# the Jasuta / Schulman report

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# TIBA's Case of the Week

# Fourteenth Court of Appeals (Houston)

**Case Name**: ***Rodney Kevin Coleman v. The State of Texas***

- **OFFENSE**: Assault of a Family Member
- **COUNTY**: Harris
- **C/A CASE No**. 14-19-01016-CR
- **DATE OF OPINION**: July 15, 2021 **OPINION**: Justice Meagan Hassan
- **DISPOSITION**: Trial Court Affirmed
- **TRIAL COURT**: 263rd D/C; Hon. Mike Wilkinson
- **LAWYERS**: Sharon Slopis (Defense); Heather Hudson (State)

(**Background Facts**): Officer Sinakone testified that he was driving on Highway 249 at approximately 6:30 a.m., when he observed a gray Nissan Altima "jerking" in front of him at a stop sign. Sinakone pulled up next to the vehicle and saw Appellant slap and hit Complainant ("Karen") with his right hand. Appellant's window was rolled down and so was the widow on Sinakone's truck. Sinakone could hear Complainant scream "help" and "stop it." He called 9-1-1 to report his observations. He continued following the vehicle and observed it failed to maintain a single lane and swerved left and right into other lanes, so he believed there continued to be a struggle and fighting in the vehicle. After a few miles, the vehicle turned onto FM 1960. The passenger door opened while the vehicle was still moving. Sinakone observed half of Complainant's body hanging out the door and the other half was "still in the vehicle" and it "look[ed] like something [was] holding her from getting out the vehicle." Appellant lost control of the vehicle "and it kind of hit the curb, hopped onto the curb." Complainant rolled out onto the road, and Sinakone called Complainant to get into his truck. He testified that Complainant told him she and Appellant were fighting,

Appellant was hitting her, and she was concerned about Appellant getting to her apartment. After Complainant got into Sinakone's truck, they followed Appellant's vehicle to an apartment complex. Another police officer was able to catch up to Appellant at the apartment complex gate, and Sinakone assisted the police officer taking Appellant into custody. Appellant "was pretty aggravated or angry."

**531 Sufficiency of the Evidence / Assaults (Physical Pain)**: Appellant contends the evidence is insufficient to prove he caused Complainant bodily injury. He argues that Complainant "did not receive a bruise or a cut," did not testify "as to whether she suffered physical pain, illness, or any impairment of physical condition," and that "the deputy, who was not a witness to the offense, admitted that the redness on the complainant's cheek could have been caused by a fall."

**Holding**: "Any physical pain, however minor, will suffice to establish bodily injury." ***Garcia v. State***, 367 S.W.3d 683 (Tex.Cr.App. 2012)(see , Vol. 20, No. 23; 06/11/2012) *** Further, a factfinder may infer that a victim actually suffered physical pain, and no witness -- including the victim -- need testify that the victim felt pain. *** Contrary to Appellant's assertion, Complainant was not required to testify "whether she suffered physical pain, illness, or any impairment of physical condition," and the State was not required to show that Complainant "receive[d] a bruise or a cut" to prove bodily injury. Based on the evidence presented, the jury could have inferred that Complainant suffered pain. Officer Sinakone saw Appellant slap and hit Complainant with his right hand. Officer Sinakone testified he could hear Complainant scream "help" and "stop it" while she was riding with Appellant in the car. Complainant even decided to get out of the moving vehicle and run to Officer Sinakone's truck to flee from Appellant. *** Based on the evidence in the record and considering the jury was the sole judge of the credibility of witnesses and was free to apply common knowledge and life experience when giving effect to the inferences that may reasonably be drawn from the evidence, we conclude the jury reasonably could have determined that Appellant was hitting Complainant causing her physical pain.

**531 Sufficiency of the Evidence / Assaults (*Mens Rea*)**: Appellant argues the evidence is insufficient to prove he "unlawfully, intentionally and knowingly assaulted the Complainant who was not present to testify" at trial. He complains that the failure of the Complainant to appear and testify, the fact that this alleged 'fight' took place while the Appellant was driving, and that there was no explanation as to who started it, it's "quite possible that the Complainant was the culpable party, and that the Appellant was under attack by the Complainant."

**Holding**: Appellant does not explain why (1) Complainant's failure to testify at trial, (2) an allegation that Complainant may have started the fight, or (3) the fact that the fight took place while Appellant was driving renders the evidence insufficient to prove Appellant intentionally and knowingly assaulted Complainant. *** Nor does Appellant cite any authority that would support his apparent argument that evidence of Appellant's *mens rea* is legally insufficient unless Complainant testifies at trial and the State proves Complainant did not start the fight. *** Moreover, although the State must prove each essential element of an offense beyond a

reasonable doubt, it does not need to exclude every conceivable alternative to a defendant's guilt. ***Cary v. State***, 507 S.W.3d 750 (Tex.Cr.App. 2016)(see ☙, Vol. 24, No. 51; 12/19/2016). *** [There] is legally sufficient evidence that Appellant intentionally and knowingly assaulted Complainant. Evidence established that Officer Sinakone called 9-1-1 to report Appellant "was beating" Complainant. He observed Appellant slap and hit Complainant with his right hand. He testified that Complainant told him she and Appellant were fighting and that Appellant was hitting her. The 9-1-1 recording confirmed Officer Sinakone's testimony. Complainant can be heard telling Officer Sinakone: "He was hitting me; he was hitting me; he's started from last night." We conclude the jury reasonably could have found that Appellant intentionally and knowingly assaulted Complainant. Accordingly, legally sufficient evidence establishes Appellant's *mens rea* . . ..

☙ **531 Sufficiency of the Evidence / Assaults (Dating Relationship)**: Appellant asserts the evidence is legally insufficient to establish that he and Complainant had a dating relationship.

**Holding**: The State played for the jury the recording of a November 5, 2017 phone call Appellant placed to Complainant from the Harris County Jail to establish that he and Complainant had a dating relationship. Appellant contends this recording constitutes insufficient evidence to show a dating relationship because neither he nor Complainant "(1) stated how long they had been together or whether there was [an] upcoming 'anniversary,' (2) referred to each other as girlfriend, boyfriend, fiancee, husband or wife, or indicated that they had a 'dating relationship,' or (3) revealed the frequency or type of interaction between them in any terms." *** Appellant and Complainant discussed intimate and personal topics. The tenor and content of this intimate conversation supports a reasonable inference that Appellant and Complainant had a romantic relationship. *** Based on the evidence admitted at trial by Appellant, we can conclude the jury reasonably found that Appellant and Complainant had a dating relationship. Accordingly, the evidence is legally sufficient to establish Complainant and Appellant had a dating relationship.

☙ **551 Sufficiency of the Evidence / Variance**: Appellant contends the "evidence was insufficient to establish that [he] had a prior conviction for assault of a member of [his] household, as a statutory element of the offense and as alleged in the indictment, where the prior judgment of conviction failed to establish that the Complainant in that cause was a member of [his] household." Appellant argues that a variance exists between the allegations in the indictment and the proof presented by the State at trial.

**Holding**: A "variance" occurs when there is a discrepancy between the allegations in the indictment and the proof offered at trial. ***Gollihar v. State***, 46 S.W.3d 243 (Tex.Cr.App. 2001)(see ☙, Vol. 9, No. 20; 05/21/2001). There are two types of variances in a legal sufficiency analysis: material variances and immaterial variances. *** Immaterial variances do not affect the validity of a criminal conviction, and a hypothetically correct jury charge need not incorporate allegations that would give rise to only immaterial variances. *** Appellant seemingly contends that a material variance exists in this case because, even though the State proved (via a certified judgment) that Appellant was previously convicted of "Assault Family Member" as alleged in the

indictment, the State did not prove that the "Assault Family Member" was "committed against a member of the Defendant's household." We reject Appellant's contention because any variance is immaterial at best. *** [The] superfluous allegation in the indictment in this case does not subject Appellant to the risk of being prosecuted later for the same crime. The specific, additional language in the indictment that the family-violence assault was "committed against a member of Defendant's household" does not define or help define the allowable unit of prosecution. *** We conclude that any variance between the indictment and the proof at trial is immaterial, should be disregarded, and does not affect our sufficiency review and the validity of the conviction.

**429.01 Judgments & Sentences / Enhanced Sentences / Habitual Criminals**: Appellant contends the "trial court erred in finding the two enhancement paragraphs true and sentencing [him] as a habitual offender. He argues that the two prior convictions could be used to elevate the underlying alleged misdemeanor assault to a third degree felony under Texas Penal Code Sec. 22.01(b)(2)(A), and therefore, could not [be] used for enhancement of punishment under Texas Penal Code Sec. 12.42(d)."

**Holding**: [Appellant] asserts that because either of the two prior felony convictions for enhancement could have been used to elevate the Class A misdemeanor family-violence assault to a third degree felony under section 22.01(b)(2)(A), these two prior convictions cannot be used to enhance his punishment as a habitual offender. To support his assertion, Appellant cites ***Rawlings v. State***, 602 S.W.2d 268 (Tex.Cr.App. 1980), and ***Edwards v. State***, 313 S.W.2d 618 (Tex.Cr.App. 1958). *** Appellant's reliance on these cases is misplaced. *** We find ***Rawlings*** inapplicable because section 22.01 does not contain even remotely similar language to that in the former theft statute. Section 22.01 contains no language stating that the offense is enhanced to a third degree felony if a defendant has been convicted of one or more family-violence assaults. Instead, it states that a family-violence assault can be elevated to a third degree felony if the State proves a defendant "has been previously convicted of an offense" of family-violence assault. *** There is no language in section 22.01 prohibiting punishment enhancement as a habitual offender under section 12.42(d) if the State proves a defendant has multiple convictions for family-violence assault. *** ***Edwards*** is inapposite because there is nothing in section 22.01 to indicate that punishment for subsequent family-violence assaults is governed by that section alone, thereby barring enhancement under the habitual offender statute. Appellant contends that "section 22.01(b)(2)(A) constitutes a special enhancement statute with regard to Assault offenses, which controls over the provisions of Sec. 12.42(d) of the Texas Penal Code and that the trial court erred in finding the two enhancement paragraphs true and sentencing the Appellant as a habitual offender." However, except for citing ***Rawlings*** and ***Edwards***, Appellant presents no argument to support his contention and, as we explained, these two cases are inapplicable. There is nothing in the language of section 22.01(b)(2)(A) from which we could conclude that it constitutes a special enhancement statute that trumps the habitual offender statute.

(**David A. Schulman**) I have, perhaps, become too jaded in my assessment of potential errors (which I would argue is perfectly understandable given the path the Court of Criminal

Appeals has taken over the last 27 years). Through that jaded prism, I see no way that any seasoned post-conviction attorney could reasonably believe that any of these issues could lead to relief on appeal.

(**John G. Jasuta**) I find particularly interesting the fact that Complainant did not testify, yet all of her statements to the off duty officer came into evidence. And as for David's thought, baffling 'em with your BS usually doesn't work.