victim's mother abused child for about two years). Often, the victim of the offense is non-verbal and there were no other witnesses to the offense. Like here, the evidence often only shows that the child was normal and healthy at a particular point in time, and then suffering from various non-accidental injuries at another. *See, e.g., Wolfe v. State*, 459 S.W.3d 201, 203-04 (Tex. App.—Fort Worth 2015), *aff'd* 509 S.W.3d 325 (Tex. Crim. App. 2017).

The legislature effectively recognized and addressed these challenges by making injury to a child a result-oriented offense. The only factor that is always known in injury cases is that the child was injured. Setting each discrete injury or impairment as the unit of prosecution sets the unit of prosecution at a factor that will always be known—the injuries. This is not to say it will always be easy to determine how many injuries a child has or that this approach is free of its own complications, but it is at least founded in knowable information and is consistent with recognizing the result as the gravamen.

Placing any amount of focus on the number of incidents or transactions in injury to a child cases, including a "collective harm" approach as suggested by Presiding Judge Keller for assault cases in her *Ortiz* dissent, "would require a wholesale reconsideration of the Court's prior jurisprudence surrounding the nature of the offense known as [injury to a child]." *Ortiz*, 623 S.W.3d at 811 (Yeary, J., concurring); 623 S.W.3d at 813, 818-19 (Keller, P.J., dissenting) (recommending a transactional approach for assault "bodily injury" cases, grouping all physical injuries sustained during a single transaction into a single offense). It also makes little sense in light of the difficulties in showing which, and how many, transactions resulted in the child's injuries. Indeed, even verbal children may not be able to sufficiently articulate the number of incidents or transactions that led to their various injuries, or pinpoint specifically which injury occurred as a result of which incident.

Cf., Price, 434 S.W.3d at 608-09 (recognizing that children often lack the ability to understand or articulate specific instances of sexual abuse when analyzing the continuous sexual abuse of a child statute).

Further, recognizing each discrete injury or impairment as the unit of prosecution provides a mechanism for more culpable offenders to be punished more severely. A child who suffered from multiple injuries could likely be in a worse position than a child that suffered from a single injury. Here, for example, A.R. was blind and suffered from cognitive and developmental delays. She was blind from the moving and twisting of her eyeballs and vitreous gel inside of her eyeballs, which led to tearing and bleeding of the blood vessels in her retina. 3 RR 280-81; 4 RR 32. She was cognitively delayed from the holes in her brain, caused by the contusions.[11] 3 RR 285-86. By suffering from both, she was in a worse position than if she had only become blind or only had developmental and cognitive delays.

For another example, this Court should look to the facts that are set out in *Jefferson*. Jefferson and the child's mother abused the child for about two years before her final, fatal injury was inflicted. *Jefferson*, 189 S.W.3d at 306-07. The evidence showed however, that in addition to the head injury that caused her death,

[11] Like it argued in the court of appeals, the State maintains that based on the evidence it could have charged Appellant for a second count of causing serious bodily injury instead of causing serious mental deficiency, impairment, or injury. *See* States COA Brief at 17-19. Even under that approach, the State should be entitled to two convictions because the retinal hemorrhaging and contusions are separate injuries.

the child had 56 other identifiable injuries at the time of her death and was also malnourished. *Id*. at 307. The torment this child must have suffered prior to her death was horrendous. In cases like this, the State should have the tools to prosecute more harshly a defendant who causes these extensive damages to a child.[12]

Alternatively, when, as here, a victim suffers multiple kinds of injuries, regardless of whether the injuries were caused by a single incident or multiple, each kind of injury should at least be its own prosecutable offense for double jeopardy purposes. The Legislature defined the offense according to the kind and degree of injury that results. *Stuhler*, 218 S.W.3d at. One kind of result is serious bodily injury. Tex. Penal Code § 22.04(a)(1). Another kind is serious mental deficiency, impairment, or injury. Tex. Penal Code § 22.04(a)(2). These are separate results. *Stuhler*, 218 S.W.3d at 719. Finding anything different would be inconsistent with *Stuhler*. *See id.* at 718-19.

This should remain true here, even though A.R.'s serious bodily injury and serious mental deficiency, impairment, or injury both stemmed from injuries to her brain and without parsing through the specific injuries to her brain, because the end-results were two different kinds of injuries, separately contemplated by the

[12] The State is not suggesting that the prosecution should have sought an additional 57 convictions. In fact, the State believes that the prosecution wisely exercised its discretion in choosing to prosecute only for the fatal injury under these circumstances. However, under different facts, such as if someone had intervened before the fatal injury occurred and the child survived, the prosecution should have the discretion to prosecute for specific injuries depending on the strength of the evidence.

legislature. A.R. suffered mental and physical disabilities as a result of Appellant's conduct. Convictions for both should be permitted. Resolving the issue in this way allows this Court to continue its long-standing focus solely on the result and gives effect to the legislature's decision to define the offense by kind and degree.

VI. There was no double jeopardy violation

A.R. suffered two discrete injuries: retinal hemorrhaging which resulted in her blindness, and contusions that resulted in developmental and cognitive delays. She also suffered two different kinds of injuries: serious bodily injury and serious mental deficiency, impairment or injury. When the unit of prosecution is the result—either each separate, discrete injury or each kind of injury—a units analysis shows there was no double jeopardy violation. The court of appeals erred to find a double jeopardy violation by focusing on the transaction. This Court should reverse the court of appeals and reinstate Appellant's conviction for injury to a child causing serious mental deficiency, impairment, or injury.

PRAYER FOR RELIEF

The State prays that the Court grant reverse the judgment of the Fifth Court of Appeals, and affirm the judgment of the trial court.

Respectfully submitted,

GREG WILLIS
Criminal District Attorney
Collin County, Texas

JOHN R. ROLATER, JR.
Assistant Criminal District Attorney
Chief of the Appellate Division

/s/ Sarah R. Preston
SARAH R. PRESTON
Assistant Criminal District Attorney
2100 Bloomdale Rd., Ste. 200
McKinney, Texas 75071
State Bar No. 24060979
(972) 548-4323
FAX (214) 491-4860
spreston@co.collin.tx.us

CERTIFICATE OF SERVICE

A true copy of the State's brief has been electronically served on counsel for Appellant, Jeremy Rosenthal, at jeremy@texasdefensefirm.com, and a true copy served on the Honorable Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Capitol Station, Austin, Texas 78711-3046, stacey.soule@spa.state.tx.us, on this, the 22nd day of November, 2021.

/s/ Sarah R. Preston
Sarah R. Preston

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 7,023 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/ Sarah R. Preston
Sarah R. Preston

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Crissy Hinojosa on behalf of Sarah Preston
Bar No. 24060979
chinojosa@co.collin.tx.us
Envelope ID: 59394732
Status as of 11/23/2021 10:52 AM CST

Associated Case Party: Collin County

Name	BarNumber	Email	TimestampSubmitted	Status
DAappeals DAappeals		daappeals@collincountytx.gov	11/22/2021 3:18:22 PM	SENT

Associated Case Party: Jeremy Rosenthal

Name	BarNumber	Email	TimestampSubmitted	Status
Jeremy Rosenthal		jeremy@texasdefensefirm.com	11/22/2021 3:18:22 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey M. Soule		stacey.soule@spa.state.tx.us	11/22/2021 3:18:22 PM	SENT