

**Court of Criminal Appeals**  
**April 15, 2015**

***Price v. State***

NO. PD–0383–14

Case Summary written by Adam J. Ondo, Staff Member.

JUDGE JOHNSON delivered the opinion of the court in which JUDGE KELLER, JUDGE KEASLER, JUDGE HERVEY, JUDGE ALCALÁ, JUDGE RICHARDSON, and JUDGE NEWELL joined.

Law-enforcement officials arrested the appellant for third-degree-felony family-violence assault after his girlfriend informed numerous medical personnel that he had struck and choked her. The girlfriend told the nurse that the appellant had choked her until she became unconscious several times. Because the indictment alleged family-violence assault by strangulation, the offense was raised from a Class A misdemeanor to a third-degree felony, which gave the district court jurisdiction over the case. A jury found the appellant guilty of third-degree-felony family-violence assault. The district court sentenced the appellant to fifty years’ imprisonment after he pled true to enhancement and habitual allegations.

The appellant appealed his conviction, claiming, *inter alia*, that “the trial court erred in failing to tailor the charge to connect the culpable mental state to the nature of the conduct.” The appellant asserted that he suffered an egregious harm due to this error. The court of appeals held that family-violence assault by strangulation was solely a result-of-conduct offense. Therefore, the trial court was correct in refusing to include nature-of-conduct language in the jury instruction.

The sole issue before the Court of Criminal Appeals was whether family-violence assault by strangulation “is both a result-oriented offense and a conduct-oriented offense.” If the offense is solely result-oriented, the law requires that a jury find that the defendant had a conscious objective to cause the victim’s breath to be impeded. If the offense is also conduct-oriented, the jury must additionally find that the defendant had a conscious objective to engage in conduct that would impede the victim’s breath. In determining whether a crime is result-oriented, conduct-oriented, or both, courts must look to the gravamen—the gist—of the offense. An offense can be both result-oriented and

conduct-oriented if it has multiple gravamina focusing on both conduct and results. The Court of Criminal Appeals affirmed the court of appeals, holding that the gravamen of third-degree-felony family-violence assault was solely conduct-oriented.

The Court of Criminal Appeals reasoned that because family-violence assault cannot be committed without engaging in conduct that results in bodily injury, the gravamen must be bodily injury. *See* TEX. PENAL CODE § 22.01(a)(1). Because bodily injury is the result of the assailant's actions, the crime is thus result-oriented. According to the court, when the offense is heightened to a third-degree felony due to the assailant's choking of the victim, the gravamen becomes bodily injury in the form of strangulation. The result of strangulation is the gravamen; the act of strangling is not the gravamen.

In coming to this determination, the court examined the wording of Texas Penal Code § 22.01(b)(2)(B). The statute provides that family-violence assault is raised to a third-degree felony in the event that the assailant "intentionally, knowingly, or recklessly imped[ed] the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." The court noted that the mental states "do not syntactically modify [the following] prepositional phrases." In other words, the method by which breathing is impeded is not the gravamen of the offense. The inability to breathe, which results from "applying pressure to the person's throat," is the gravamen. The application of pressure is not the gravamen. Thus, family-violence assault by strangulation is solely result-oriented.

#### JUDGE YEARY, concurring.

Judge Yeary disagreed with the majority's conclusion that family-violence assault by strangulation was not a conduct-oriented offense. Without the specific conduct of impeding the victim's breath, the family-violence assault charge would not have been raised to a felony. The assailant's conduct, namely choking the victim, is the main factor for enhancing the charge, while the result of bodily injury is the main factor for proving the base charge. Thus, the gravamina are both conduct-oriented and result-oriented.

However, in order for the appellant to prevail, he was required to prove that the error caused him egregious harm because he did not

object to the jury instructions at trial. Judge Yeary did not believe that it mattered whether the impeding of breath was a “result-of-conduct element or a nature-of-conduct element.” He summed up his reasoning by bluntly stating, “Choking is choking . . . .”

JUDGE MEYERS, dissenting.

Judge Meyers dissented because he refused to ignore the fact that the element of “applying pressure to the person’s throat” is what caused the charge to be elevated from a misdemeanor to a felony. Thus, at least one of the gravamina was a nature-of-conduct element. He also would have reversed the court of appeals’ decision because, unlike Judge Yeary, he believed that egregious harm occurred because the error altered the basis of the case.

***Ex Parte Benson***

No. WR-81, 764-01

Case Summary written by Laura Parton, Staff Member.

JUDGE KELLER delivered the opinion of the Court, in which JUDGE KEASLER, JUDGE HERVEY, JUDGE RICHARDSON, JUDGE YEARLY, and JUDGE NEWELL joined.

The Applicant’s convictions for intoxication assault and felony DWI arose from the same motor–vehicle accident that occurred on October 17, 2012. This accident, which resulted in the applicant’s third DWI conviction, caused serious bodily injury to an individual, Charles Bundrant. The applicant filed a habeas and argued that his right under the Fifth Amendment to be protected against multiple punishments had been violated. The applicant alleged that intoxication assault and felony DWI are the same offense under the *Blockburger* same-elements test. Although the “two-prior convictions element” of felony DWI is not required for intoxication assault, the applicant contended that it should be viewed merely as an enhancement of punishment and thus not an “element” for double–jeopardy purposes. The court denied relief.

ISSUE: Are felony DWI and intoxicated assault the same offense for double–jeopardy purposes?

HELD: No, under the *Blockburger* same-elements test, the “two-prior convictions” requirement of felony DWI is not merely an enhancement of punishment but is an element that differentiates felony

DWI from intoxication assault. Further the *Erwin* factors that weighed in the applicant's favor were not enough to rebut this presumption that they are different offenses. Therefore, felony DWI and intoxicated assault are not the same offense for double-jeopardy purposes.

ANALYSIS: The double jeopardy provision of the "Fifth Amendment provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" The right to be free from double jeopardy extends to providing protection against being punished for the same offense, or multiple punishments.

The court first considered whether or not the two offenses were codified in same statute. If both offenses were contained in different statutes, then for a violation of double jeopardy rights to occur the offenses must be the same under an "elements" and a "units" analysis. If the offenses are both contained in one statute, then only the "units" analysis must be conducted. Intoxication assault is codified in Texas Penal Code § 49.07 and felony DWI is codified in Texas Penal Code §§ 49.04 and 49.09. The offenses, being present in different statutes, require both an "elements" and "units" analyses to establish a double-jeopardy violation.

The *Blockburger* same-elements test states that "[i]f the two offenses, so compared, have the same elements, then 'a judicial presumption arises that the offenses are the same for purposes of double jeopardy.'" Both offenses contain elements that the other does not. Felony DWI does not require serious bodily injury, and intoxication assault does not require two prior convictions. The court offered multiple reasons why the "two-prior convictions element" is not, as applicant contended, merely an enhancement. Firstly, it is admitted into evidence at the guilty-innocence stage of trial rather than the punishment stage. Secondly, the "two-prior convictions element" is a jurisdictional element, and as such is required for a conviction of felony DWI. Lastly, "felony DWI is not a lesser-included offense of intoxication assault." Thus, a presumption exists that intoxication assault and felony DWI are not the same, subject to a rebuttal of this presumption.

The court analyzed the several *Ervin* factors to determine whether the presumption that the two offenses are not the same had been rebutted. A few factors favored the applicant: that the offenses are codified in the same chapter, are similarly named, and have the same punishment ranges. The court, however, found the factors that weighed

against the applicant to be more convincing. The two offenses do not have the same focus or unit of prosecution. Intoxication assault, unlike felony DWI, requires a result—bodily injury. History also does not weigh in favor of the applicant, “[t]he legislature could easily have crafted ‘serious bodily injury’ and ‘prior convictions’ as statutory alternatives but did not.” The *Ervin* factors failed to present a “clear” rebuttal of the presumption established by the *Blockburger* same-elements test.

Having already established that the offenses are not the same under the “elements” analysis, the applicant’s relief was already denied because *both* the “elements” and the “units” analyses are required to establish a double-jeopardy violation. The “units” analysis mirrors the “focus or unit of persecution” factors of *Ervin*. Even if the offenses are the same under *Blockburger*, double jeopardy is not violated where there are “separate allowable units of prosecution.” For instance, an individual who murdered two victims may be charged with murder twice. Intoxication assault and felony DWI have different units of prosecution, in fact, the court determined that they have different focuses entirely. One is aimed at “those who repeatedly engage in drunk driving,” while one is aimed at individuals who “cause bodily injury while engaging in drunk driving.” In the instant case, the “units” analysis did not affect the determination of the “elements” analysis.

It is for these reasons that the court denied the applicant’s relief and held that intoxicated assault and felony DWI are not the same offense for double-jeopardy purposes.

JUDGE MEYERS filed a dissenting opinion in which JUDGE JOHNSON and JUDGE ALCALA joined.

The dissent argued that the “two-prior convictions element” should not be considered “a true element” because it is a jurisdictional element. A jurisdictional element, “once pled in the indictment,” is prohibited from being presented by the state “during its case-in-chief in order to prevent unfair prejudice.” Further, because intoxication assault and *misdemeanor* DWI would be barred under the *Blockburger* same-elements test (since there is no jurisdictional priors requirement), legislative intent to impose multiple punishments for *felony* DWI cannot be assumed to “suddenly appear.” The dissent argued that even if the offenses have different elements, because they arose out of the same

transaction and the element in question is merely a jurisdictional element, they should be barred by double jeopardy.

***Murray v. State***

No. PD-1230-14

Case Summary written by David Miles, Staff Member.

JUDGE HERVEY delivered the opinion of the court in which PRESIDING JUDGE KELLER, JUDGE JOHNSON, JUDGE KEASLER, JUDGE ALCALA, JUDGE RICHARDSON, JUDGE YEARY, and JUDGE NEWELL joined.

Chad William Murray was convicted of misdemeanor driving while intoxicated and was sentenced to “one-year confinement in the county jail and ordered to pay a \$1,000 fine.” His confinement was suspended and he was instead placed on community supervision for two years.

The court of appeals reversed the decision based on appellant’s argument that there was insufficient evidence to prove that he was operating a vehicle. Murray was arrested on January 16, 2011, while passed out behind the wheel of his car with the engine running. There was no alcohol in the car and Murray was not found near any establishment that served alcohol.

The Court of Criminal Appeals reversed the decision of the appellate court on the grounds that there was sufficient evidence to convict Murray on the charge of misdemeanor driving while intoxicated. The standard of review applied in this case was “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

The court held that a fact finder could have reasonably inferred that Murray had become intoxicated elsewhere based on his admission that he had been drinking, the arresting officer’s observation that he was very intoxicated, and the fact that no alcohol was found in or around Murray’s truck. Additionally, since no other people were in the area, the court held that a fact finder could reasonably infer that Murray “drove his vehicle to the location at which he was found after drinking to intoxication.”

JUDGE MEYERS filed a dissenting opinion.

Judge Meyers dissented to explain his dissatisfaction with the type of inference described by the majority. Further, Judge Meyers stated that he was “aware of no possession case where [the court has] allowed this type of attenuated inference, and [the court] should not allow it now in this driving while intoxicated case.”

***Miller v. State***

No. PD-0038-14

Case Summary written by Molly Neace, Staff Member.

JUDGE HERVEY delivered the opinion of the Court in which PRESIDING JUDGE KELLER, and JUDGES KEASLER, ALCALA, RICHARDSON, YEARY joined.

In November 2011, the appellant confessed, both verbally and in writing, to four incidents of molesting his daughter during a 27-day period. The state charged the appellant with four counts of aggravated sexual assault of a child under six years of age.

At trial, the state corroborated Count Three by positively identifying the appellant’s seminal fluid on a tested section of carpet next to his daughter’s changing table. Detectives did not obtain any additional evidence that would corroborate his confessions on the other three counts. The jury convicted the appellant of all four counts, sentencing him to life confinement on each count. On appeal, the appellant argued that the state failed to establish corpus delicti by corroborating his confessions on three of the four counts with independent evidence. The court of appeals agreed and acquitted him on those three counts. In response, the state filed a Petition for Discretionary Review, which the Court of Criminal Appeals granted.

The court looked at three issues: (1) whether or not the prosecution satisfied the corpus delicti rule in this case; (2) whether the rule continues to serve its intended purpose in Texas’s jurisprudence; and (3) whether application of the exception to the appellant would violate his due process rights.

First, the state argued that the corpus delicti rule should be abolished in Texas. But if the court determined that an extrajudicial confession requires corroboration, then the state argued for the trustworthiness standard. And finally, if the court elected to keep the

corpus delicti rule, the state argued it should be applied less rigorously to those cases where a defendant confesses to multiple crimes that involve a single course of conduct. In response, the appellant argued that abolishing the corpus delicti rule was unjustified and replacing it with the trustworthiness standard was inappropriate. Also, the appellant argued that the exception is based on circular logic and causes public-policy concerns.

In its discussion, the court introduced policy reasons for the corpus delicti rule suggesting that it protects mentally infirm individuals confessing to imaginary crimes and those who give extrajudicial confessions due to official coercion. Additionally, the court reviewed criticism and various jurisdictional interpretations of the rule. With this background, the court overruled the state's first and second grounds for review, electing not to abolish the corpus delicti rule in Texas or replace it with the trustworthiness standard because the rule continues to satisfy its jurisdictional purpose.

On the state's third ground for review, the court elected to adopt the closely related crime exception on a limited application to the corpus delicti rule; the exception applies only to sufficiently proximate offenses so that the introduction of the extrajudicial confession does not violate the underlying policy reasons of the rule. Accordingly, in cases where a defendant gives extrajudicial confessions to similar criminal offenses, the state need only establish the corpus delicti of one offense. Thus, the state satisfied the corpus delicti rule in this case.

On its last issue, the court decided that the retroactive application of the closely related crimes exception would not violate the appellant's due process rights. Based on the law at the time of Appellant's conduct, the decision does not unexpectedly and indefensibly violate his due process of law. The court's decision to allow the exception reasonably conforms to the law. In conclusion, the court reversed the judgment of the court of appeals and reinstated the trial court's judgment.

JUDGE MEYERS, dissenting.

The dissent believed the majority improperly came to the aid of the state in electing to adopt the closely related crime exception. Further, the dissent contended the new exception eliminated the protection that the rule ensures and disagreed with the alteration of the corpus delicti rule.