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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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**NO.** PD-0645-19

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/24/2019
DEANA WILLIAMSON, CLERK

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**MANYIEL PHILMON**
Appellant

v.

**THE STATE OF TEXAS**
Appellee

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Petition is in Cause No. 1477929D from the
213th Criminal District Court of Tarrant County, Texas,
and Cause No. 01-18-00279-CR
in the Court of Appeals for the First District of Texas

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# PETITION FOR DISCRETIONARY REVIEW

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## IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a list of all parties to the trial court's judgment, and respective trial and appellate counsel:

Presiding Judge
Hon. Louis Sturns, presiding judge
Hon. Magistrate Judge Sheila Wynn, presiding over jury selection
213th Criminal District Court
Tarrant County, Texas

Attorneys for Appellee (State of Texas)
Myra Gildner (at trial)
Zane Reid
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Appellant
Manyiel Philmon

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***Statutes***



***Court Rules***

## STATEMENT REGARDING ORAL ARGUMENT

Because Petitioner does not believe that oral argument will materially assist the Court in its evaluation of matters raised by this pleading, Petitioner respectfully waives oral argument.

## STATEMENT OF THE CASE

On January 27, 2017, Manyiel Philmon ("Mr. Philmon" or "Appellant") was indicted in two counts for the second-degree felony offense of aggravated assault with a deadly weapon and the third-degree felony offense of assault causing bodily injury on a family member by impeding breath or circulation, both alleged to have occurred on November 20, 2015. [C.R. 6]; *see* TEX. PENAL CODE ANN. §§ 22.01(b)(2)(B), 22.02(b)(2).[2]

On February 12, 13 & 14, 2018, a jury trial was held in the 213th Criminal District Court of Tarrant County before the Honorable Louis Sturns, presiding judge.[3] [II, III &IV R.R. *passim*].

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[2] Unless set forth otherwise, all statutory citations are to the current versions.

[3] The Honorable Magistrate Judge Sheila Wynne presided over jury selection

The jury found Mr. Philmon guilty as charged on both counts. [IV R.R. 31-32]. Punishment was to the jury, which assessed a sentence of two years incarceration in count one, and five years incarceration in count two but probated that sentence. [C.R. 63, 65; IV R.R. 42]. A timely Notice of Appeal was filed on February 14, 2018. [C.R. 82].

## STATEMENT OF PROCEDURAL HISTORY

The Opinion by the First Court of Appeals affirming Mr. Philmon's conviction was handed down on June 18, 2019. *Philmon v. State*, _ _S.W.3d_ _, 2019 WL 25050 77 (Tex. App.–Houston [1st Dist.] Jun. 18, 2019, no. pet. h.). This Petition is therefore timely.

## GROUNDS FOR REVIEW

## GROUND FOR REVIEW ONE

**Did the court of appeals err in holding that conviction in Count Two for assault on a family member did not violate the double jeopardy clause of the Fifth Amendment?**

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on February 12, 2018. [II R.R. *passim*].

## REASONS FOR REVIEW

1. The opinion of the First Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the United States Supreme Court. *See* TEX. R. APP. P. 66.3( c).

## ARGUMENT

### GROUND FOR REVIEW ONE (Restated)

**Did the court of appeals err in holding that conviction in Count Two for assault on a family member did not violate the double jeopardy clause of the Fifth Amendment?**

**A.** ***Facts***

In September of 2016, Appellant began dating a woman named Evonne White. [III R.R. 116]. Appellant eventually began spending most nights of the week at Evonne's apartment. [III R.R. 118]. One morning when Appellant was still asleep, Evonne went through Appellant's phone and discovered text messages that showed that he had been unfaithful with other women. [III R.R. 126].

Evonne woke Appellant up and confronted him with her discovery; an argument ensued and Evonne eventually told

Appellant to gather his belongings and leave her apartment. [III R.R. 128]. Evonne testified at trial that Appellant gathered all his belongings and clothes in a motorcycle cover, dropped the items into the middle of the living room floor and proceeded to dropping lit matched into the pile in an apparent attempt to start a fire. [III R.R. 129-30]. At that time, an altercation ensued, in the course of which Appellant pushed and choked Evonne, threatened her with a metal bar, knives and an unloaded pistol, and placed plastic bags over her head in an attempt to suffocate her. [III R..R. 131, 134, 138, 141, 142, 146]. Evonne and Appellant were both screaming during the altercation to the point where a neighbor knocked on the door and called 9-1-1. [III R.R. 150, 151]. Appellant answered the door when the neighbor knocked, so Evonne was able to push him out the door and lock him out. [III R.R. 151]. The police arrived and Appellant was eventually arrested.[4] [III R.R. 79]. Appellant was convicted and sentenced as

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[4] Evonne estimated that the entire altercation between her and Appellant lasted approximately one hour. [III R.R. 152].

set forth above.

**B.** ***Appellant's Argument in the Court of Appeals***

Appellant was charged and convicted in Count Two with assault causing bodily injury on a family member by impeding breath or circulation. Appellant was also charged and convicted in Count One with aggravated assault with deadly weapon. [C.R. 5; 70, 75]. Based on the language of the indictment and the evidence shown at trial, the offense alleged in Count Two is subsumed by that alleged in Count One.

**C.** ***Opinion Below***

In citing to the Waco Court of Appeals' opinion in *Childress v. State*, 285 S.W.3d 544, 550 (Tex. App.—Waco 2009, pet. ref'd), the court below held,

> We agree with the Waco court's analysis. Additionally, we note that the gravamen of appellant's aggravated assault charge was threatening someone with bodily injury with a deadly weapon, here, a knife, a metal bar, a bag, or a metal object, while the gravamen of his dating-violence assault charge was actually causing bodily injury to a person with whom he was in a dating relationship by choking her with his hand or arm. Though the offenses may have occurred during the same criminal

> episode, we hold that they are not "the same offense" for purposes of the Double Jeopardy Clause. Thus, appellant could be tried and convicted on both counts.

*Philmon*, _ _S.W.3d_ _, 2019 WL 25050 77, *3 (citations omitted).

**D.** ***Controlling Law***

The Fifth Amendment's Double Jeopardy Clause, enforceable against the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. The Double Jeopardy Clause protects an accused against multiple prosecutions for the same offense and multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221 (1977); *Ex parte Chaddock*, 369 S.W.3d 880, 882 (Tex. Crim. App. 2012).

Here, Mr. Philmon is being punished twice for the same offense. "When the same conduct violates different criminal statutes, the two offenses are the same for double jeopardy purposes if one of the offenses contains all the elements of the other." *Belt v. State*, 227 S.W.3d 339, 344 (Tex. App.–Texarkana

2007, no pet.). For example, "greater inclusive and lesser included offenses are the same for jeopardy purposes." *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994).

There are two contexts in which a multiple-punishments claim can arise: (1)the lesser-included offense context, in which the same conduct is punished twice—once for the basic conduct, and a second time for that same conduct plus more, and (2) punishing the same criminal act twice under two distinct statutes when the legislature intended the conduct to be punished only once. *Bigon v. State*, 252 S.W.3d 360, 369-70 (Tex. Crim. App. 2008).

When multiple punishments arise out of two distinct statutory violations, the *Blockburger* test is the starting point in analyzing the two offenses. *Id.*; *see also Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932). Under *Blockburger*, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger,* 284 U.S. at 304.

When resolving whether two crimes are the same for

double-jeopardy purposes, Texas courts focus on the elements alleged in the charging instrument. *Bigon*, 252 S.W.3d at 270. Under the cognate-pleadings approach adopted by the Court of Criminal Appeals, double-jeopardy challenges should be made even to offenses that have differing elements under *Blockburger*, if the same "facts required" are alleged in the indictment. *See Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007).

It's important to recognize that the *Blockburger* test is a rule of statutory construction, and not the exclusive test for determining if two offenses are the same—the ultimate question is whether the Legislature intended to allow the same conduct to be punished under both of the statutes in question. *Bigon*, 252 S.W.3d at 370. As a result, the inquiry does not end if the two offenses are not the same under a strict application of the *Blockburger* test. In such a situation, the court examines a non-exclusive list of factors to determine whether two offenses are the same in the context of multiple punishments: (1)whether the offenses are in the same statutory section; (2)whether the

offenses are phrased in the alternative; (3)whether the offenses are named similarly; (4) whether the offenses have common punishment ranges; (5) whether the offenses have a common focus; (6) whether the common focus tends to indicate a single instance of conduct; (7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and (8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Under the multi-factor tests, Mr. Philmon's multiple punishments violate the Double Jeopardy Clauses of the United States and Texas Constitutions.

**E.** ***Application***

**1.** ***Blockburger* Test**

Here, Aggravated Assault with a Deadly Weapon (Count One) required proof of the following elements:

(1) The offense occurred in Tarrant County;

(2) Appellant intentionally or knowingly threatened bodily injury to Evonne White on November 26, 2016;

(3)Appellant used or exhibited a deadly weapon, to-wit, a knife, metal bar, bag, or a metal object.

[C.R. 6].

Meanwhile, the enhanced Assault – Family Violence/ Strangulation charge (Count Two) required proof of the following elements:

(1) The offense occurred in Tarrant County;

(2) Appellant intentionally, knowingly, or recklessly caused bodily injury to Evonne White;

(3) White was a member of Appellant's family or household or was someone with whom he has had a dating relationship;

(4) Appellant intentionally, knowingly, or recklessly impeded White's normal breathing and circulation of blood by applying pressure to her throat or neck with his hand or arm on November 26, 2016.

[C.R. 6].

Under the traditional *Blockburger* test, a reviewing court asks whether each of the two offenses requires proof of an element that the other does not. A review of the above indictments demonstrates that Count Two requires proof that Appellant caused bodily injury to White by using his hand or arm to impede her normal breathing or circulation, while Count One does not. The question then becomes whether Count One requires proof of any element of which Count Two does not require proof. The State could argue that Count One requires proof that a Deadly Weapon was used in the commission of the offense, while Count Two does not require such proof.

However, this superficial observation would not end the inquiry, as Count One would subsume Count Two if the element in Count Two requiring proof of strangulation requires the same facts as the element in Count One requiring proof of a deadly weapon. In other words, if the facts alleged to prove Strangulation also constitute proof of a Deadly Weapon, then the *Blockburger*

test would dictate that punishing Appellant for both offenses violates the Double Jeopardy Clause.

Here, the State could prove its strangulation allegation in Count Two through proof that Appellant applied pressure on White's neck with his hand, or applied pressure on her neck with his arm. These same manners and means were not alleged in Count One to support the allegation that Appellant used or exhibited a metal bar, bag, or metal object.

**2. *Ervin Factors***

The next step is to consider the non-exclusive list of Ervin factors. *See Ervin*, 991 S.W.2d at 814.

Under the first factor, courts consider whether the two offenses are in the same statutory section. Here, both charges are from Chapter 22 of the Texas Penal Code, which is titled "Assaultive Offenses." In fact, they are very close together in the Penal Code, as Aggravated Assault is contained in Section 22.02, while Assault Family Violence/Strangulation is contained in Section 22.01.

Second, the offenses are phrased in the alternative in the indictment. In Count One, the State alleged that Appellant threatened imminent bodily injury to White and threatened her with either a metal bar, bag, or metal object. In Count Two, the State alleged that Appellant strangulated White in two alternative ways: (1) applying pressure to her neck with his hand, and (2) applying pressure to her neck with his arm. Due to the alternative phrasing of the manner and means for each offense, along with the overlap between the two counts, there is a risk that Appellant was convicted twice for the same conduct.

Third, the offenses have similar names, including the word "Assault."

Fourth, they have the similar punishment ranges: aggravated assault with a deadly weapon being a second-degree felony, the punishment range is between two and twenty years incarceration. The assault / strangulation charge being a third-degree felony, the punishment range is between two and ten years incarceration.

Fifth, the two offenses have the same focus: the protection of people from assaultive conduct.

Sixth, this common focus indicates a single instance of conduct, as the allowable unit of prosecution for an *assaultive* offense in Texas is each victim. *Garfias v. State*, 424 S.W.3d 54, 60 (Tex. Crim. App. 2014)(holding the unit of prosecution for aggravated assault is one unit per victim). This factor should be regarded as the best indicator of legislative intent when determining whether a multiple-punishments violation has occurred. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014). Furthermore, this factor indicates that the Legislature did not intend for one instance of assaultive conduct against a single person to yield convictions for both Aggravated Assault and Assault – Family Violence/Strangulation for injuring one person. *See Shelby*, 448 S.W.3d at 439-40 (finding that Legislature did not intend for one instance of assaultive conduct against a single person to yield convictions for both aggravated assault with a deadly weapon against a public official and intoxication assault

for injuring the same person).

Finally, there is no legislative history indicating any intent for courts to treat the two offenses differently in the double-jeopardy analysis. Considering that the offenses protect a victim from a single instance of assaultive conduct, the offenses should be considered the same for double-jeopardy purposes absent proof of any legislative intent to the contrary.

In *Shelby*, the Court of Criminal Appeals considered whether convictions for both Aggravated Assault against a Public Servant and Intoxication Assault violated the Double Jeopardy Clause. *Id*. at 436-440. The Court found the *Ervin* factors weighed in favor of a finding that the Legislature did not intend for multiple punishments for essentially the same criminal act:

> In weighing the eight *Ervin* factors to determine legislative intent, we conclude that the Legislature did not intend to permit dual convictions for aggravated assault against a public servant and intoxication assault under the circumstances in this case because these offenses share the same gravamen, share similar names, and have some elements that are the same under an imputed theory of liability. Because the best indication of the Legislature's intent in the absence of specific legislative history is the fact that the offenses

> share the same gravamen, we are persuaded that a double-jeopardy violation has occurred even though the offenses do not have the same punishment ranges and are contained in separate sections of the penal code. We hold that under the facts of this case, the trial court violated appellant's rights against double jeopardy by convicting him of both aggravated assault with a deadly weapon against a peace officer and intoxication assault.

*Shelby*, 448 S.W.3d at 440.

Turning to the present case, the *Ervin* factors weigh even more strongly in favor of a finding that multiple punishments constitutes a double-jeopardy violation, as Aggravated Assault with a Deadly Weapon and Assault – Family Violence/ Strangulation are more similar than the offenses in *Shelby*.

**E.** ***Remedy***

When a defendant is subjected to multiple punishments for the same conduct, the remedy is to affirm the conviction for the most serious offense and vacate the other convictions. *Bigon*, 252 S.W.3d at 372 (the remedy for impermissible multiple convictions and punishments is to retain the most serious offense and vacate the other). Here, Appellant was convicted of aggravated assault,

which is a second-degree felony, and assault - family violence / strangulation, which is a third-degree felony. Thus, the court of appeals should have vacated the conviction and sentence for the third degree felony in Count Two. This Court has the opportunity to clarify the law and remedy the error below.

## PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court grant discretionary review and allow each party to fully brief and argue the issues before the Court of Criminal Appeals, and that upon reviewing the judgment entered below, that this Court reverse the opinion of the First Court of Appeals.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the word count for the portion of this filing covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure is 2,462.

/s/ Daniel Collins
Daniel Collins

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to counsel for the Tarrant County District Attorney and the State Prosecuting Attorney listed below pursuant to Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure through the electronic filing manager, as opposing counsel's email address is on file with the electronic filing manager, on this 20th day of June , 2019.

/s/ Daniel Collins
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## APPENDIX

1. Opinion of the First Court of Appeals, June 18, 2019.

2. Concurring Opinion of the First Court of Appeals, June 18, 2019.

**Opinion issued June 18, 2019**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-18-00279-CR**

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**MANYIEL PHILMON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 213th District Court**
**Tarrant County, Texas[1]**
**Trial Court Case No. 1477929D**

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[1] The Texas Supreme Court transferred this appeal to this Court from the Court of Appeals for the Second District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

## O P I N I O N

A jury convicted appellant, Manyiel Philmon, of aggravated assault with a deadly weapon ("Count 1") and assault of a family member, household member, or person with whom he had a dating relationship ("Count 2") and assessed punishment at two years' confinement and five years' confinement suspended with five years' community supervision, respectively. In four issues on appeal, appellant contends that (1) the conviction for dating-violence assault violates the double-jeopardy clause of the United States Constitution's Fifth Amendment; (2) the trial court abused its discretion in assessing a Crime Victim's Compensation Fee as a court cost; (3) he was unlawfully assessed duplicate court costs; and (4) the trial court erred when it allowed the State to cross-examine appellant with a question that assumed a fact not in evidence. We affirm the judgment in Count 1. We modify the judgment in Count 2, and, as modified, affirm.

## BACKGROUND

In September 2016, appellant began dating Evonne White. Eventually, he began spending most nights of the week at White's apartment. One morning, while appellant was still asleep, White looked through appellant's cell phone and discovered text messages showing that he had been unfaithful to her with other women.

White woke appellant and confronted him with her discovery. An argument ensued, and White told appellant to gather his belongings and leave her apartment. Appellant gathered his belongings, placed them near the center of White's apartment, and tried to light them on fire. When White told appellant that he was going to burn down the whole apartment, he pushed her onto an air mattress, took the battery out of her phone, and threw it across the room. He then threatened White with a metal bar from an exercise weight. Appellant also retrieved a gun and told White that he was going to pistol-whip her with it. Appellant then went into the kitchen and retrieved a kitchen knife and plastic storage bags. Appellant threatened White with a knife, then he wrapped the plastic bag around her head and attempted to suffocate her; in doing so he used his hands to constrict her throat and prevent her from breathing.

Appellant and White were both screaming during the altercations, and a neighbor eventually knocked on the door and called 9-1-1. When appellant answered the door, White pushed him out and locked the door. The police arrived, and appellant was arrested.

## DOUBLE JEOPARDY

In his first issue on appeal, appellant contends that "the conviction in Count Two for [dating-violence assault] violates the double jeopardy clause of the Fifth amendment."

***Applicable Law***

The Double Jeopardy Clause bars, among other things, multiple criminal punishments for the same offense. *See* U.S. CONST. amend. V; *Hudson v. United States*, 522 U.S. 93, 99 (1997). But, the Double Jeopardy Clause does not prohibit multiple punishments for the same conduct under two statutory provisions if this is what the legislature intended. *See Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.").

We apply the usual test to determine whether the legislature intended multiple punishments for the same offense. *See Blockburger v. United States*, 284 U.S. 299 (1932). Under *Blockburger*, two offenses are not the same if "each provision requires proof of a fact which the other does not." *Id.*, 284 U.S. at 304. In Texas, we look to the pleadings to inform the *Blockburger* test. *Bien v. State*, 550 S.W.3d 180, 184 (Tex. Crim. App. 2018). If the two offenses have the same elements under the cognate-pleadings approach, then a judicial presumption arises that the offenses are the same for purposes of double jeopardy and the defendant may not be convicted of both offenses. *Id.* That presumption can be rebutted by a clearly expressed

legislative intent to create two separate offenses. *Id.* Conversely, if the two offenses, as pleaded, have different elements under the *Blockburger* test, the judicial presumption is that the offenses are different for double-jeopardy purposes and multiple punishments may be imposed. *Id.* at 184–85. This presumption can be rebutted by showing, through various factors, that the legislature clearly intended only one punishment. *Id.*

***Analysis***

In the first count of the indictment, the State charged appellant with aggravated assault with a deadly weapon. *See* TEX. PENAL CODE § 22.02(a)(2). The indictment for this offense alleged the following elements: (1) appellant, (2) intentionally or knowingly, (3) threatened imminent bodily injury to Evonne White, and (4) used or exhibited a deadly weapon, namely, a knife, or a metal bar, or a bag, or a metal object.

In the second count of the indictment, the State charged appellant with dating-violence assault by impeding the normal breathing or circulation of the blood of the person. *See* TEX. PENAL CODE § 22.01(a)(1), (b)(2)(B). The indictment for this offense alleged the following elements: (1) appellant, (2) intentionally, knowingly, or recklessly, (3) caused bodily injury to Evonne White, (4) by impeding the normal breathing or circulation of the blood of Evonne White by applying pressure to her

throat with his hand or arm, and (5) Evonne White was a member of appellant's family or household or a person with whom he had a dating relationship.

Here, the aggravated-assault-with-a-deadly-weapon charge required proof that appellant threatened Evonne White with bodily injury, while the dating-violence assault charge required an actual assault. Thus, the dating-violence assault charge is not a lesser-included offense of the aggravated assault charge because it is not established by proof of the same or less than all of the facts require to establish the aggravated assault. *See Childress v. State*, 285 S.W.3d 544, 549 (Tex. App.—Waco 2009, pet. ref'd) (holding dating-violence assault not lesser-included offense of aggravated assault because "the basis for the underlying assault—the threat of imminent bodily injury—is distinct from the basis for the dating violence assault, which was actual bodily injury").

Likewise, the aggravated-assault-with-a-deadly-weapon charge required proof that appellant used a deadly weapon, while the dating-violence assault did not. *Compare* TEX. PENAL CODE § 22.02(a)(2) with TEX. PENAL CODE § 22.01(b)(2)(B). And, the dating-violence assault required proof that Evonne White was in a dating relationship with appellant; the aggravated assault charge did not. *Id.*

Thus, after applying the *Blockburger* test, because the two offenses, as pleaded, have different elements, we presume that the charged offenses are not the

same offense for double-jeopardy purposes. *See Bien*, 550 S.W.3d at 185. We then must determine whether the legislature clearly intended only one punishment. *Id.*

Other (nonexclusive) considerations relevant to determining whether the legislature intended multiple punishments are: whether the offenses' provisions are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the offenses are named similarly, whether the offenses have common punishment ranges, whether the offenses have a common focus (i.e., whether the "gravamen" of the offense is the same) and whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the "same" under an imputed theory of liability which would result in the offenses being considered the same under *Blockburger* (i.e. a liberalized *Blockburger* standard utilizing imputed elements), and whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999).

The *Childress* case has discussed these factors, as applied to the same statutes, as follows:

> It is apparent to us that the legislature intended these two offenses to be treated separately. While they are in the same chapter of the Penal Code, they are separate and distinct statutes, and they are not phrased in the alternative. They do not have common punishment ranges. While they have a related focus—assaults—in this case there is no common focus between the two offenses. The dating violence assault focus is on

> the bodily injury of a victim in a dating relationship with the defendant, while the focus of aggravated assault in this case is the assaultive conduct in the form of threatening imminent bodily injury with a deadly weapon. The threat of harm was being set on fire, while the harm actually suffered was bodily injury to [the complainant's] eyes and face from the gasoline.
>
> The differing elements between dating violence assault and aggravated assault, as charged, cannot be considered the same under an imputed theory of liability. Dating violence assault, with its bodily injury element (which conceptually would be no different had [the defendant] hit [the complainant] in the face), is not similar to an imminent threat of bodily injury with a deadly weapon. Finally, neither [defendant] nor the State has provided us with any legislative history that might indicate whether or not the legislature intended to treat the offenses as the same or different for double-jeopardy purposes.

*Childress*, 285 S.W.3d at 550.

We agree with the Waco court's analysis. Additionally, we note that the gravamen of appellant's aggravated assault charge was threatening someone with bodily injury with a deadly weapon, here, a knife, a metal bar, a bag, or a metal object, while the gravamen of his dating-violence assault charge was actually causing bodily injury to a person with whom he was in a dating relationship by choking her with his hand or arm. Though the offenses may have occurred during the same criminal episode, we hold that they are not "the same offense" for purposes of the Double Jeopardy Clause. Thus, appellant could be tried and convicted on both counts. *See* TEX. PENAL CODE § 3.02(a) ("A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.").

Accordingly, we overrule issue one.

## COURT COSTS

The judgment in Count 1 includes an assessment of court costs in the amount of $319. The bill of costs attached to that judgment includes an assessment of $133 for "CCC-Felony" as a line item in the $319 total. It does not include a line item assessment of $45 pursuant to the Crime Victim's Compensation Act ["C.V.C.A."].

The judgment in Count 2 indicates that $0 costs are assessed, but the bill of costs attached to the judgment includes a line item assessment of $45 for "C.V.C.A."

In issues two and three, appellant challenges the total court costs assessed. Specifically, appellant contends that a $45 C.V.C.A. assessment is included within the $133 CCC-Felony assessment.

We begin by noting that court costs, as reflected in a certified bill of costs, need not be orally pronounced or incorporated by reference in the judgment to be effective. *See Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009). Thus, the fact that the $45 C.V.C.A. assessment was not incorporated into a judgment is irrelevant. Similarly, the fact that the $45 C.V.C.A. assessment is attached to Count 2 instead of Count 1 is irrelevant because "[i]n a single criminal action in which a defendant is convicted of two or more offenses . . . the court may assess each court cost or fee only once against the defendant." TEX. CODE CRIM. PROC. art. 102.073(a). Thus, the issue is not whether the $45 C.V.C.A. cost was improperly assessed in

Count 2 rather than Count 1, but whether it was assessed twice when considering both judgments together.

The State agrees that it was. *See Smith v. State,* No. 02-16-00412-CR, 2017 WL 2276751, at *2 (Tex. App.—Fort Worth May 25, 2017, pet. ref'd) (mem. op., not designated for publication) (holding that Crime Victim's Compensation Fee could not be assessed separately from $133 cost charged for felony conviction); *see also Aviles-Barroso v. State,* 477 S.W.3d 363, 388 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (holding same).

Accordingly, we sustain issues two and three. We modify the judgment in Count 2 to delete the $45 "C.V.C.A" assessment attached thereto because that cost is already included in the $133 CCC-Felony assessment in Count 1.

**ADMISSION OF EVIDENCE**

During appellant's testimony, the following exchange took place:

> Q: Okay. Do you think your memory could be at all affected by the fact that you were using cocaine or under the influence at the time this happened?
>
> Defense Counsel: Judge, I'm going to object. There hasn't been any testimony—
>
> Appellant: I—I
>
> Trial Court: Excuse me. Hold on. Let him make his objection. Go ahead.
>
> Defense Counsel: I'm going to object to any allusion to him using cocaine. There hasn't been any testimony about that.

The trial court overruled the objection.

In issue four, appellant contends that "[t]he trial court erred when it allowed the State to cross examine [a]ppellant regarding his cocaine use during the assault where such a question had no basis in fact."[2]

***Standard of Review and Applicable Law***

We review a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Walker v. State*, 321 S.W.3d 18, 22 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd, untimely filed). We will uphold the trial court's ruling unless it falls outside the zone of reasonable disagreement. *Dabney v. State*, 492 S.W.3d 309, 318 (Tex. Crim. App. 2016); *accord Walker*, 321 S.W.3d at 22. If the trial court's evidentiary ruling is reasonably supported by the record and correct on any theory of applicable law, we will uphold the decision. *See State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014); *Tarley v. State*, 420 S.W.3d 204, 206 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

It is improper to cross-examine a witness with a question that assumes a fact not in evidence. *Ramirez v. State*, 815 S.W.2d 636, 652 (Tex. Crim. App. 1991); *see*

[2] We note that appellant did not object, either at trial or on appeal, that the evidence regarding cocaine usage was an inadmissible, extraneous offense.

*Duncan v. State*, 95 S.W.3d 669, 673 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

***Analysis***

Thus, the issue is whether there was evidence of appellant's use of cocaine in evidence. The State argues that there was, and we agree.

During the complainant's testimony, which was before appellant testified, the following exchange took place when she was being questioned about whether appellant asked her to drop the charges:

> Q: Did [appellant] offer you any kind of explanation of why that happened on November 20th?
>
> A: He told me—because when we would have our arguments in the past, he—I would—I would say things like "Are you on drugs?" And he would get really upset. But then once he went to jail, that's when he told me, he was like, you know, when you used to always ask me if I was on drugs, well, yeah, I—I do—I experiment with cocaine or I snort cocaine and I was high that night.

Thus, there was evidence before the jury that appellant admitted to cocaine use the night before as a way to explain or justify his conduct on the morning of the offense in an effort to get White to drop the charges. As such, the trial court did not abuse its discretion in admitting the testimony.[3]

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[3] To the extent that appellant is now complaining about the timing of his use of cocaine, i.e., that he used it the night before rather than during the offense, that issue is waived. Appellant objected that "there hasn't been any testimony about—cocaine and he's—stating it like it's a fact." He did not object regarding the timing of his use of cocaine, only that there was no evidence that he used it at all. He cannot

## CONCLUSION

We affirm the judgment in Count 1. We modify the judgment in Count 2, delete the assessment of $45 costs for C.V.C.A., and, as modified, we affirm.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.

Justice Goodman, concurring.

Publish. TEX. R. APP. P. 47.2(b).

object to the timing of his use of cocaine for the first time on appeal. *See* TEX. R. APP. P. 33.1(a).

**Opinion issued June 18, 2019**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-18-00279-CR**

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**MANYIEL PHILMON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 213th District Court**
**Tarrant County, Texas**
**Trial Court Case No. 1477929D**

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## CONCURRING OPINION

The majority holds that the trial court's imposition of multiple punishments on Manyiel Philmon based on his separate convictions for aggravated assault with a deadly weapon and assault of a person with whom he had a dating relationship does not violate his constitutional guarantee against double jeopardy. While I agree that

there is no double-jeopardy violation in this case, I do not think that what is true on this record will necessarily be true of all prosecutions for these two offenses. To the extent that the majority suggests that multiple punishments for both aggravated assault with a deadly weapon and assault of a person with whom the defendant had a dating relationship may never result in a double-jeopardy violation, I disagree.

I part company with the majority in its analysis of whether the legislature intended only one punishment and its assessment of the non-exclusive factors outlined in *Ervin v. State*, 991 S.W.2d 804 (Tex. Crim. App. 1999). In this analysis, the focus or gravamen of an offense is the best indicator of legislative intent when deciding whether a multiple-punishments double-jeopardy violation has occurred. *Garfias v. State*, 424 S.W.3d 54, 59 (Tex. Crim. App. 2014). In this case there is no double-jeopardy violation because the gravamen of each offense differs. Philmon was convicted of aggravated assault with a deadly weapon for threatening his victim with a metal bar; he was convicted of assault of a person with whom he had a dating relationship for trying to suffocate her with a plastic bag. The gravamen of the former offense is the threat, while the gravamen of the latter is the injury. *See id.* at 60–61. This best indicates that the legislature intended to allow these two offenses to result in multiple punishments when committed in the same criminal episode. *See id.*

But the same cannot be said of all possible prosecutions for these two offenses. A person may commit aggravated assault with a deadly weapon in more than one

way, including by causing serious bodily injury. *See* TEX. PENAL CODE §§ 22.01(a), 22.02(a)(1). When the bodily injury caused by an aggravated assault is the same as the injury caused by another assaultive offense on the same victim, the gravamina of the two crimes are identical. *See Hernandez v. State*, 556 S.W.3d 308, 327 (Tex. Crim. App. 2017) (gravamen of aggravated assault is victim and bodily injury that was inflicted); *see also Shelby v. State*, 448 S.W.3d 431, 439 (Tex. Crim. App. 2014) (allowable unit of prosecution for assaultive offenses is "each victim" and this indicates legislature "did not intend for one instance of assaultive conduct against a single person" to yield multiple assault convictions). Thus, under different circumstances than those before the court, multiple punishments for aggravated assault with a deadly weapon and assault of a person with whom the defendant had a dating relationship may violate the guarantee against double jeopardy.

The State concedes as much on appeal. "To be clear," says the State in its brief, it "does not contend multiple convictions and sentences for aggravated assault and assault can *never* present valid double jeopardy concerns."

The majority's analysis reads like the application of "a hard-and-fast rule" that multiple punishments for the two assaultive offenses at bar cannot present a double-jeopardy violation; because such a determination instead depends on the facts of each case, I respectfully concur in the judgment but not in the majority's reasoning. *See Garfias*, 424 S.W.3d at 64 (Cochran, J., concurring).

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.

Justice Goodman, concurring in the judgment.

Publish. TEX. R. APP. P. 47.2(b).