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***State v. Goodwin*: DEFINING SERIOUS BODILY INJURY IN AGGRAVATED ASSAULT AND KIDNAPPING CASES**

Janet L. Freeman

I. INTRODUCTION

Under the Montana Criminal Code, the severity of punishment for aggravated kidnapping¹ and assault² depends upon the degree of bodily harm threatened or inflicted by the perpetrator of the criminal act. The question becomes whether the bodily harm suffered by the victim was a “serious bodily injury” or a mere

1. MONT. CODE ANN. § 45-5-303 (1985) states:

(1) A person commits the offense of aggravated kidnapping if he knowingly or purposely and without lawful authority restrains another person . . . by using or threatening to use physical force with any of the following purposes:

. . .

(c) to inflict bodily injury on or to terrorize the victim or another;

. . .

(2) . . . a person convicted of the offense of aggravated kidnapping shall be punished by death or life imprisonment . . . or be imprisoned in the state prison for a term of not less than 2 years or more than 100 years . . . unless he has voluntarily released the victim alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years

2. MONT. CODE ANN. § 45-2-201 (1985) states:

(1) A person commits the offense of assault if he:

(a) purposely or knowingly causes bodily injury to another;

(b) negligently causes bodily injury to another with a weapon;

(c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or

(d) purposely or knowingly causes reasonable apprehension of bodily injury in another

(2) Except as provided in subsection (3), a person convicted of assault shall . . . be imprisoned in the county jail for any term not to exceed 6 months

(3) If the victim is less than 14 years old and the offender is 18 or more years old, the offender, upon conviction under subsection (1)(a), shall be . . . imprisoned in the state prison for a term not to exceed 5 years

MONT. CODE ANN. § 45-2-202 (1985) states:

(1) A person commits the offense of aggravated assault if he purposely or knowingly causes serious bodily injury to another.

(2) A person commits the offense of felony assault if he purposely or knowingly causes:

(a) bodily injury to another with a weapon;

(b) reasonable apprehension of serious bodily injury in another by use of a weapon; or

(c) bodily injury to a peace officer

(3) A person convicted of aggravated assault shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years A person convicted of felony assault shall be imprisoned in the state prison for a term not to exceed 10 years

“bodily injury.” The Montana Criminal Code, enacted in 1973,³ defines both terms:

“Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.⁴

“Bodily injury” means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.⁵

A “bodily injury” inflicted without the use of a weapon carries a maximum term of six months in the county jail.⁶ A conviction involving “serious bodily injury,” however, imposes a substantially greater sentence.⁷ Problems may arise when interpreting these two definitions, because medical treatment can, and frequently does, prevent a potential serious bodily injury from meeting the statutory requirements. The Montana Supreme Court faced this dilemma in *State v. Goodwin*⁸ and held that if serious bodily harm would have resulted in the absence of medical intervention, then the injury would meet the statutory requirements of serious bodily injury. This case note examines the shortcomings of the statutory definitions of serious bodily injury and bodily injury in light of *Goodwin*, and proposes a legislative amendment to address the questions raised by medical treatment immediately following the physical attack.

II. PRIOR STANDARD: GRIEVOUS BODILY HARM

Prior to 1973, a felony assault offense required a “grievous bodily harm” as the requisite standard of injury.⁹ The earlier criminal code lacked a statutory definition of “grievous bodily harm,” yet the courts placed much emphasis on this term in distinguishing a felony assault¹⁰ from a simple assault.¹¹ The vintage Montana

3. 1973 Mont. Laws ch. 513, § 1 (MONTANA CRIMINAL CODE OF 1973, tit. 94, MONT. REV. CODES 1947, effective January 1, 1974) (codified as amended at MONT. CODE ANN. tit. 45 (1985)).

4. MONT. CODE ANN. § 45-2-101(59) (1985).

5. MONT. CODE ANN. § 45-2-101(5) (1985).

6. MONT. CODE ANN. § 45-5-201(2) (1985).

7. MONT. CODE ANN. §§ 45-2-201(3) (five years), -202(3) (ten years), -202(3) (twenty years), -303(2) (one hundred years, life imprisonment, or death) (1985).

8. — Mont. —, 679 P.2d 231 (1984).

9. MONT. REV. CODES § 94-602(3), (4) (Supp. 1977).

10. MONT. REV. CODES § 94-602 (1947).

11. MONT. REV. CODES § 94-603 (1947).

case of *State v. Laughlin*¹² provides an understanding of this traditional distinction.¹³ The *Laughlin* court ruled that an injury could be described as “grievous” merely by contrasting the injury to one that was “slight or moderate.”¹⁴ Thus, the judicial definition of “grievous bodily harm” as mandated by the court in 1937 included “any hurt or injury calculated to interfere with [the] health or comfort of the person injured.”¹⁵ Further, *Laughlin* held that the injury need not be of a “permanent character”¹⁶ and that the word “grievous” meant “atrocious, aggravated, harmful, painful, hard to bear and serious in nature.”¹⁷

The 1973 Legislature completely revised Montana’s criminal code, substituting “grievous bodily harm” with a dual standard: mere “bodily injury”¹⁸ versus “serious bodily injury.”¹⁹ “Serious bodily injury differs from bodily injury in the substantiality of pain, risk, disfigurement or impairment which is created.”²⁰

The language of these definitions is nearly identical to the Model Penal Code source²¹ and to the New York Penal Law.²² By inserting “[i]t includes serious mental illness or impairment,” the 1973 Legislature journeyed beyond these two sources and innovatively established an approach in which the victim’s mental functions were impaired as a result of a physical attack.²³ With the new code, “serious bodily injury” received definition, clarity, and a seemingly workable four-pronged classification scheme. This new meaning, however, is less flexible than “grievous bodily harm” and creates a higher standard of proof for prosecutors to hurdle.

III. DEFINING “SERIOUS BODILY INJURY”

Clear and concise meanings of serious bodily injuries as opposed to mere bodily injuries are important because one of the dis-

12. 105 Mont. 490, 73 P.2d 718 (1937).

13. See also Comment, *Recent Developments—“Substantial Risk of Death” in the Montana Aggravated Assault Statute*, 38 MONT. L. REV. 414, 416-17 (1977).

14. *Laughlin*, 105 Mont. at 495, 73 P.2d at 720 (citing *State v. Doherty*, 52 Or. 591, 595-96, 98 P. 152, 154 (1908)).

15. *Id.* at 494, 73 P.2d at 720.

16. *Id.*

17. *Id.*

18. MONT. CODE ANN. § 45-2-101(5) (1985).

19. MONT. CODE ANN. § 45-2-101(59) (1985).

20. *Id.*, Commission Comments.

21. MODEL PENAL CODE § 210.0(3) (Proposed Official Draft 1962), which reads: “Serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”

22. N.Y. PENAL LAW § 10.00(10) (McKinney 1965).

23. MONT. CODE ANN. § 45-5-202(1).

tinguishing features between "aggravated assault," "felony assault," and "assault" is the degree of bodily harm inflicted or apprehended.²⁴ The minimum standard necessary for conviction under Montana's aggravated assault offense involves "purposely" or "knowingly" causing a serious bodily injury to another with or without the use of a weapon.²⁵ A felony assault requires mere "bodily injury to another with a weapon" or "reasonable apprehension of serious bodily injury . . . by use of a weapon."²⁶ Intentional conduct resulting in bodily injury without the use of any weapon constitutes simple assault which carries a lesser sentence than either felony or aggravated assault.²⁷

"Serious bodily injury" also is considered for sentencing purposes under Montana's aggravated kidnapping statute.²⁸ A convicted kidnapper may receive a reduced sentence by voluntarily releasing the victim alive and not suffering from serious bodily injury.²⁹

Imagine a hypothetical situation where one person kicks another person in the stomach. The victim, feeling dazed, is taken to a hospital where the doctor discovers a bleeding laceration of the right lobe of the liver. The doctor performs surgery and the victim's condition returns to normal. The victim, after remaining in the hospital under observation for a short period of time, is eventually released.³⁰ Although the surgery results in a long scar running the length of the victim's upper body, the victim has the scar removed with plastic surgery prior to trial.³¹

There is no question in the minds of reasonable persons that the victim suffered some degree of physical injury. The trier of fact faces the formidable task of determining the seriousness of bodily injury sustained.³² Section 45-2-101(5) of Montana Code Anno-

24. See generally MacKenzie, *Criminal Assault in Montana: A New Face for an Old Code*, 35 MONT. L. REV. 184 (1974).

25. MONT. CODE ANN. § 45-5-202(1) (1985).

26. MONT. CODE ANN. § 45-5-202(2)(a), (b), (c) (1985).

27. MONT. CODE ANN. § 45-5-201(1)(a) (1985).

28. MONT. CODE ANN. § 45-5-303 (1985).

29. MONT. CODE ANN. § 45-5-303(2) (1985) provides a ten-year maximum prison sentence if the victim is free from serious bodily injury; otherwise, the offender's criminal act invokes a life sentence or death penalty as a maximal standard.

30. The author adapted the facts of *State v. Anderson*, 370 N.W.2d 703, 705 (Minn. App. 1985) for this example.

31. The victim's scar had not yet been removed by the time of trial in *Anderson*, although the defendant unsuccessfully attempted to introduce evidence that the victim was considering having plastic surgery after the trial. *Id.* at 706.

32. Even if the victim did not incur a serious bodily injury, the offender may still be convicted of felony assault under MONT. CODE ANN. § 45-5-202(2)(a) if the offender inflicted injury by use of a weapon. Under MONT. CODE ANN. § 45-2-101(71) (1985), "[w]eapon means

tated³³ is an apparent attempt to assist the jury in recognizing a serious bodily injury. The criminal code may provide this definitional tool, but the statute is silent with respect to the "proper" injury to be considered. The absence of any express guidelines leaves the factfinder guessing as to which of the following is the "proper" injury for scrutiny: (1) the actual injury, if any, existing at the time of trial, or (2) the potential injury which did not in fact develop, but could have resulted absent medical intervention. Thus, not knowing which of the two injuries to examine may confuse the jury. The problems encountered in applying Montana's current statutory definition of "serious bodily injury" are readily apparent.

In the hypothetical example above, a jury may rationally conclude that there is no "substantial risk of death" since the doctor intervened and prevented permanent serious bodily injury.³⁴ A liver laceration, however, can be a "life-threatening" injury if the

any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury." While the use of hands and feet ordinarily do not constitute the use of weapons per se, a Mississippi court in Pulliam v. State, 298 So. 2d 711, 713 (Miss. 1974) held that "the use of feet and fists are deadly weapons if used with the means or force likely to produce death." See also State v. Zangrilli, 440 A.2d 710, 711 (R.I. 1982) (hands were considered weapons); Annot. 33 A.L.R.3d 922 (1976). But see State v. Dazhan, 15 Or. App. 300, —, 516 P.2d 92, 96 (1973) (no instruction was requested or given that the jury could consider a shoe, used to inflict bodily injury upon the victim, as a weapon); State v. Jones, 266 N.W.2d 706 (Minn. 1978) (trial court was requested, but did not give, an instruction that the use of defendant's fists, resulting in the victim's injuries, were considered a weapon). Hence, an offender's bodily parts may not always be construed as weapons. Fear of setting unwieldy precedent may result in a court's reluctance to do so. In fact, there have been no Montana cases to date deeming the use of hands, feet, and/or shoes as the use of a weapon. In these kinds of cases in Montana the inquiry should focus on the nature and extent of the injury following the physical attack.

33. MONT. CODE ANN. § 45-2-101(59) (1985).

34. See, e.g., Alvis v. State, 434 So. 2d 859, 860 (Ala. Crim. App. 1983) (Defendant beat the victim, a middle-aged man suffering from angina, hypertension, and lung problems, about his head and chest. The victim's blood pressure peaked at a "dangerously high" level of 230/100 and "there had been some leakage of blood from the lung caused by blunt trauma." These conditions necessitated a three-day stay at the hospital. Although medical evidence established that any emotional or physical trauma could have caused a serious injury due to the victim's preexisting coronary condition, the court concluded this was not a "substantial risk of death."); State v. Howard, 195 Mont. 400, 402, 403 637 P.2d 15, 16-17 (1981) (Defendant beat the victim, dragged her across a vacant lot and attempted to strangle her with a pair of pantyhose. She sustained strangulation marks, a bluish tinge to her face and many petechiae (tiny purple spots caused by hemorrhaging of capillaries). The jury determined the injuries were not in and of themselves "serious bodily injury" although the attending physician testified he was "surprised to see a person with this much injury still alive," and that "[s]he looked like she should have been dead."); State v. Moyer, 37 Or. App. 477, 587 P.2d 1054 (1978) (trial court specifically found that a stab wound in the chest necessitating surgery to determine whether a vital organ had been injured did not involve a substantial risk of death).

internal bleeding is not stopped.³⁵ The factfinder may reason that the victim did not suffer a "protracted loss or impairment of the function of any bodily member or organ" because the doctor consequently prevented the development of a potential "protracted loss."³⁶ A narrow interpretation may lead the factfinder to determine that the victim did not incur a "permanent disfigurement" because the scar was subsequently removed by cosmetic procedures prior to trial.³⁷ Finally, the victim's suffering from a mental impairment as a result of the assault depends upon the individual victim's characteristics and may be difficult to assess at the time of trial.

A prosecutor may only be able to prove "bodily injury" if the factfinder strictly interprets "serious bodily injury," resulting in lighter sentences for offenders who impose egregious behavior upon innocent persons. On the other hand, defense counsel should argue that the current definition of "serious bodily injury" grants excessive latitude to the jury. Without explicit standards governing the application of medical evidence in establishing a serious bodily injury, arbitrary and discriminatory enforcement of this definition by the trier of fact becomes a distinct possibility. The jurors' emotional response to the nature of the physical attack may override the legal definition of "serious bodily injury." Hence, similar conduct by defendants in two different cases resulting in relatively identical injuries to the respective victims may be considered serious bodily injury by one trier of fact and not by another.³⁸

35. *Anderson*, 370 N.W.2d at 706.

36. *E.g.*, *People v. Rucker*, 94 A.D.2d 948, 464 N.Y.S.2d 73 (1983) (appellate court found that the medical evidence that the victim's lacerations, if untreated, could have resulted in "serious and protracted disfigurement" is insufficient to support the jury's determination that the victim sustained "serious physical injury").

37. *Anderson*, 370 N.W.2d at 706 (victim considered having scars removed by plastic surgery). *Cf. Moyer*, 37 Or. App. at —, 587 P.2d at 1056 (scar from a penetrating knife wound in the chest and a scar from exploratory surgery performed to determine whether damage had been done to victim's heart did not constitute a "serious . . . disfigurement" since both scars were located in an area normally covered by clothing); *Jones*, 266 N.W.2d at 708 (evidence that a broken jaw, if left untreated, would have left the victim permanently disfigured did not convince the jury of "great bodily harm").

38. *E.g.*, *State v. King*, 604 P.2d 923 (Utah 1979) (where a ¾ inch stab wound in the upper left chest constituted a "serious bodily injury"); *but cf. Moyer*, 37 Or. App. 477, 587 P.2d 1054 (stab wound on the left side of the chest left a scar one to one and a quarter inches long and one-eighth of an inch wide did not constitute a "serious bodily injury"); *e.g.*, *People v. Caliendo*, 84 Ill. App. 2d 987, 405 N.E.2d 1133 (1980) (defendant's kicking the victim in the chest fracturing three ribs resulted in "serious bodily injury"); *but cf. Alvis*, 434 So. 2d 859 (although the victim had been beaten and kicked about the head and chest, had difficulty breathing, a sore rib cage, high blood pressure, and some leakage of blood from the lung caused by blunt trauma, this did not constitute a "serious bodily injury"); *e.g.*, *Thomas v. State*, 418 So. 2d 964, 965 (Ala. Crim. App. 1982) (gunshot wounds, although

The factfinder's reliance on medically uncertain proof of serious bodily injury can lead to strained interpretations of the statutory definition. This dilemma—the absence of a standard providing a more clear and convincing level of proof that the victim incurred a serious bodily injury or that the victim *would have* incurred such an injury but for medical intervention—was precisely the issue in *State v. Goodwin*.³⁹ A thorough examination of the implications of the *Goodwin* case justifiably warrants the conclusion that revision of the statutory definition of “serious bodily injury” is in order.

IV. STATE V. GOODWIN

A. *The Facts*

The defendant, a middle-aged man, took the victim, a seven-year-old girl, to a secluded spot in the country.⁴⁰ He removed her clothes and tied her to his truck seat with a white rope.⁴¹ He then choked and assaulted her, physically and sexually, and threatened to kill her if she told anyone of the incident.⁴² The defendant later released the child approximately five blocks from her home leaving her to walk the rest of the way.⁴³

An immediate medical examination revealed “various bruises and lacerations, including a severe laceration in the vaginal area extending all the way to [her] cervix.”⁴⁴ Major surgery was necessary to repair the vaginal laceration and to prevent the onset of infection.⁴⁵ The state charged Goodwin with aggravated kidnapping and felony sexual assault.⁴⁶

Montana's aggravated kidnapping statute provides in part that a person convicted of the offense may be imprisoned up to 100

not “life-threatening,” constituted “serious bodily injury” because a slight deflection in the paths of the bullets could have caused paralysis or death by hitting a vital organ or blood vessel); *but cf.* *Stroup v. People*, 656 P.2d 680, 686 (Colo. 1982) (stab wound between victim's eyes was not “serious bodily injury” even though medical evidence established that there could have been a substantial risk of death due to penetration of the brain had the point of entry been a fraction of an inch to the right or left); *e.g.*, *Cronin v. State*, 454 A.2d 735 (Del. Super. Ct. 1982) (victim's two dislodged teeth constituted “serious bodily injury”); *but cf.* *Marshall v. State*, 646 P.2d 611, 612 (Okla. Crim. App. 1982) (two “busted” teeth did not amount to “serious bodily injury”).

39. ___ Mont. ___, 679 P.2d 231 (1984).

40. *Id.* at ___, 679 P.2d at 232.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at ___, 679 P.2d at 233.

46. *Id.* at ___, 679 P.2d at 231.

years "unless he has voluntarily released the victim alive, in a safe place *not suffering from serious bodily injury*."⁴⁷ Defense counsel challenged the constitutionality of this statute on grounds that these "provisions . . . fail[ed] to require establishment of facts by the State by a sufficiently stringent standard."⁴⁸ Goodwin's counsel jointly argued the evidence was insufficient to support the trial court's findings that the girl suffered serious bodily injury.⁴⁹ Goodwin appealed a sentence of 60 years for aggravated kidnapping and 15 years for sexual assault.⁵⁰

B. *The Issue*

The dispositive issue in *Goodwin* was whether the evidence was adequate to warrant the trial court's finding that the seven-year-old suffered serious bodily injury. Goodwin contended that the evidence fulfilled none of the four statutory categories.⁵¹ The defendant argued that the successful medical treatment obviated any serious or permanent risks.⁵² He further emphasized the lack of certainty in the medical testimony and contended that any conditions threatening to her were only possibilities which did not occur.⁵³ Justice Weber, writing for a unanimous court, disagreed.

C. *The Analysis*

1. "*Substantial Risk of Death*"

Goodwin asserted there was no substantial risk of death because the infection feared by medical personnel never occurred.⁵⁴ In rejecting this argument, the supreme court relied on medical testimony presented at trial. Since the laceration suffered by the child was very near the perineal membrane, the abdominal cavity could have been exposed to bacteria normally present in the vaginal and rectal areas. The court upheld the inference that there would have been a "substantial risk of death" due to infection had the child not received appropriate medical treatment.⁵⁵

47. MONT. CODE ANN. § 45-5-303(3) (1985) (emphasis added).

48. *Goodwin*, ___ Mont. at ___, 679 P.2d at 233.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at ___, 679 P.2d at 234.

53. *Id.*

54. *Id.*

55. *Id.* at ___, 679 P.2d at 233-34.

2. "Serious Permanent Disfigurement"

As an additional basis for finding serious bodily injury, the Montana Supreme Court concluded that the victim suffered a serious permanent disfigurement.⁵⁶ Relying on the trial court's record, the *Goodwin* court seemed convinced the evidence sufficiently supported a factual finding on this ground.⁵⁷ "The term 'disfigurement' connotes, among other things, deformity, defacement, marring and/or damage to one's attractiveness."⁵⁸ The court declared that the child had been left with a serious permanent disfigurement "within the commonly accepted meaning of that word" for two implicit reasons: (1) the injury resulted in a scar in the vaginal and perineal areas, and (2) a portion of the victim's hymen ruptured.⁵⁹

Whether an injury creates a serious permanent disfigurement is ultimately for the jury to decide. The code does not provide a definition for this term.⁶⁰ The potential for arbitrary and discriminatory application of the statutory definition of "serious bodily injury" is readily apparent. "Serious permanent disfigurement" in one jury's opinion may not constitute "serious permanent disfigurement" to another jury.⁶¹

3. "Protracted Loss of Impairment of the Function of Process of any Bodily Member or Organ"

The defendant asserted that the seven-year-old did not incur a protracted loss of function of her bodily organs since a later examination of the victim revealed no problems with either functioning of the urinary tract or rectum.⁶² Although both medical witnesses testified that the injury could produce complications with sexual intercourse and/or childbirth in the future,⁶³ neither could state

56. *Id.* at _____, 679 P.2d at 235.

57. *Id.*

58. *Id.*

59. *Id.*

60. MONT. CODE ANN. § 45-2-101 (1985).

61. See, e.g., *State v. Garcia*, 138 Ariz. 211, 673 P.2d 955 (1983) (both defendants raped a 21-year-old female victim; although her hymenal membrane was broken, the Arizona Supreme Court held that such injury did not fit within the meaning of "disfigurement," reasoning that the scar was in such a place so as not to distract from the victim's physical attractiveness. *Id.* at _____, 673 P.2d at 958); see also *Thomas*, 418 So. 2d at 965 (jury concluded that scars from a gunshot wound on the victim's back constituted "serious and protracted disfigurement"); but see *Davis v. State*, 467 So. 2d 265, 267 (Ala. Crim. App. 1985) (scars resulting from gunshot wounds on the victim's hand and arm did not constitute "serious . . . disfigurement").

62. Brief of Defendant, at 16.

63. *Id.* at 17-18.

with medical certainty whether the victim's bodily functions would in fact be impaired.⁶⁴ The defendant consequently alleged that this lack of medical certainty outweighed any contrary proof. Justice Weber did not emphasize this category in establishing serious bodily injury. Instead he merely noted that any medical evaluation with respect to the child's sexual or childbearing functions was premature.⁶⁵

4. "Mental Illness or Impairment"

One of the medical experts testified that "there is usually an emotional scar in such cases of child sexual abuse, although in this case it was too early to tell."⁶⁶ The *Goodwin* court did not rely on this fourth criterion apparently because of the conjectural nature of this testimony. There have been no cases in Montana defining this category, perhaps because of the difficulty encountered at trial of assessing whether a victim will suffer from a mental illness in the future. Nevertheless, applying the same line of analysis the court used in identifying "substantial risk of death"—that the injury would have been a serious injury had it gone untreated⁶⁷—could result in the finding of mental impairment as well.

D. *The Goodwin Dilemma*

The court expressed dissatisfaction with the current status of Montana's "injury" statutes⁶⁸ stating "The[se] statutes leave for the courts the difficult line-drawing involved in distinguishing the two categories of injury."⁶⁹ On one hand, a sound argument could be made in defendant Goodwin's favor. Under the applicable language of subsection (59),⁷⁰ a person cannot be held to have committed aggravated assault (or aggravated kidnapping, as in this case) unless he "purposely" or "knowingly" causes serious bodily injury to another. The *Goodwin* court focused largely on "substantial risk of death" in describing the seriousness of the victim's injuries. From a narrow standpoint, the defendant Goodwin did not

64. *Id.* at 18.

65. *Goodwin*, ___ Mont. at ___, 679 P.2d at 234. In examining the medical testimony with respect to all of the girl's injuries, Justice Weber declared "[i]t was . . . too early to know whether normal sexual intercourse or childbearing would be possible."

66. *Id.*

67. *Id.* at ___, 679 P.2d at 233.

68. MONT. CODE ANN. §§ 45-2-101(5) (bodily injury) and § 45-2-101(59) (serious bodily injury) (1985).

69. *Goodwin*, ___ Mont. at ___, 679 P.2d at 233.

70. MONT. CODE ANN. § 45-2-101(59) (1985).

inflict a serious injury. Testimony from the attending surgeon established that the victim in fact had never been placed in substantial risk of death by her injuries, although the injuries were conceivably fatal.⁷¹ The evidence revealed that any substantial risks would have been imminent only if the child had not received medical attention.⁷²

Goodwin's argument is "indistinguishable" from the argument rejected in *State v. Fuger*.⁷³ In *Fuger*, the defendant kicked and beat the victim about the face and upper portion of the body.⁷⁴ When admitted to the hospital, the victim "was in a semi-conscious state with extensive bruises and swelling around the face [and suffering from] a broken nose and a fractured palate."⁷⁵

Relying on medical evidence that "[n]o serious complications in fact developed as a result of [the victim's] injuries,"⁷⁶ the defendant contended that "in retrospect [the victim] was not in 'substantial risk of death' at any time."⁷⁷ The *Fuger* court struck down this argument: "[T]he test of 'substantial risk of death' is not whether the victim lives or dies."⁷⁸ The *Fuger* court ruled that the evidence sufficiently enabled the jury to find that the victim's injuries created a "substantial risk of death." Therefore, the *Fuger* rule, likewise employed in *Goodwin*, is not a hindsight test. Rather, the combination of *Fuger* and *Goodwin* suggests that the factfinder may focus on the extent of the injury inflicted prior to the victim's receiving any medical treatment. This pattern indicates the Montana Supreme Court's unwillingness to limit inquiry to injuries that are visible at trial.

The original draftsmen of the Model Penal Code definition of "serious bodily injury" did not foresee the *Goodwin* dilemma. In fact, the states that have adopted some variation of this definition differ with respect to its proper application. For instance, some courts have interpreted the definition as being directed exclusively towards a present serious bodily injury.⁷⁹ Conversely, other courts have interpreted the definition to include serious injuries prior to

71. *Goodwin*, ___ Mont. at ___, 679 P.2d at 132-34.

72. *Id.*

73. *Id.* at ___, 679 P.2d at 234 (citing *Fuger*, 170 Mont. 442, 554 P.2d 1338).

74. 170 Mont. at 443, 444, 544 P.2d at 1340, 1341.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (quoting *People v. Martinez*, 189 Colo. 408, 410, 540 P.2d 1091, 1093 (1975)).

79. *E.g.*, *People v. Rucker*, 94 A.D.2d 948, 464 N.Y.S.2d 73 (1983) ("the statute requires not that such [injury] could result, but that it actually did result"); *State v. Jones*, 266 N.W.2d 706, 708 (Minn. 1978); *State v. Dazhan*, 15 Or. App. 300, 516 P.2d 92 (1973); *Stroup v. People*, 656 P.2d 680 (Colo. 1982).

medical treatment.⁸⁰

Although reasonable persons could only consider the victim's injuries in *Goodwin* as serious, the court could not look to the strict letter of the law for an answer. For this reason, the character of the *Goodwin* court's interpretation appears slightly strained, though the reasoning employed and the result reached were justifiable. The Montana Supreme Court judicially "amended" the definition of "serious bodily injury" to uphold the aggravated kidnapping conviction where justice demanded a stricter sentence. It is the legislature's function, however, to provide additional guidance distinguishing a serious bodily injury from mere bodily injury to maintain consistency for conviction purposes in our criminal justice system.

V. A SOLUTION

A. *From the Prosecutor's Point of View*

Montana's current definition does not instruct the factfinder to examine potential consequences absent any medical intervention. Thus, the trier of fact may believe that the existing statutory definition focuses only on those injuries, if any, *existing at trial* rather than on the *possibility* of a serious impairment. Lacking an instruction to the contrary, the factfinder might not consider the nature of a victim's injuries prior to medical treatment. If this is the case, dangerous offenders who have severely injured victims will receive a windfall in the form of a substantially lesser sentence. An injury should not cease to become "serious" simply because the victim sought medical treatment which prevented a serious bodily injury from developing. The prosecutor could argue the need for a definitional mechanism instructing the jury to consider pre-treated injuries.

B. *From the Defense Counsel's Point of View*

Alternatively, as demonstrated in *Goodwin*, a jury might consider hypothetical injuries which in fact could have, but did not, develop. The prosecutor, however, must offer medical testimony attempting to convince the jury of potential consequences of the injury. Evidence, which might not otherwise convince a panel of medical experts, may persuade the jury that a serious bodily injury would have developed in the absence of medical treatment. De-

80. *E.g.*, *State v. Coburn*, 315 N.W.2d 742 (Iowa 1982); *Anderson*, 308 N.W.2d 42; *King*, 604 P.2d 923; *Martinez*, 189 Colo. 408, 540 P.2d 1091.

fense counsel could argue the need for a minimal evidentiary standard precluding prosecutorial abuse of conjectural medical testimony. It would be unfair to allow jurors to find a potential serious bodily injury based on evidence not medically probable.

C. *A Proposal for a Legislative Amendment*

By adding a provision of existing statutory law addressing those circumstances where the victim sought medical aid, the *Goodwin* dilemma can be eliminated. For example, the following is a suitable codification of *Goodwin*: "(2) If it is medically probable that a 'serious bodily injury' would have resulted in the absence of any medical or surgical intervention or treatment, then for purposes of this statute the injury shall be deemed a 'serious bodily injury.'"

Hence a twofold test would emerge: the first test would simply rest on the existing statutory language. The standard would remain consistent with the original legislative intent: an offender could be convicted if it were evident at trial that the victim suffered a serious bodily injury. The second test, however, would come into effect only if a victim procured medical treatment. Under the proposed amendment an injury would be considered a serious bodily injury, if it was medically probable that the victim *would have* incurred a serious injury without medical or surgical intervention.

The Montana Legislature's innovation has achieved needed change in the criminal law in the past. The Model Penal Code, from which the "serious bodily injury" definition was derived, is approximately twenty-five years old. It is time the legislature analyze the unforeseen implications inherent in an adopted uniform statutory definition. Montana will have one of the most modern, straightforward, and systematic applications of the definition of "serious bodily injury" if our lawmakers establish a clearer approach and adopt this proposed amendment.

