



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783  
Austin, Texas 78767  
Tel. 512-354-7823  
Fax: 512-532-6282



Web Site: [www.texindbar.org](http://www.texindbar.org)

⌘ Vol. 10, No. 13, April 1, 2002

**Case Name:** Michael Anthony Fuller v. The State of Texas

- OFFENSE: Injury to an Elderly Individual
- COURT OF APPEALS: Waco 1998
- C/A CITATION: Unpublished
- C/A RESULT: Conviction Reversed
- COUNTY: Navarro
- C.C.A. CASE No. 1283-98 (PDR Granted on November 18, 1998)
- DATE OF OPINION: March 27, 2002
- JUDGE: Hervey, J.
- DISPOSITION: Court of Appeals Reversed
- LAWYERS: Michael Ware (Appellant); Patrick Batchelor (State), Matthew Paul (SPA)

⌘ **551 Sufficiency of the Evidence / Variance:** The indictment in this case alleged that Appellant committed the offense against “Olen M. Fuller” who is his father. The State proved that Appellant injured his elderly father by hitting him in the face with his fist. During trial, however, Appellant’s father was only referred to as “Mr. Fuller” or as “Buddy.” The prosecution presented no evidence that he was “Olen M. Fuller.” Consistent with the indictment’s allegation, the charge instructed the jury to convict if it found appellant committed the offense against “Olen M. Fuller.” The Court of Appeals decided that, as a matter of federal constitutional law under **Jackson v. Virginia**, the evidence was insufficient to support appellant’s conviction because “the name of the complaining witness is material to an indictment and must be alleged and proven,” and that a “hypothetically correct jury charge” required the prosecution to prove the victim’s name as alleged in the indictment.

**Holding:** We recently decided in **Gollihar v. State**, 46 S.W.3d 243 (Tex.Cr.App. 2001)(see **Greenwood & Schulman**, [Vol. 9, No. 20](#); May 21, 2001), that under **Malik v. State**, 953 S.W.2d 234 (Tex.Cr.App. 1997)(see **Greenwood & Schulman**, [Vol. 5, No. 36](#); September 15, 1997), evidentiary sufficiency should be measured against the “elements of the offense as defined by the hypothetically correct jury charge for the case” in all sufficiency cases. **Gollihar** rejected the view that **Malik** was a federal constitutional decision which adopted only the **Jackson v. Virginia** evidentiary sufficiency standard. The federal constitutional issue in this case is whether the victim’s name is a substantive element of the criminal offense as defined by state law. State law does not define the victim’s name as a substantive element of the offense by, for example, defining the offense as “injury to an elderly individual named Olen M. Fuller.” The prosecution’s failure to prove the victim’s name exactly as alleged in the indictment does not, therefore, make the evidence insufficient to support appellant’s conviction under **Jackson v. Virginia**. The evidence that appellant injured the elderly victim by hitting him in the face with his fist satisfies the **Jackson v. Virginia** standard because it constitutes proof of every fact necessary to constitute the crime charged of “injury to an elderly individual.”

**Notes:** Judge Keller delivered a concurring opinion in which she argued that there are three types of variances: (1) statutorily-enumerated elements, (2) non-statutory facts defining allowable units of prosecution, and (3) other non-statutory facts. The variance here, she argues, is of the second type, and the analysis of whether the variance is material “turns on the concept of jeopardy-preclusion.” She argued that, while “a lack of notice may implicate due process, it does not implicate sufficiency concerns. If a defendant fails to receive proper notice, the remedy is to give him that notice, in a new trial if necessary, not to terminate the prosecution.” Judge Womack delivered a separate concurring opinion in which he was joined by Judges Keller and Johnson. He argued that the case is easily resolved under **Gollihar**, and “presents a variance, not a failure of proof, and the variance is immaterial.” **Judge Keasler** delivered a dissenting opinion. He argued that the Court of Appeals didn’t have the benefit of **Gollihar** and so the case should be remanded to that court not resolved in this opinion. He also argued that, pursuant to **Gollihar**, “the issue, under a sufficiency analysis, should be whether a rational jury could conclude beyond a reasonable doubt that Fuller assaulted the person he was accused of assaulting. Here, it could.”

**Comments:** ([David A. Schulman](#)) While this decision is absolutely correct under **Gollihar**, Judge Keasler is correct about the procedures that should be used. Whenever a Court of Appeals didn’t “have the benefit” of a Court of Criminal Appeals opinion when it decided the case, the traditional practice is to remand back so the case can be “reconsidered in light of” the subsequent case. Not that it would make a difference, but that is the correct procedure.